BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

AUGUST 11, 2000

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

INTERIM ORDER OF ARBITRATION AWARD

INTRODUCTION

This matter came before the Tennessee Regulatory Authority ("the Authority") upon the petition of ITC^DeltaCom ("DeltaCom") for arbitration of an interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth") pursuant to the Telecommunications Act of 1996 ("1996 Act"). This Interim Order of Arbitration Award embodies all decisions made by Chairman Melvin J. Malone, Director H. Lynn Greer, Jr. and Director Sara Kyle, acting as Arbitrators, at a public meeting held on April 4, 2000.

The 1996 Act requires that incumbent local exchange carriers ("ILECs") provide new entrants to the local market with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(2)(D). Pursuant to Sections 251 and 252 of the 1996 Act, ILECs and competing local exchange carriers ("CLECs") have a duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements listed in these sections. *See id.* §§ 251, 252. If the parties are unable to reach an agreement voluntarily, either party may petition the state commission for arbitration. *See id.* § 252(b)(1). A final interconnection agreement, whether negotiated or arbitrated, must be reviewed by the state commission to determine whether it complies with the 1996 Act. *See id.* § 252(e)(1).

On June 11, 1999, DeltaCom filed a petition requesting the Authority arbitrate the interconnection agreement between it and BellSouth. The petition contained seventy-three (73) issues, including sub-issues. The Directors accepted DeltaCom's petition for arbitration on June 29, 1999, appointed themselves as Arbitrators, and directed the General Counsel or his designee to serve as the Pre-Arbitration Officer. BellSouth responded to the petition on July 6, 1999. The Pre-Arbitration Officer held a conference on August 4, 1999 for the purpose of clarifying the

issues and setting a procedural schedule. As a result, the parties resolved many issues, leaving the following sixteen (17) issues open for resolution: 1(a), 2, 6(a), 2(a)(iv), 2(b)(ii), 2(b)(iii), 3(1), 3(2), 4(a), 5, 6(b), 6(c) 6(d), 7(b)(iv), 8(b), 8(e) and 8(f). The Authority heard testimony related to these issues at a three-day hearing held from November 1, 1999 until November 3, 1999.[1]

On January 25, 2000, one of the Arbitrators proposed taking official notice of the ICG arbitration record, Docket 99-00377, which contains the final Texas Performance Plan and late filed exhibits outlining the differences in the Texas Plan and BellSouth's Service Quality Measurements ("SQMs"). The Arbitrators gave the parties an opportunity to respond and none objected. Thereafter, the Arbitrators took official notice of Docket No. 99-00377. The Arbitrators deliberated at a public meeting on April 4, 2000. The Arbitrators resolved many of the issues, but requested final best offers on issues 1(a), 4(a), 5 and 8(e).

[1] Issue 6(c) was resolved during the hearing by witness Don Wood. During his testimony, he represented that the issue regarding disconnect charges would be resolved for DeltaCom if the Authority's oral directive on this matter were codified in an interim order. The Authority released its interim order in Docket No. 97-01262 on November 3, 1999. *See In Re: Petition to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements, Order Re Petitions for Reconsideration and Clarification of Interim Order in Phase 1*, Docket No. 97-01262, at 34 (Tenn. R. Auth. Nov. 3, 1999)

ISSUE 1(a)

Should BellSouth be required to comply with performance measures and guarantees for pre-ordering/ordering, resale, and unbundled network elements ("UNEs"), provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions and the bona fide request processes as set forth fully in Attachment 10 of Exhibit A to this Petition?

POSITIONS OF THE PARTIES

DELTACOM

A. The Authority has the Power to Arbitrate Enforcement Mechanisms, and Performance Measures and Enforcement Mechanisms are Necessary.[2]

DeltaCom asserts that the Authority may order the use of monetary enforcement mechanisms and award damages for poor performance. DeltaCom bases its assertion on: 1) the 1996 Act and the authority provided therein to those who arbitrate interconnection agreements; 2) BellSouth's existing tariffs that were approved by this Authority and contain late payment penalties and interest; and 3) BellSouth's current offers of "Unconditional Satisfaction Guarantees," "Performance Guarantees," and "Service Installation Guarantees" in its access and retail tariffs.

