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December 8, 1999

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

In Re: Petition of ICG Telecom Group, Inc. for Arbitration with Bellsouth Telecommunications, Inc. Pursuant to Section 252 of the Telecommunications Act of 1996
Docket No. 99-00377

Dear David.

Enclosed herewith are the original and thirteen copies of the Post-Hearing Brief of ICG Telecom Group, Inc. in the above reference docket.

Copies have been sent to parties.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker
Henry Walker, attorney for ICG

HW/nl
Attachment
cc: Guy Hicks, attorney for BellSouth

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FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: PETITION OF ICG TELECOM GROUP, INC. FOR ARBITRATION WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252 OF THE TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. 99-00377

POST-HEARING BRIEF OF ICG ON LEGALITY OF PERFORMANCE MEASURES AND LIQUIDATED DAMAGES

ICG Telecom Group, Inc. (ICG) submits the following post-hearing brief on whether or not the Tennessee Regulatory Authority (TRA) has the power under state and federal law to adopt and enforce performance measures and provisions for liquidated damages and to include those provisions in an interconnection agreement arbitrated under Section 252 of the federal Telecommunications Act.

SUMMARY

There is no serious question, none whatsoever, that the TRA has the power to approve -- or impose -- performance measures and liquidated damages in tariffs, in contracts, and in interconnection agreements. BellSouth itself has proposed that performance measures developed by BellSouth be incorporated into the company's interconnection agreements and is currently negotiating liquidated damage provisions with the staff of the Federal Communications Commission. (BellSouth's most recent proposal to the FCC was filed December 3.) The carrier has said it will file its FCC-approved list of performance measures and liquidated damages in each BellSouth state as soon as the FCC approves the carrier's re-entry into the interLATA market pursuant to Section

271 of the federal Telecommunications Act. (See Sept. 7, 1999 pre-hearing brief of BellSouth in this docket.)

BellSouth's promise to file the completed plan with state regulators and the company's offer to incorporate the plan in BellSouth's various interconnection agreements presumes, of course, that the state commissions in the BellSouth region have the authority to adopt and enforce those plans.

Moreover, as the TRA is aware, many of BellSouth's tariffs and contracts on file at the agency contain liquidated damage provisions. Such provisions "are appropriate and enforceable" under Tennessee law, according to BellSouth's own attorneys. See Post-Hearing Brief of BellSouth, filed August 24, 1999, in Docket 98-00559, at p. 12. BellSouth itself acknowledges that "Tennessee law permits parties to stipulate to an amount of damages in order to 'create certainty where damages are likely to be uncertain and not easily proven.'" *BellSouth Telecommunications, Inc.'s Memorandum in Compliance with the Chairman's Request*, filed in Docket 98-00559, at 2.

Having so recently and successfully argued that the liquidated damages provisions in BellSouth's tariffs and Contract Service Arrangements ("CSA") are both legal and enforceable, BellSouth can hardly now contend that the TRA has no authority to adopt and enforce similar provisions contained in an interconnection agreement.

If the TRA agrees, as a matter of policy, with the FCC that such provisions are critical to the success of local competition, the only unsettled question of law is whether the specific, liquidated damages provisions proposed by ICG in this docket would be enforceable under Tennessee law. That was the main issue in the TRA's recent CSA Docket (No.98-00559) and is equally applicable to the present proceeding.

As fully briefed and argued in the CSA docket, the applicable legal standard for the enforcement of liquidated damages is well established. "If the liquidated sum is a reasonable prediction of potential damages and the damages are indeterminable or difficult to ascertain at the time of contract formation," courts will generally enforce the damages provisions. *Guiliana v. Cleo* 995 S.W. 2d 88, 97 (Tenn 1999).

Based on the record in this case, ICG's proposal for liquidated damages meets the *Cleo* test. It would be extremely difficult for a competitive local exchange carrier to calculate or prove actual damages resulting from BellSouth's failure to meet the long list of performance measures proposed by both parties. Nevertheless, the Tier 1 damages provisions contained in the "Texas Plan" proposed by ICG represent the best efforts of many parties, including Southwest Bell, the staff of the Texas Commission, ICG, and others to estimate what those damages would be. ICG's witness Ms. Gwen Rowling testified at some length on this exact point.

