BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 23, 1999

IN RE:	)	
	)	
PETITION FOR ARBITRATION BY	)	
ITC^DELTACOM COMMUNICATIONS,	)	**DOCKET NO. 99-00430**
INC. WITH BELLSOUTH	)	
TELECOMMUNICATIONS, INC.,	)	
PURSUANT TO THE	)	
TELECOMMUNICATIONS ACT OF 1996	)	

INITIAL POST-HEARING BRIEF OF ITC^DELTACOM COMMUNICATIONS, INC. REGARDING PERFORMANCE GUARANTEES

COMES NOW, ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), pursuant to the request by the Tennessee Regulatory Authority ("TRA"), and hereby submits this initial post-hearing brief. At the November 1-3, 1999 hearing in this Docket, the TRA requested that ITC^DeltaCom and BellSouth Telecommunications, Inc. ("BellSouth") address the issue of whether the TRA has authority under Section 252(b) of the Telecommunications Act of 1996[1] (the "Act" or "Telecommunications Act") to arbitrate the open issue of self-effectuating performance guarantees and direct ITC^DeltaCom and BellSouth to include a set of self-effectuating performance guarantees in the interconnection agreement resulting from this Docket.

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[1] Pub.L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 153 *et seq.*

I. INTRODUCTION

On June 11, 1999, ITC^DeltaCom filed a Petition for Arbitration with the TRA pursuant to Section 252(b)(1) of the Act, asking the TRA to arbitrate certain disputed issues regarding interconnection obligations and rights with BellSouth. In support of its Petition, ITC^DeltaCom presented evidence of past non-performance by BellSouth and expert testimony supporting the policy of self-effectuating performance guarantees as an incentive to future performance by BellSouth.[2]

BellSouth will argue that the issue of self-effectuating performance guarantees is not even arbitrable by the TRA due to the fact that the TRA does not have clear state statutory authority to impose "damages." First, the word "damages" describes payment to an aggrieved party. ITC^DeltaCom proposes that where BellSouth fails to perform, payment would be to the State. Second, ITC^DeltaCom's proposal calls for self-effectuating, prospective guarantees. Under the ITC^DeltaCom proposal, the TRA would not be required to impose or award anything for a breach of the interconnection agreement. Rather, the interconnection agreement will include a set of guarantees that recognizes that no party should have to pay the same price for failed services as it does for successfully performed services. Third, there is ample legal authority in support of the proposition that the TRA has discretion to adopt a set of self-effectuating performance guarantees when it acts as the arbitrator of open issues under Section 252(b) of the Act.

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[2] ITC^DeltaCom has asked that the TRA approve a system of self-effectuating performance guarantees to ensure nondiscriminatory treatment as required by the Act. *See, e.g.*, 47 U.S.C. § 251(c). ITC^DeltaCom proposed financial incentives in Attachment 10 to its Proposed Interconnection Agreement (Exhibit A to its Petition for Arbitration), which was sponsored by ITC^DeltaCom witness Rozycki.

This initial brief discusses the TRA's authority to require such a set of self-effectuating performance guarantees under the Telecommunications Act, the Federal Arbitration Act, and federal common law. It also discusses Tennessee law, BellSouth's tariffs, the NEXTLINK arbitration, and the TRA's brief to the District Court for the Middle District of Tennessee on judicial review of a previous MCI arbitration.

II. ARGUMENT

A. Authority Under the Telecommunications Act

The Act is highly unusual in structure -- Congress has conferred a duty upon State commissions and a framework in which telecommunications companies are to enter into bilateral contracts.[3] The TRA is charged -- by *Congress* -- with implementation of federal, not state standards. Indeed, this proceeding is being conducted for purposes of such implementation.