DeltaCom sets forth three reasons to justify why performance measures and enforcement mechanisms are necessary: 1) BellSouth gains competitive and financial incentives by deterring entry of competitive carriers; 2) BellSouth is in control of the telecommunications network; and 3) requiring CLECs to seek remedies through the complaint process will thwart competition. DeltaCom also argues that without performance measures and enforcement mechanisms BellSouth is unlikely to provide service to CLECs in the same manner that it provides service to

[2] Performance measures are criterion used to determine whether the Bell Operating Company ("BOC"), in this case, BellSouth has opened its network to competition. Enforcement mechanisms are benchmarks used to ensure future performance by the BOC, to maintain competitiveness, and to prevent "backsliding" by the BOC once interLATA entry has been gained.

itself as required by 47 U.S.C. § 251(c)(2)(C). Further, if BellSouth is granted Section 271[3] approval, antibacksliding measures must be in place to ensure the quality of service to CLECs.

B. Proposed Performance Measures and Enforcement Mechanisms

Attachment 10 of Exhibit A of the interconnection agreement contains the performance measures proposed by DeltaCom. This proposal is structured into three tiers. Tier I contains forty-five (45) measures with specific enforcement mechanisms. The enforcement mechanisms require a waiver of the nonrecurring charge or an indication that it is a performance metric. Tier II consists of a "Specified Performance Breach." This breach occurs when BellSouth does not meet a specified standard for two (2) consecutive months or twice during a quarter. When a breach occurs, BellSouth is required to pay DeltaCom $25,000 for each measurement they failed to meet. Tier III is the "Breach-of-Contract" section in which BellSouth pays $100,000 for each day the breach continues. A breach is a failure to meet a single standard five times during a six-month period.

DeltaCom maintains the Tier II and Tier III dollar amounts are justified because of BellSouth's market dominance. Also, DeltaCom attempts to dispel BellSouth's accusation that Tiers II and III provide DeltaCom with a windfall by suggesting that Tiers II and III amounts be paid to the State.

C. Arguments Against BellSouth's Proposal

DeltaCom states that BellSouth's "Voluntary Self Effectuating Performance Measures"[4] are a good start, but they do not advocate their use for two reasons. First, the performance

[3] Section 271 of the 1996 Act sets forth guidelines under which a BOC may provide interLATA services. *See* 47 U.S.C. § 271.

[4] As a prelude to its Section 271 application, BellSouth filed Voluntary Self-Effectuating Enforcement Measures ("VSEEMs") with the FCC.

measures do not guarantee that CLECs will receive service equal to what BellSouth provides to itself. Second, DeltaCom contends there are no consequences to BellSouth when performance does not equal parity or meet a standard.

DeltaCom states that the Service Quality Measurements ("SQMs")[5] proposed by BellSouth are inadequate and not acceptable to all CLECs. DeltaCom argues that the SQMs do not include bona fide requests and coordinated conversions, both of which are extremely important to DeltaCom. Additionally, DeltaCom states that substantial portions of the BellSouth SQMs are still under development. Nevertheless, DeltaCom suggested the Authority could combine BellSouth's and DeltaCom's proposals. For example, the Authority could assure that the SQMs are proper, add to the SQMs the new measures included in the DeltaCom proposal, and adopt the enforcement mechanisms proposed by DeltaCom.

BELLSOUTH

A. The Authority Lacks the Power to Arbitrate Enforcement Mechanisms, and Performance Measures and Enforcement Mechanisms are Unnecessary

According to BellSouth, DeltaCom's proposed enforcement mechanisms are unnecessary and Section 251 of the 1996 Act does not require such guarantees. BellSouth maintains that DeltaCom is proposing penalties or liquidated damages that are not appropriate for arbitration, and the Authority lacks statutory authority to adopt liquidated damages. In lieu of the proposed monetary enforcement mechanisms, BellSouth points to state law and state and federal regulatory procedure as being adequate to address any breach of contract. BellSouth acknowledges its obligation under the 1996 Act to provide non-discriminatory access to CLECs and contends that additional incentives, such as penalties, are unnecessary.

[5] BellSouth presented the September 15, 1999 version of the SQMs as a solution to Issue 1(a).