Under cross examination by BellSouth, Ms. Rowling testified (Tr. Vol. IA, pp. 59-63):

> The Texas Staff and the Texas Commission literally spent hundreds of hours looking at a level of monetary damages and assessments. Quite frankly we went through meetings that on occasion lasted from 9:00 in the morning until midnight.
>
> The Texas Staff tried to reach a balance to harm caused to a CLEC and also to balance out that they did not want the CLEC to reap financial benefits from problems.
>
> They wanted to impose a system that financially could support the public policy position that substandard performance should have a financial liability on the ILEC.
>
> So part and parcel of what they did, the process, they pulled November 1998 data from the ILEC, looked at the performance, and then calculated an amount of damages or assessments that would attempt to strike the balance.
>
> So it was not an exact science and it wasn't an exact methodology, but it was done in a framework to be just and equitable and also to achieve a particular policy goal . . . .

. . . I was saying that having been involved in this entire process in the performance measures in Texas, they did attempt -- again, it wasn't exact science, but they did try to strike a reasonable approximation of damages suffered by the ILEC (sic).[1] And they also tried to do it in terms of, for example, loop provisioning.

I mean, if you order, you know, a hundred loops every single month, they didn't want the level of damages and assessments to be so high because the frequency was so high, so they tried to moderate that.

Again, a one-to-one basis, it's not an exact match up. But it was done in a very conscientious manner of trying to strike a reasonable balance. And then on some items, for example, that you don't have the high frequency, like missed collocation dates, you're not going to have hundreds of those every single month, you may have one or two. So they struck a level of damages and assessments for that type of measurement that is different and to try to equate to some sense of damages suffered by CLECs.

Later, Chairman Malone specifically asked again about the calculation of liquidated damages payable to CLECs under the Texas Plan (referred to in the Plan as "Tier One" payments[2]). Chairman Malone asked (*id.* at 82-84):

Finally, just for my clarification, can you explain again with the Tier 1 damages how the damages in the Texas Plan are or are not related to either the actual damages of the CLEC or the reasonably anticipated damages.

The Witness: As I stated, it's not an exact science. And it goes back to what you just said a moment ago. It's difficult when you talk about real commercial experience the CLEC is having to quantify that in terms of a specific measurement tied to a specific monetary loss.

For example, one analysis that one of the Texas commissioners made, when you go into a new restaurant and your service is poor, your food is poor, you leave

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[1] "CLEC" was intended, not "ILEC."

[2] Tier One payments are liquidated damages payable to the CLECs to compensate them for the ILEC's breach of the performance measures. Tier Two payments are payable to the state and are more in the nature of a fine or penalty. Tr. Vol IA, pp. 63-64, 75-76. Ms. Rowling acknowledged that the TRA might have to adjust the Tier 2 payments in order to be consistent with the TRA's limited ability to impose fines under state law. *Id.* at 75-76. The more important issue to ICG -- and the focus of this brief -- is the legality of the Tier One, liquidated damages provisions.

that new restaurant and you're never going to try it again and you're going to talk badly about that restaurant. That potential financial loss is hard to quantify. That's, in fact, what happens in telecommunications services.

. . . . If the transition from one local service provider to another local service provider isn't seamless, then the customer may leave the CLEC, may not turn over the rest of their business because of a problem of install or because the database listing was incorrect or never there in the first place because the ILEC hadn't uploaded their database. In addition, they're going to talk badly and harm the reputation of the CLEC in the marketplace. Those things are hard to quantify.

So in Texas because there isn't a one-to-one -- you can't come to a one-to-one correlation. And the reason you can't is because otherwise you don't want CLECs to come back to the Authority time and time again and say I lost ABC Plumbing Company ---

Chairman Malone: Let me interrupt you. But if something is hard to quantify, isn't that why you -- keep saying it's not an exact science, it's not an exact science. But is that not why you might move from an exact calculation or number of sorts to some reasonable estimation of potential damages?