Sections 252(b) and (c) of the Act specify the duties and responsibilities of the TRA with regard to this arbitration. Included in that charge is the responsibility to arbitrate "any unresolved" issues between the parties. Performance guarantees is one such issue. Section 252(b)(4)(C) of the Act states that "[t]he State commission *shall* resolve each issue" brought before it in an arbitration. (emphasis added). The issue of performance guarantees was properly presented and certainly may be considered by the TRA. Similarly, Section 252(c) of the Act

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[3] The obligations and rights of parties, when determined by an arbitrator, exist independently of the parties' intent on the issues covered by the "agreement" or "contract." In subsequent litigation, courts will look, not to the parties' intent, but to the arbitrator's intent. We colloquially become accustomed to calling these sets of rights and duties "agreements" or "contracts," primarily because the Act refers generically to "interconnection agreements," regardless of whether the agreement was ever agreed to. This reference is for syntactical convenience only. An arbitrated "agreement" should be more properly considered a party-specific codification of the parties' duties to one another.

states that "[i]n resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties" the State commission shall ensure that such resolution meets the requirements of Section 251 and any regulations prescribed by the FCC. There is certainly nothing about performance guarantees that conflicts with the requirements of Section 251 of the Act and the regulations prescribed by the FCC. Indeed, the parity requirements of the Act and the FCC's pronouncements support the system of self-effectuating guarantees supported by ITC^DeltaCom witness Rozycki in his testimony. Additionally, the language of Section 252(c) does not confine the resolution of the issues to the requirements of Section 251 as not every issue included in the resolution involves the affirmative requirements of Section 251. *See U.S. West Communications, Inc. v. Minnesota Public Utilities Comm'n*, 55 F.Supp.2d 968, 986 (D.Minn. 1999). The requirement that the interconnection agreement must meet the standards of Section 251 is stated as a floor, not a ceiling.

B. Authority Under the Federal Arbitration Act

The scope of the TRA's authority when acting as an arbitrator under Section 252 of the Telecommunications Act was not specifically delineated by Congress in the Act. However, there is no reason to assume Congress intended to leave a hole in the body of the law governing the right it had created for carriers to request compulsory arbitration under Section 252.

Indeed, by enacting the Telecommunications Act, Congress used a word that already had a meaning in the body of federal substantive law, and even though it delegated the arbitration process to the states, it is doubtful Congress intended the word to take on fifty (50) different

meanings.[4] Put simply, the word "arbitration" already had an established meaning under existing law[5] -- that given to it under the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* In fact, at the time Congress enacted the Telecommunications Act, "the Supreme Court ha[d], by an expansive reading of the [Federal Arbitration Act], largely supplanted state law, so that today, almost all agreements to arbitrate will be subject to the federal statute." *See Baravati v. Josephthal Lyon & Ross, Inc.*, 834 F.Supp. 1023 (N.D.Ill. 1993), aff'd 28 F.3d 704 (7th Cir. 1994); *see also* 7 Samuel Williston & Richard Lord, A Treatise on the Law of Contracts § 15:11, at 188 (4th ed. 1997). Nothing in the Telecommunications Act suggests that the broad affirmative powers of an arbitrator, as they currently exist under federal substantive law, are intended to be limited in any way. Therefore, "[w]here Congress uses terms that have accumulated settled meaning under common law, the Court must infer, unless the statute otherwise dictates, that congress means to incorporate the established meaning of those terms." *Field v. Mans*, 116 S.Ct. 437 (1996).

The Third Circuit addressed a similar issue in a recent case involving whether the Federal Arbitration Act applied, in conjunction with the mandatory "informal dispute resolution" procedures required under the Pennsylvania "Lemon Law" and the federal Magnuson-Moss Warranty Act. Both the state and federal laws required plaintiffs seeking relief under these laws

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[4] "Uniform laws are commonly interpreted in light of provisions in other uniform laws." Sutherland Statutory Construction (5th ed.) § 53.04, p. 237.

[5] "In the absence of a contrary legislative command, when two Acts of Congress touch upon the same subject matter the courts should give effect to both if that is feasible." *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) (citing *City Pipefitters Local 562 v. United States*, 407 U.S. 385, 432 n. 43 (1972)). *See also* Sutherland, § 51.02, p. 121. ("It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. . . . In the absence of express repeal or amendment, the new provision is presumed in accord with the legislative policy embodied in those prior statutes. Thus, they should all be construed together.").

to submit their disputes first to "informal dispute resolution" proceedings, procedures for which are provided for in the state law. The court, in holding that the Federal Arbitration Act did not apply, relied on the distinction that the procedures required under Pennsylvania law were not intended to "conclusively" settle disputes in the same manner as arbitrations. The court reasoned that "[i]f the drafters had intended this procedure to be cognizable under the [Federal Arbitration Act], then it is likely they would have referred to it as 'arbitration'." *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3d Cir. 1997). *Harrison* is instructive because the Telecommunications Act, however, does use the term "arbitration," and this arbitration is intended to settle conclusively the parties' rights and duties toward each other under the Telecommunications Act.