B. Proposed Performance Measures and Enforcement Mechanisms

BellSouth's SQMs include pre-ordering OSS, ordering, provisioning, maintenance and repair, billing, operator services (Toll) and directory assistance, E911, trunk group performance and collocation. BellSouth maintains that these measurements insure non-discriminatory access as required by the 1996 Act and are a result of working with state commissions, the FCC, and CLECs. In an attempt to compare the SQMs and the measures proposed by DeltaCom, BellSouth provided a matrix to demonstrate that 38 of the 45 measurements proposed by DeltaCom are contained in the SQMs and that the SQMs are more detailed than DeltaCom's proposal. Therefore, BellSouth contends the SQMs are sufficient for CLECs including DeltaCom. Finally, BellSouth states that the SQMs as presented are continually being revised based on the requirements of CLECs.

C. Arguments Against DeltaCom's Proposal

Dr. William Taylor submitted testimony addressing the defects in the proposed performance measures of DeltaCom. According to Taylor, BellSouth has not determined if it will be able to meet the measures as proposed. Further, he contends the proposed enforcement mechanisms are not related to cost and are not based on economics. He also states that the cost of providing Unbundled Network Elements ("UNEs") with performance measures and enforcement mechanisms is different than the cost of providing UNEs without guarantees. Taylor asserts that if BellSouth were required to provide a higher grade of service than that provided to its retail customers, then the UNE cost would need to reflect such a provision.

DELIBERATIONS

A. The Authority has the Power to Arbitrate Enforcement Mechanisms, and There is a Need for Performance Measures and Enforcement Mechanisms

DeltaCom petitioned the Authority to arbitrate the issues of performance measures and enforcement mechanisms in the interconnection agreement between it and BellSouth. BellSouth and DeltaCom have agreed that the Authority may impose performance measures. The parties cannot agree, however, on the issue of enforcement mechanisms.

Numerous courts have held that state commissions may impose performance measures and enforcement mechanisms in interconnection agreements. *See MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 40 F. Supp. 2d 416, 428 (E.D. Ky. 1999); *US West Communications, Inc. v. Hix*, 57 F. Supp. 2d 1112, 1121-22 (D. Colo. 1999). In *US West Communications, Inc. v. TCG Oregon,* the Court evaluated a liquidated damages provision included in an interconnection agreement between TCG Oregon and US West Communications, Inc. *See US West Communications, Inc. v. TCG Oregon*, 31 F. Supp. 2d 828, 837-38 (D. Or. 1998). The Court stated: "[a]lthough 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." *Id.* at 837.

Having concluded that the Authority may impose performance measures and enforcement mechanisms, the Arbitrators must determine if such measures are necessary. Section 251(c) places an obligation upon ILECs to: 1) provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection"; 2) the duty to provide unbundled access in a nondiscriminatory manner; 3) the duty to offer nondiscriminatory resale; and 4) the duty to

provide collocation on a nondiscriminatory basis. *See* 47 U.S.C. § 251(c)(2)-(4),(6). Enforcement mechanisms encourage BellSouth to meet the requirements of Section 251, and performance measures provide the necessary information to determine if BellSouth is complying with Section 251.

Enforcement Mechanisms are also necessary to ensure that DeltaCom receives services in the same manner and quality that BellSouth's provides to itself. BellSouth controls the network and needs an incentive to open this network to competition. Further, as noted by DeltaCom, once BellSouth receives 271 approval, there will be no incentive for BellSouth to provide services in a competitively neutral manner. It is, therefore, incumbent upon this Authority to adopt enforcement mechanisms that will ensure that BellSouth's network and systems in Tennessee are open to CLECs in a nondiscriminatory manner.

B. Adoption of BellSouth's SQMs and VSEEMs with Certain Adjustments are Appropriate for Use in This Interconnection Agreement

ICG and DeltaCom argued that BellSouth's SQMs lack certain measurements of importance for competition. At the request of the Arbitrators, BellSouth and ICG submitted Late-Filed Exhibits 2 and 3 comparing the Texas Plan to BellSouth's SQMs. When reviewing these exhibits, the Arbitrators gave particular attention to those measurements noted as excluded in the SQMs by ICG and DeltaCom. Based on this review, it is apparent that the SQMs are lacking in the specific areas discussed by ICG and DeltaCom. Therefore, the Arbitrators determine that additions and revisions to the SQMs are needed in order to demonstrate nondiscriminatory access.