The Witness: Yes, sir. And that's exactly what the tier one-type of damages are supposed to equate to.

In sum, the only legal question the agency must decide in regard to ICG's proposed, liquidated damages is not whether the TRA may adopt and enforce liquidated damages as part of a telecommunications contract -- a power the TRA clearly has -- but whether the particular damage provisions set forth in Tier 1 of the Texas Plan represent a "reasonable prediction of potential damages" which, at this time, are "indeterminable or difficult to ascertain." *Cleo*, *supra*, at 99.

Based on Ms. Rowling's testimony, ICG's proposal clearly meets those requirements.

DISCUSSION

I. The TRA Has Authority under the Federal Telecommunications Act to Impose Liquidated Damages in an Interconnection Proceeding Arbitrated under Section 252.

"Interconnection" is the key concept for carrying out the basic purpose of the federal Act which is "to promote competition." Section 251 is headed "Interconnection." In addition to the duties imposed on all LECs in section 251(b), ILECs have the duty, pursuant to section 251(c)(1) to negotiate in good faith and in accordance with section 252 "the particular terms and conditions of agreements" to fulfill their statutory duties. Those statutory duties include in section 251(c)(2)(C) the duty to provide interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself"; in section 251(c)(2)(D), the duty to provide interconnection with the LEC's network, "on rates, terms and conditions that are just, reasonable and non-discriminatory in accordance with the terms and conditions of the agreement" and the statutory requirements; and, in section 251(c)(3), the duty to provide unbundled access to network elements "on rates, terms and conditions that are just and reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement" and the statutory requirements.

The federal Act thus contemplates that agreements between ILECs and competing carriers will be complete agreements including "terms and conditions that are just, reasonable and nondiscriminatory." There is no statutory definition of "terms and conditions," and the phrase of necessity includes "terms and conditions" appropriate to accomplish the purposes of such agreements.

Under section 252(a)(1), ILECs and competing carriers are required, first, to attempt to negotiate interconnection agreements. Failing to arrive at an agreement through negotiation, any party may petition the State commission "to arbitrate any open issues," with the objective being, as

stated in the heading to subsection (b) to arrive at an agreement "through compulsory arbitration." Under the Act, state arbitration must resolve all "unresolved issues." Such unresolved issues are to be resolved by the state commission pursuant to subsection (b)(4)(C) "by imposing appropriate conditions as required to implement subsection (c)."

Subsection (c) of section 252 provides:

> **Standards For Arbitration**. – In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall –
>
> (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

The process of arriving at complete interconnection agreements is traced here in some detail because the statutory language itself emphasizes that the objective is to arrive at just, reasonable and nondiscriminatory terms and conditions implementing the duties stated in section 251. "Terms and conditions," in any contract includes provisions setting the measures of performance, and provisions to assure that such measures are met.

As stated in 17A *Am Jur 2d*, § 607 "Form drafting guide":

> Care should be taken in drafting a contract to include all acts or events that are necessary to the complete performance of the contract in the written document. Care should also be taken to avoid ambiguity as to what standards are to be used to determine satisfactory performance as well as what actual matters constitute performance.

"An agreement or contract may provide that the subject matter thereof is to be tested for performance in a certain manner." 17A *Am Jur 2d* "Contracts, § 628." Standards of performance are particularly significant in interconnection agreements. The competing carrier is likely to be

dependent on the ILEC's services to satisfy the CLEC's customers. Without the statutory duties, and just, reasonable and nondiscriminatory terms and conditions to assure their enforcement, the ILEC would not have any realistic incentive to perform effectively.

Of course, the parties to an interconnection agreement may generally agree as they will as to terms and conditions. However, where the measure of performance and the means of enforcing performance are unresolved, the State commission clearly has the power under the federal Act to require the inclusion of such standards and such means of enforcement as just, reasonable, and nondiscriminatory terms and conditions of the agreement.