Under the Federal Arbitration Act, the arbitrator has the authority to consider any issue submitted to him by the parties. *Sunshine Mining Co. v. United Steel Workers of America*, 823 F.2d 1289, 1294 (9th Cir. 1987). Any doubts concerning the scope of arbitration should be resolved in favor of arbitration. *Wailua Associates v. AETNA Cas. and Sur. Co.*, 904 F.Supp. 1142, 1149 (D.Haw. 1995). Additionally, under the Federal Arbitration Act, an arbitrator enjoys wide latitude in conducting an arbitration hearing. An arbitration proceeding is not constrained by formal rules of procedure or evidence. The arbitrator's role is to resolve disputes, based on his consideration of all relevant evidence. *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985). Because Congress has not limited the broad powers of a State commission acting as an arbitrator under the Telecommunications Act, a State commission has the same powers of an arbitrator as they currently exist under the Federal Arbitration Act. *See Field v. Mans, supra.* Therefore, the TRA acting as an arbitrator under the

Telecommunications Act is not constrained by formal rules of procedure or evidence. It has the authority to consider the issues presented by the parties and to resolve these issues, including the issue of self-effectuating performance guarantees.

C. Federal Common Law Under the Telecommunications Act

The federal district courts have repeatedly held that a State commission is not barred by the Act from considering the issue of performance guarantees and including such provisions in an interconnection agreement. Although these courts sometimes state that a State commission is not *required* to consider performance measures and guarantees, they do not *preclude* a State commission from considering the issue and approving the inclusion of these provisions in an interconnection agreement. For example, in *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, MCI contended that the Kentucky Public Service Commission failed to include in the interconnection agreement performance standards to prevent BellSouth from ignoring substantive performance requirements without fear of any meaningful penalty. 40 F.Supp.2d 416 (E.D.Ky. 1999). BellSouth argued that because performance standards are not mentioned anywhere in the Act, those issues are beyond the scope of the arbitration proceedings before the Kentucky PSC. Although the district court stated that it was "leery to use 47 U.S.C. § 252(c), which permits a state commission to resolve 'any open issues and impos[e] conditions upon the parties to the agreement' as a *requirement* that the PSC set performance standards," the court further stated that "a state commission *may* decide to impose such standards. . . ." *Id.* at 428 (emphasis added). Although the court did not impose a duty on the Kentucky PSC to include such provisions in an interconnection agreement, it made it clear that a State commission has the

authority to implement performance guarantees when arbitrating an interconnection agreement under the Act.

Similarly, in *MCI Telecommunications Corp. v. U.S. West Communications, Inc.*, the court affirmed the Oregon Public Utilities Commission's decision to reject certain performance standards requested by MCI in that particular instance, finding that the PUC's decision was not arbitrary and capricious. 31 F.Supp.2d 859 (D.Or. 1998). In so holding, the court stated that although it had affirmed in *U.S. West Communications, Inc. v. TCG Oregon*, CV 97-858-JE, the PUC's decision to require certain performance standards and to provide TCG specific remedies in the event U.S. West repeatedly failed to meet those standards, "that does not mean that the PUC must include performance standards and specific remedies in every interconnection agreement. Rather, it is a discretionary decision on the part of the PUC, and this court will not disturb that decision unless it is arbitrary and capricious or violates the Act." *Id.* at 861. *See also MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F.Supp.2d 1157 (D.Or. 1999); *U.S. West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.*, 31 F.Supp.2d 839, 856 (D.Or. 1998).