Although BellSouth proposes the adoption of the SQMs, they provide no evidence demonstrating that services are or will be provided to DeltaCom in the same manner and at the

same quality that BellSouth provides to itself. The SQMs lack a standard or benchmark with enforcement mechanisms. There is no way to determine when enforcement mechanisms should apply without standards or benchmarks and there is no incentive for BellSouth to meet the standards or benchmarks and to provide nondiscriminatory access without enforcement mechanisms.

In both the ICG and DeltaCom dockets, BellSouth noted that it filed VSEEMs with the FCC as a prelude to its 271application. These measures include the exact action being measured, the methodology for testing whether the CLEC has received inferior service, and the remedy procedure. Although the FCC and BellSouth may not agree on the specifics of performance measures and enforcement mechanisms, it is evident from the submission of VSEEMS that BellSouth and the FCC agree on the general concept that measures and mechanisms are necessary. The VSEEMs include the provision of the underlying data used to prepare the reports to the CLEC. During the arbitration, in both DeltaCom and ICG, there was no evidence presented regarding a method of data collection or for not using BellSouth data.

Finally, failure by BellSouth to meet a standard and/or benchmark may occur through no fault of BellSouth. This necessitates the establishment of procedures by which BellSouth may request that this Authority waive an enforcement mechanism. Establishing these procedures in the interconnection agreement will eliminate confusion in the future should BellSouth seek such a waiver.

CONCLUSIONS

Given the above, the Arbitrators find that the interconnection agreement should include performance measures and enforcement mechanisms. These measures and mechanisms should remain in effect permanently or until this Authority conducts a generic proceeding to adopt

permanent performance measures and enforcement mechanisms applicable to all CLECs. Therefore the Arbitrators adopt:

A. Performance measures with standards and/or benchmarks and enforcement mechanisms. These standards and mechanisms shall be in effect until the Authority adopts generic standards and mechanisms applicable to all competitors.

B. BellSouth's SQM's with associated definitions and business rules and the following measurements from the Texas Plan including the associated definitions and business rules:

1. Remove the SQM on Firm Order Confirmation Timeliness;
2. Add Percent Firm Order Confirmation Returned within specified;
3. Add Percent Mechanized Rejects Returned Within one hour of receipt of reject in LASR;
4. Add Percent of Accurate and Complete Formatted Mechanized Bills;
5. Add Billing Completeness;
6. Add Unbillable Usage;
7. Add Percent Busy in the Local Service Center (LSC);
8. Add Percent Busy in the Local Operations Center (LOC);
9. Add Percent Installations Completed Within Industry Guidelines for LNP With Loop;
10. Add Average Response Time for Loop Make Up Information;
11. Add Directory Assistance Average Speed of Answer;
12. Add Operator Services Speed of Answer;
13. Add Percentage of LNP Only Due Dates within Industry Guidelines;
14. Add Percentage of Time the Old Service Provider Releases the Subscription Prior to the Expiration of the Second 9 Hour (T2) Timer;
15. Add Percentage of Customer Account Restructured Prior to LNP Due Date;
16. Add Percentage Pre-mature Disconnects for LNP Orders;
17. Add Average Days Required to Process a Request;
18. Add Cageless Collocation to the Level of Disaggregation on BST's SQM "Collocation/Average Response Time;"
19. Add Cageless Collocation to the Level of Disaggregation on BST's SQM "Collocation/Average Arrangement Time;"

20. Add Cageless Collocation to the Level of Disaggregation on BST's SQM "Collocation/Percent of Due Dates Missed;"
21. Add Percentage of Updates Completed into the DA Database within 72 hours for Facility Based CLECs;
22. Add Average Update Interval for DA Database for Facility Based CLECs;
23. Add Percentage DA Database Accuracy for Manual Updates;
24. Add Percentage of Premature Disconnects (Coordinated Cutovers);
25. Add Percentage of Missed Mechanized INP Conversions;
26. Add Percent NXXs loaded and tested prior to the LERG effective date;
27. Add Average Delay Days for NXX Loading and Testing;
28. Add Mean Time to Repair;
29. Add Percentage of Requests Processed Within 30 Business Days; and
30. Add Percentage of Quotes Provided for Authorized BFRs/Special Requests Within X (10, 30, 90) Days.