In several cases involving the review of interconnection agreements approved by a state commission, United States District Courts have upheld the powers of a state commission to require performance standards and terms and conditions to assure compliance therewith. The fullest discussion of such provisions is in *U S West Communications, Inc. v. TCG Oregon*, 31 F. Supp. 2d 828 (D. Or. 1998), at pages 837-38. In that case, the Oregon commission had approved performance standards for U.S. West, the ILEC, and mandated an award of liquidated damages if U S West failed to meet those standards. In upholding the provision for performance standards, the Court relied on: (i) the provisions of 47 U.S.C. § 251(c)(2)(C) requiring that interconnection services to the CLEC be at least equal in quality to that provided by the ILEC to itself; (ii) the broad discretion of the Oregon commission under Oregon law to establish service standards; and (iii) the existence of disputes as to the adequacy of the service of U.S. West in Oregon.

In upholding the provision for liquidated damages, the Court stated, at pages 837-38:

> Although the Act does not expressly provide for such damages, neither does it categorically preclude such provisions in an interconnection agreement so long as they are reasonable and justified under the circumstances.

> Inadequate service can be fatal to a new local exchange carrier such as TCG. If prospective customers try TCG service only to discover that they cannot reliably obtain a dial tone, that calls are disconnected in the middle of a conversation or that service orders are not timely filled, then those customers will probably switch back to U. S. West and turn a deaf ear to future entreaties from TCG. Adverse publicity will also deter other prospective customers from considering TCG. Even assuming the problems are eventually resolved, that may not be soon enough to save TCG. Moreover, damages in such cases can be difficult to quantify and prove, and it would require years (and considerable expense) to litigate such claims. A further concern is that U. S. West stands to gain financially if customers become dissatisfied with TCG's local service, hence U. S. West is operating under a conflict of interest.
>
> Under the totality of the circumstances, including the PUC's extensive experience in overseeing U. S. West service in Oregon, the PUC could reasonably conclude that enforceable performance standards, *i.e.*, those with teeth, are necessary and proper. Even if no damages are ever paid, the very existence of enforceable standards may help to reassure TCB (and other prospective CLECs) who might otherwise be hesitant to enter the local telephone market, and to minimize the suspicions and accusations that might otherwise arise between TCG and U. S. West. The PUC also could reasonably have concluded that the liquidated damages clause would help to minimize costly litigation. US West disagrees with these premises, but the question before this court is not whether the PUC is correct but simply whether the PUC could reasonably have come to such a conclusion (it could), and whether the liquidated damages provision violated the Act (it does not).

The Court also rejected U S West's contentions that the liquidated damages provision was a penalty and therefore invalid under Oregon law, and that the agreement allowed TCG to recover both compensatory and liquidated damages.

The same District Court considered the absence of performance standards and specific remedies in *MCI Telecommunications Corp. v. U. S. West Communications, Inc.*, 31 F. Supp. 2d 859 (D. Or. 1998). In that case the Court held that the inclusion of such provisions was in the discretion of the state commission, stating, at page 861:

> Many factors may enter into that decision making calculation, including the specific terms of the requested standards and remedies, any counter-proposal from U. S. West, the adequacy of any standards and remedies already included in the agreement, the ILEC'S past conduct, the duration of the agreement, and the CLEC's ability to adequately protect its own interests.

See also, MCI Telecommunications Corp. v. GTE Northwest, 41 F. Supp. 2d 1157, 1183 (D. Or. 1999), where the Court noted that the Oregon commission "offered a cogent explanation for its decision" not to include such provisions, supported by substantial evidence in the record; and *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 40 S.W.2d 416 (E.D. Ky. 1999), at page 428, the Court held that although not mandated, "a state commission may decide to impose such standards and [enforcement] mechanisms . . . ."

Similarly, the Court in *U S West Communications v. Hix*, 57 F. Supp. 2d 1112 (D. Colo. 1999) held, at page 1121, that the inclusion of performance standards was in the discretion of the state commission. The Court also held, at pages 1121-22, that the inclusion of a liquidated damages provision was within the discretion of the state commission, that the liquidated damages provision was designed to encourage compliance with the agreement by setting forth clear remedies for noncompliance.