In *U.S. West Communications, Inc. v. Hix*, MCI challenged the Colorado Public Utilities Commission's decision not to include detailed performance standards in MCI's interconnection agreement with U.S. West. 57 F.Supp.2d 1112 (D.Col. 1999). The court stated that although the Act contains no provision requiring a public utilities commission to create detailed performance standards, the Act does require that public utilities commissions implement the nondiscrimination rules of the Act by adopting specific rules and any other specific conditions they deem necessary to provide new entrants with a meaningful opportunity to compete in local

exchange markets. *Id.* at 1121. The court upheld the Colorado PUC's decision to include general performance standards in the interconnection agreement. *Id.*

In that same case, the court also addressed U.S.West's contention that its interconnection agreement with MCI violated the Act because it included "liquidated damages and penalties provisions." *Id.* U.S. West argued that the PUC had only limited authority under the Act and that these provisions exceeded that authority. The court found that although the Act does not specifically delineate the powers of the public utilities commissions with respect to these types of provisions, the Act gives the commissions the authority to adopt specific rules and any other specific conditions they deem necessary to provide new entrants with a meaningful opportunity to compete in local exchange markets. The court went on to hold that the liquidated damages and penalties provisions were designed to encourage compliance with the agreements by setting forth clear remedies where a party fails to comply, and that including such provisions was certainly within the scope of the PUC's authority. *Id.* at 1122.

Finally, in *U.S. West Communications, Inc. v. TCG Oregon*, the court held that the Oregon Public Utilities Commission had broad discretion to establish service standards. 31 F.Supp.2d 828 (D.Or. 1998). The court stated that the Act does not preclude the commission from heightening those standards when appropriate to spur service improvements by U.S. West, so long as the higher standards are generally applicable. *Id.* at 837. The court further found that although the Act does not expressly provide for liquidated damages, it does not categorically preclude such provisions in an interconnection agreement so long as they are reasonable and justifiable. *Id.* Therefore, the court held that the interconnection agreement could include a

liquidated damages provision that mandates an award of damages if U.S. West fails to meet certain performance standards. *Id.*

As the above cases show, when arbitrating an interconnection agreement pursuant to the Act, the TRA has the authority to consider the issue of self-effectuating performance guarantees and to adopt a set of such guarantees consistent with the evidence presented to it. In reviewing the decisions of the State commissions, the federal district courts have repeatedly held that the law allows State commissions to direct the parties to include self-effectuating performance measures and guarantees. Indeed, as the court in *Hix* held, the imposition of performance guarantees in an interconnection agreement is within the required scope of a State commission's authority in that it is designed to provide new entrants with a fair and meaningful opportunity to enter the local exchange market.

D. Tennessee Law

BellSouth likely will contend that the TRA's jurisdictional limits under state law do not allow the TRA to "assess or impose liquidated damages in an interconnection agreement." To date, BellSouth has made this argument to the TRA without citation to authority. Even assuming *arguendo* that the TRA has no authority under state statutes to "assess or impose liquidated damages," ITC^DeltaCom submits that BellSouth poses the wrong question. ITC^DeltaCom is not requesting an award of damages. "Damages" refers to compensation in money for a loss or damage. Parties who have suffered harm may seek reparation through damages. ITC^DeltaCom asks the TRA to approve a set of self-effectuating remedies under which, if BellSouth fails to perform as required by the interconnection agreement approved by the TRA, BellSouth shall

either waive charges that otherwise would be due or BellSouth shall pay to the State certain monies.

With regard to the waiver of charges, ITC^DeltaCom's request is simple and can best be understood through an example. If ITC^DeltaCom asks for a customer cutover to be completed on a Monday, and the cutover does not occur until Wednesday, ITC^DeltaCom did not get what it ordered and the charge should be waived. With regard to other remedies, ITC^DeltaCom simply asks the TRA to adopt incentives that will deter repeated non-performance.

In short, an argument that Tennessee law prevents the TRA from awarding "damages" is inapplicable in this context. First, the TRA is charged with implementing federal law in this Docket. Secondly, and more to the point, ITC^DeltaCom is not asking for damages, but merely self-effectuating performance guarantees that will compel BellSouth to waive charges or pay penalties to the State when it fails to perform. BellSouth has cited no authority to the contrary.