The Arbitrators also hold:

A. All measurements shall be at the Tennessee level.

B. BellSouth shall file with Final Best Offers a reasonable commitment date for when the measurements will be available for the SQMs where it is noted that the level of disaggregation is under development and a date for when the additional measures listed above will be available.

C. BellSouth data should be used for all measurements and calculations as specified in BellSouth's proposal in the VSEEMs and BellSouth shall make performance reports available to DeltaCom on a monthly basis. The reports will contain information collected in each performance category and will be available to DeltaCom through an electronic medium. BellSouth will also provide electronic access to the raw data underlying the performance measurements.

D. Final Best Offers shall be submitted on the following:

1. The electronic medium to be used in providing DeltaCom with access to the performance report and underlying data;
2. The process to be utilized to determine BellSouth's compliance or non-compliance with the standard and/or benchmark;
3. Standards and/or benchmarks for each measurement. Standards must be specific and measurable. Parity or retail analog should include the specific service to which parity will be measured or the retail analog companion. Additionally, a methodology should be provided for defining or calculating the performance standard and/or benchmark, for each measure, such as the method contained in the VSEEMs for each measure;
4. Enforcement mechanisms. These must be specific and should provide the number of occurrences at which the enforcement mechanism applies at the threshold and the specific enforcement mechanism once the threshold is met. Enforcement mechanisms should be categorized by tiers structured similar to those contained in BellSouth's VSEEMs and should include appropriate caps; and
5. Circumstances that would warrant a waiver request from BellSouth and the time frame for submitting such waiver request.

The parties shall submit their final best offers on or before the forty-fifth day following receipt of the transcript by the Authority.

COMBINED ISSUES 2, 2(a)(iv), AND 6(a)

Pursuant to the definition of parity, should BellSouth be required to provide the following and if so, under what conditions and at what rates: 1) Operational Support Systems ("OSS"), 2) UNEs, and 3) unbundled loop using Integrated Digital Loop Carrier ("IDLC") technology?

POSITIONS OF THE PARTIES

DELTACOM

A. OSS Development Costs

DeltaCom contends that BellSouth should not be permitted to recover all of its OSS development costs strictly from CLECs. Instead, each telecommunications carrier should bear the cost of developing its own OSS. DeltaCom makes three arguments in support of its position. First, OSS development costs are transitory costs that are required by the 1996 Act. Specifically, Section 251(c) of the 1996 Act directs BellSouth to develop electronic interfaces that will allow competing carriers to have real-time electronic access to BellSouth's systems. DeltaCom claims these costs are compliance costs of BellSouth and only because of its monopoly position is BellSouth capable of imposing its cost of compliance on its competitors. Second, BellSouth's own retail customers will benefit by its development and implementation of new systems. BellSouth's retail customers are essentially purchasers of UNEs. By upgrading its OSS to handle this process more efficiently, BellSouth will reap benefits attributable to OSS development. Third, BellSouth is not the only carrier that must incur OSS costs in order to achieve the competitive environment envisioned by the 1996 Act. For every system BellSouth implements, each CLEC must develop its own corresponding system on its side of the electronic interface. Thus, BellSouth is not saddled with a disproportionate amount of OSS development costs.

DeltaCom states further that if the Authority decides that BellSouth should be allowed to recover OSS development costs from CLECs, the Authority should follow three principles in doing so: 1) OSS development costs should be recovered in a competitively neutral and non-discriminatory manner, which recognizes that BellSouth's customers also benefit from local competition and, therefore, should defray a pro-rata share; 2) CLECs should not pay BellSouth for upgrading systems which would benefit its retail services; and 3) OSS development costs should not be assessed as nonrecurring charges, but should be amortized over the expected economic life of the OSS. DeltaCom asserts that BellSouth should be made to contribute to the recovery of OSS costs and the rates for OSS should be spread over BellSouth's entire retail customer base. DeltaCom asserts further that this action would be consistent with the Authority's clarification of the Interim Order in Docket No. 97-01262, wherein the Authority stated that "OSS interface costs should be recovered from all users of the new systems, whether ILECs or CLECs." *In Re: Petition to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements, Order Re Petitions for Reconsideration and Clarification of Interim Order in Phase 1*, Docket No. 97-01262, at 34 (Nov. 3, 1999) (hereinafter *Clarification Order*).