Thus, under the federal Act, state commissions in the arbitration and approval of interconnection agreements, clearly have the power to include performance standards and enforcement mechanisms to assure compliance with such standards in the form of just, reasonable and nondiscriminatory remedies, including provisions for liquidated damages.

II. Other State Commissions Have Approved the Performance Measures and Liquidated Damages in Arbitration Proceedings.

Commissions in at least three states -- Illinois, New York and Oregon -- have determined they have the authority in arbitration proceedings to order ILECs to agree to performance standards and enforcement mechanisms. [3] In an arbitration proceeding before the Oregon Public Utility Commission, an Arbitrator rejected US West's argument that the Oregon Commission lacked authority to impose a liquidated damages requirement and found a basis for such action in the Act:

> US West's argument that there is no legal basis for the Arbitrator or the Commission to impose liquidated damages is wrong. The Act requires that the arbitration resolve the open issues.

Arbitrator's Decision, in the matter of TCG Oregon's Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with US West Communications, Inc. ARB 2, issued Nov. 8, 1996. [4]

The Illinois Commerce Commission also approved a clause in an arbitration agreement imposing a $10,000 per day deficiency payment should Ameritech fail to provide on a timely basis certain mandated operational electronic interfaces. *Arbitration Decision, AT&T Communications of Illinois, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and related arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois, et al.* 96-AB-003, November 26, 1996, 1996 Ill. PUC LEXIS 665. The Illinios Commission characterized the provision as "a liquidated damages clause." *Id.* at 34.

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[3] In some states, such as California and Texas, incumbent LECs have voluntarily agreed to performance standards and remedies.

[4] The *Arbitrator's Decision* was approved in relevant part by Commission Decision (Order No. 96-325, entered Dec. 9, 1996). In *US West Communications v. TCG Oregon, supra*, the court granted TCG Oregon and the Oregon PUC summary judgment on the issue of performance standards and liquidated damages. 31 Supp. 2d at 839.

In *Order Concerning Performance Standards and Associated Remedies, Petition of AT&T Communications of New York, Inc. for Arbitration of an Interconnection Agreement with New York Telephone Company*, Case No. 96-C-0723, 1998 N.Y. LEXIS 112 (Feb. 3, 1998), the New York Public Service Commission explained in some detail the basis for its authority to require liquidated damages. In this proceeding, the New York Commission considered a request by AT&T for a schedule of liquidated damages in an interconnection agreement with New York Telephone. New York Telephone objected arguing that the New York Commission lacked authority under federal or state law to compel mandated damages. *Id.* at 8-9. The New York Commission quoted with approval AT&T's following arguments:

> [I]n adopting a schedule of liquidated damages for failure to meet service quality standards we would not, in any event, be making a damage award . . . . Rather, such action would be akin to our award of dispute resolution procedures in this arbitration and would be in effect essentially equivalent to approval of tariffs containing remedies provisions. "That the commission itself does not have the power to award those damages," AT&T explains, "does not prevent it from approving a tariff that permits a court to award such damages.
>
> . . . .
>
> We agree with AT&T 's two central points. First, we are acting here pursuant to authority granted by Congress under the Act, and that authority permits us to award terms and conditions designed to adequately enforce the provisions of interconnection agreements. Second, such an award would not be a "damage award," for it would set forth stipulated remedies for agreed upon contract breaches and would not adjudicate a specific wrong. Thus, any limitation on our jurisdiction to make damage awards would not apply here in any event.
>
> Accordingly, we are free to consider proposals for contractual liquidated damages and similar or associated remedies.

Id. at 10-11.

As the state commission cases discussed above make clear, the Authority has the requisite power under the Act to require BellSouth to agree to performance standards and enforcement mechanisms, and it should do so in resolving the issues ICG raised on such matters in its petition.[5]

III. The TRA has authority under Tennessee Law to Require and Enforce Performance Measures and Liquidated Damages Provisions.