E. <u>Other Contractual or Administrative Remedies.</u>

BellSouth argues that because ITC^DeltaCom "has available to it the full array of contractual and administrative remedies should BellSouth breach its agreement," ITC^DeltaCom should not be entitled to self-effectuating performance guarantees in its interconnection agreement. *See Brief of BellSouth Telecommunications, Inc. Regarding the Appropriateness of Certain Issues in this Arbitration Proceeding*, p. 4, Docket No. 99-00430, Before the Tennessee Regulatory Authority (filed August 19, 1999). Although it is true that ITC^DeltaCom may seek contractual or administrative remedies, through breach of contract lawsuits in civil court or complaint cases brought before the TRA or the FCC in the event BellSouth breaches its agreement, such a requirement would effectively thwart competition in the local telephone market

by greatly hampering the efforts of would-be competitors such as ITC^DeltaCom to bring the benefits of competition to Tennessee consumers. Requiring this of ITC^DeltaCom would contradict the purpose of the Act. Congress passed the Act to end the monopoly of local telephone markets and to foster competition in those markets. *Iowa Utilities Bd. v. FCC,* 120 F.3d 753, 791 (1997), *rev'd in part sub nom., AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999).

Should ITC^DeltaCom have to institute litigation every time BellSouth breaches the agreement, Tennessee consumers, as well as ITC^DeltaCom, will be put in a precarious position. Extensive litigation would constitute a considerable expenditure of time and money and a waste of the civil court's or the TRA's valuable time and resources. Neither the TRA nor any court should be subjected to the constant and continuous litigation that is sure to arise. Rather, the inclusion in the interconnection agreement of performance measures "with teeth" will ensure that costly and wasteful litigation will be minimized.

One court has persuasively commented on the effect that the failure to include self-effectuating performance guarantees would have on a Competitive Local Exchange Carrier ("CLEC") and on judicial resources:

> 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 TCG (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.

U.S. West Communications, Inc. v. TCG Oregon, 31 F.Supp.2d 828, 837-38 (D.Or. 1998). It is clear that the mere availability of contractual and administrative remedies is not enough to protect ITC^DeltaCom or the TRA from any failure by BellSouth to perform. ITC^DeltaCom needs an interconnection agreement with "teeth."

F. <u>The TRA's Brief to the District Court</u>

BellSouth maintains that the TRA has already determined that it will not "require a system of penalties and credits" in the context of an arbitration of an interconnection agreement. *See Brief of BellSouth Telecommunications, Inc. Regarding the Appropriateness of Certain Issues in this Arbitration Proceeding*, p. 2, Docket No. 99-00430, Before the Tennessee Regulatory Authority (filed August 19, 1999) (citing *Brief of Tennessee Regulatory Authority*, p. 26, Case No. 3-97-0616, U.S. District Court, M.D. Tenn. (filed April 13, 1998)). BellSouth's contention that this statement by the TRA precludes the TRA from *ever* arbitrating the issue of performance guarantees or contractual remedies is untenable.

In its brief to the Federal District Court for the Middle District of Tennessee, the TRA addressed an appeal by MCI that the TRA erred in failing to require that its interconnection agreement with BellSouth contain "an enforceable system of non-performance credits and penalties." *Brief of Tennessee Regulatory Authority* at 25. The TRA concluded that "[a]bsent

any legal requirement on [BellSouth] or the TRA to include an additional type of remedial mechanism for a violation of the Interconnection Agreement, and in view of the reasonableness and adequacy of the remedies available to MCI in the event of a breach of the Interconnection Agreement by [BellSouth], the TRA's refusal to *require* a system of penalties and credits, as requested by MCI, was eminently reasonable and should be upheld by this Court." *Id.* at 26 (emphasis added). Thus, the TRA made a discretionary policy decision regarding performance guarantees. In that case the decision was not to include performance standards based on the evidence. The evidence in this case is different and more strongly supports the inclusion of self-effectuating performance guarantees in the interconnection agreement.

The operative word in the TRA's argument is "require." The TRA only took the position that it is not *required* to arbitrate the issue of performance guarantees or contractual remedies. Nowhere in its brief does the TRA also conclude that it lacks the *discretion* or *authority* to arbitrate the issue of performance guarantees or contractual remedies. Indeed, the TRA further argued in its brief that it was reasonable in its decision to refuse to require a system of penalties and credits in the interconnection agreement. Had the TRA determined that it was precluded from even arbitrating the issues of performance guarantees, it would not have reached the issue of whether it was reasonable in its refusal in that particular case. Contrary to BellSouth's contention, the TRA never stated that it did not have the authority to include performance guarantees in an interconnection agreement. Rather, the TRA only concluded that it was reasonable under the circumstances in that case for the TRA to refuse to include such a provision in the interconnection agreement at issue in that Docket. The TRA's position is consistent with that of the federal courts that have reviewed arbitrations by State commissions. *See supra*

Section II.C. Nothing in the TRA's brief could be read to preclude the TRA from considering the issue of performance guarantees or contractual remedies in the present case and directing the parties to include these guarantees in their interconnection agreement.

G. The NEXTLINK Arbitration

BellSouth will likely rely upon the TRA's decision in a previous arbitration between NEXTLINK Tennessee L.L.C. ("NEXTLINK") and BellSouth for the proposition that the TRA may not include performance guarantees in an interconnection agreement. In that case, the TRA addressed the issue of performance guarantees. *See In Re: Petition of NEXTLINK Tennessee L.L.C. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*, TRA Docket No. 98-00123. In its *First Order of Arbitration Award* (hereinafter "*Order*"), the TRA addressed whether the interconnection agreement between NEXTLINK and BellSouth should include remedies to address BellSouth's failure to meet performance measures or loop provisioning intervals to which the parties had agreed. TRA Docket No. 98-00123, *Order*, p. 16. A review of the TRA's decision on this issue demonstrates that BellSouth's argument that the TRA has ruled that it may not arbitrate issues relating to damages or remedies is simply incorrect.

The TRA did not reach the issue of appropriate remedies in the NEXTLINK case because the evidentiary record adduced in that case was insufficient to support a resolution of the issue. Again, the TRA made a policy decision and exercised its discretion not to adopt performance guarantees. NEXTLINK proposed a series of self-executing remedies relating to failure to meet performance measures and agreed-upon loop provisioning intervals. Although the TRA did not make an explicit finding that such remedies were appropriate, the Order hardly rejected the TRA's authority to arbitrate such provisions in interconnection agreements. The TRA concluded that "it

is not possible to fashion remedies based on the evidentiary record developed in this arbitration proceeding," and thus did not establish such remedies due to the lack of support thereof in the evidentiary record. *Id.*

The true basis of the NEXTLINK Order regarding remedies, therefore, is that NEXTLINK failed to submit sufficient evidence which would enable the TRA to fashion remedies within the interconnection agreement at issue. ITC^DeltaCom has presented sufficient evidence that demonstrates that self-effectuating performance measures and guarantees are essential to its interconnection agreement with BellSouth and are crucial to the success of Tennessee's competitive telecommunications marketplace.

H. BellSouth's Existing Tariffs and Proposed Interconnection Agreement

BellSouth's position is inconsistent with its own tariffs. BellSouth argues that the TRA is not empowered to approve an interconnection agreement which contains self-effectuating performance measures, and yet BellSouth's very own tariffs, approved by the TRA, contain performance measures and guarantees. Apparently, according to BellSouth, what is acceptable for BellSouth's own tariffs is not good enough for its interconnection agreement with ITC^DeltaCom. Some well-known examples of penalties in BellSouth's local exchange tariffs are late fees and returned check charges to consumers of BellSouth. The tariffs that permit the imposition of these penalties are approved by the various state regulatory authorities throughout the BellSouth region, including the TRA. Clearly the TRA has authority to approve penalties as part of a tariff which governs the relationship between BellSouth and its retail customers. Likewise, the interconnection agreement at issue in this case governs the relationship between ITC^DeltaCom and BellSouth. ITC^DeltaCom is a customer of BellSouth. Late fees and

returned check charges are not the only examples of remedies or "penalties" which BellSouth seems to find acceptable. Indeed, in some cases, BellSouth's tariffs impose remedies on BellSouth for failure to perform.[6] BellSouth's Access Services Tariff contains several examples of performance guarantees, the type of provisions to which BellSouth so strenuously objects to even discussing in this proceeding.