Section 252(e)(1) of the federal Act requires all interconnection agreements to be submitted to the state commission for approval. The state commission may reject an agreement adopted by arbitration "if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section."

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[5] To date, the Federal Communications Commission ("FCC") has addressed enforcement mechanisms for performance standards only in the context of Bell Company applications for interLATA authority under the public interest requirement of Section 271 of the Act. However, in reviewing such applications, the FCC has emphasized the importance of enforcement mechanisms:

> We would be particularly interested in whether such performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards. That is, as part of our public interest inquiry, we would inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention. The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent.

Application of BellSouth Corporation, BellSouth Telecommunications, Inc, and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd 20599, 20806, (1998).

As discussed above, section 251 requires just, reasonable and nondiscriminatory terms and conditions. Therefore, at the approval stage, the state commission has the power under the Federal Act to require such terms and conditions, including performance standards and the means to assure compliance with such standards.

In addition, section 252(e)(3) provides:

> **Preservation of Authority** -- Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a state commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Thus, a state commission in exercising its power to approve interconnection agreements has the power to establish or enforce other requirements of state law, including requiring compliance with intrastate service quality standards. Therefore, in considering the power of the TRA to require performance standards and the means of enforcing such standards, it is appropriate to consider the provisions of Tennessee law.

The most obvious source of the TRA's powers in this regard is T.C.A. § 65-4-124(a), which provides:

> All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.

Under subsection (b) the TRA is empowered to issue orders as necessary to enforce the requirements of subsection (a). Thus, the TRA is given the express power to require reasonable terms and conditions to assure the prompt provision of the features, functions and services necessary

to implement interconnection. T.C.A. § 65-4-124(a) thus, complements the provisions of the federal Act. Under both statutes, it is recognized that the requirement of reasonable terms and conditions in interconnection agreements is essential to the fulfillment of the common statutory objective, to foster the development of competition in the local exchange markets.

In addition, the power of the TRA to impose just, reasonable and nondiscriminatory terms and conditions is supported by its general supervisory and regulatory powers under T.C.A. § 65-4-104; by the power to impose service requirements under T.C.A. §§ 65-4-114 and 115; and by the power, under T.C.A. § 65-4-117(3) and (4):

> (3) After hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility;
>
> (4) After hearing, by order in writing, ascertain and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, voltage, or other condition, pertaining to the supply of the product or service rendered by any public utility, and to prescribe reasonable regulations for examination, test and measurement of such product or service;

Therefore, under the express statutory grants of power to the TRA, the TRA has the power to fix standards of performance to assure the quantity and quality of the services provided by ILECs to CLECs pursuant to interconnection agreements. Of necessity, and by the express provisions of the federal and state statutes concerning interconnection, the TRA has the power to require that such agreements include just, reasonable and nondiscriminatory terms and conditions to assure that such performance standards are promptly met.

Not surprisingly, in view of the express statutory language, no Tennessee case has held that the TRA, or its predecessors, lack the power to require such performance standards from public

utilities or the power to require reasonable and nondiscriminatory terms and conditions to assure that such standards were met. Indeed, the Tennessee Court of Appeals in *Tennessee Cable TV Association v. Tennessee Public Service Commission*, 844 S.W.2d 151 (Tenn. App. 1992), in the context of the technology master plan adopted by the TPSC, recognized the "broad powers" of the TPSC to regulate utility services, although holding that the TPSC had not followed the proper procedures in that case.

Certainly, the TRA, and its predecessors, over the years in approving tariffs and special contracts have repeatedly exercised the power to require just and reasonable terms and conditions for the provision of utility services. There is no question that the Authority has the power to impose just and reasonable standards, including performance measures and liquidated damages for non-performance as part of this interconnection arbitration proceeding just as the agency would do in any other proceeding to approve or amend a CSA or a tariff.

CONCLUSION

For these reasons, ICG respectfully submits that the TRA has ample power under state and federal law to adopt the performance measures and liquidated damages provisions proposed by ICG in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served via U.S. First Class Mail or Hand Delivery on the parties of record on this the 8th day of December, 1999.

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