For example, Section E7.4.1.A.3. of BellSouth's Access Services Tariff provides a list of services offered by BellSouth which "are eligible for credit of nonrecurring charges under 'Service Installation Guarantee' found in E.2.4.10." This list includes the following services: Voice Grade, Wired Music, Digital Data Access service, High Capacity service, SMARTPath service, Commercial Quality Video, and SMARTRing service. Section E2.4.10 states that BellSouth "assures that orders for services to which the Service Installation Guarantee applies will be installed and available for customer use no later than" a specified date. Further, the failure of BellSouth to meet this commitment for installation of those services "will result in the credit of an amount equal to the nonrecurring charges associated with the individual service having the missed Service Date being applied to the customer's bill." Section A.12.20.3 of the Tariff is even more explicit. This section addresses "MultiServ Service" and provides that "[i]f the subscriber is not *completely satisfied* with MultiServ service within ninety (90) days of the effective billing date" (emphasis added), certain charges will be refunded, including nonrecurring and recurring charges for certain rate elements, and service charges. Under the language excerpted above, BellSouth is required to waive or refund certain charges if it fails to perform in a timely manner the services

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[6] Examples of such tariff provisions were provided as evidence through the Exhibits to ITC^DeltaCom's testimony.

which it is obligated to perform. ITC^DeltaCom urges the TRA to approve the incorporation of similar waivers and refunds in the interconnection agreement that is at issue in this Docket.

Incredibly, in another obvious inconsistency, BellSouth asks the TRA to take jurisdiction and approve performance guarantees and remedies in this docket. BellSouth has proposed language which would require ITC^DeltaCom to pay a penalty when it overstates the Percent Interstate Usage ("PIU") and Percent Local Usage ("PLU").[7] BellSouth has proposed that in the event of an overstatement of the PIU or PLU, the party responsible for the overstatement shall reimburse the auditing party for the cost of the audit. Depending upon the scope of the audit, this remedy could be many thousands of dollars. BellSouth submits this as an issue to be arbitrated by the TRA. Apparently, this is a remedy that BellSouth thinks is appropriate for arbitration.

I. BellSouth's Proposed Self-Effectuating Performance Measures To the FCC.

BellSouth has acknowledged the need for a "self-effectuating penalty or enforcement measurement" in a recent *ex parte* communication with the FCC. In an attempt to obtain approval to enter the long distance market pursuant to Section 271 of the Act, BellSouth agreed that such remedies are appropriate in arrangements between BellSouth and CLECs. *BellSouth's Proposal for Self-Effectuating Enforcement Measures*, April 8, 1999.[8] It is distressing and hypocritical that BellSouth acknowledges the importance of such measures, and even considers

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[7] *See BellSouth's Proposed Interconnection Agreement* at Attachment 3, Section 1.4. BellSouth has not submitted its proposed Interconnection Agreement in Tennessee but has done so elsewhere and has used this "template" throughout the negotiations with ITC^DeltaCom.

[8] A copy of this *ex parte* communication was attached as Exhibit A to ITC^DeltaCom's Pre-Hearing Brief, filed in this docket on August 18, 1999. BellSouth suggests a second *ex parte* presentation was made and promised to file that presentation as a late-filed exhibit.

them proper before the FCC, but somehow maintains that they are not proper issues for its interconnection agreement with ITC^DeltaCom in Tennessee.

III. CONCLUSION

Performance guarantees are essential to a meaningful and effective interconnection agreement that provides fairness to both parties, as well as needed incentives for performance. The TRA has the authority to consider these issues under the statutory provisions of the Act itself when acting as an arbitrator under federal law and under its own determinations. Additionally, the TRA should exercise its authority to consider the issues of performance guarantees in order to protect the Tennessee consumers and the emerging competitive local exchange market in Tennessee.

BellSouth must satisfy the dictates of the Act, including providing services to competing local exchange companies at parity with that which it provides to itself. Even BellSouth acknowledges -- at least to the FCC in *ex parte* communications -- the need for self-effectuating performance measures to help fulfill the promise of competition. Moreover, such measures are commonplace in BellSouth's tariffs, which are approved by the TRA.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of November, 1999, a true and correct copy of the foregoing was served by hand delivery, facsimile transmission, overnight delivery or U. S. Mail, first class postage prepaid, to the following:

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