With respect to the use of OSS, DeltaCom complains that BellSouth has not offered OSS at parity or in a nondiscriminatory manner. Two chief complaints made by DeltaCom are that it takes too long to process orders through the systems and that too many orders submitted electronically do not flow through the systems. Witness Rozycki testified that it frequently takes more than ten days to process DeltaCom orders, whereas orders for the same services are processed within 24 to 48 hours for a BellSouth customer. Additionally, DeltaCom claims that sixty-two percent of orders submitted electronically to BellSouth fall out for manual processing.

B. Rates for UNEs

As for UNE rates in general, DeltaCom supports the UNE pricing standard set out in Docket No. 97-01262. *See In Re: Petition to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements, Interim Order*, Docket No. 97-01262 (Jan 25, 1999) (hereinafter *Interim Order*). DeltaCom states that if the pricing measures set forth in the *Interim Order* were made permanent, this issue would be resolved.

C. IDLC Technology

Regarding IDLC technology, DeltaCom claims that BellSouth provides inferior service to CLECs because BellSouth refuses to provision IDLC equivalent service in most instances. DeltaCom claims that BellSouth either uses excessively long copper loops that result in substantial loss on the loop or BellSouth uses outdated technology that increases costs and often does not provide the same quality and features of IDLC. DeltaCom proposes the following language in its proposed interconnection language:

> BellSouth must offer an unbundled loop which will allow end users to obtain the same level of performance as that offered by IDLC. Specifically, the unbundled loop should deliver to DeltaCom a digital signal that is equivalent to that which enters a switch when IDLC is employed. No additional digital to analog or analog to digital transformation should occur. The price of such an unbundled loop should be computed by calculating the combined cost of a loop connected to a switching port with access to all software features using IDLC technology. The loop cost between this combined cost and the cost of an unbundled switching port with access to all software features.

BELLSOUTH

A. OSS Development Costs

BellSouth agrees with DeltaCom on the point that a competitively neutral recovery of OSS development costs occurs when each telecommunications provider is held responsible for its own OSS. BellSouth notes, however, that it has already established its own OSS, and it is not

seeking to recover costs associated with the development of OSS for its retail customers. On the contrary, BellSouth is attempting to recoup costs that it has incurred to create interfaces and systems for the CLECs' benefit.

BellSouth asserts that it should be allowed to recover all the costs associated with the development and implementation of OSS from CLECs because the CLECs caused the costs. According to BellSouth, DeltaCom has ignored the facts that BellSouth has developed the OSS interfaces for the sole purpose of serving CLECs such as DeltaCom and BellSouth's retail customers will not derive any benefits from BellSouth's implementation of these systems. BellSouth also avers that the principle that the cost causer should pay for the costs that it incurs is consistent with FCC regulations and decisional law in this area. BellSouth observes that this position is further supported by the 1996 Act in that Section 252(d)(1) addresses pricing standards for UNEs like OSS, but does not impose the requirement of competitive neutrality. In the absence of any such requirement, the general principles of cost causation should be utilized. This means that in a competitive market, firms will recover costs from those who cause the costs. Accordingly, the CLECs, as opposed to BellSouth's retail customers, should bear the OSS development costs.

BellSouth claims that CLECs should pay OSS development costs pursuant to the Authority's *Clarification Order*. According to BellSouth's interpretation of the Authority's decision, BellSouth is permitted to recover OSS costs solely from all carriers that use the interfaces and systems consistent with the general principles of cost causation.

Furthermore, BellSouth claims that it provides nondiscriminatory access to its OSS through its preordering, ordering, provisioning and maintenance and repair interfaces. This contention is supported by the exponential growth in the use of these interfaces by CLECs.

BellSouth specifically points out that submission of orders via the EDI interface, the interface used by DeltaCom, has increased seventy percent in the period of March through August 1999 over comparable 1998 figures. BellSouth attributes DeltaCom's high "fall out" rate to the type of orders that are processed. BellSouth avers that DeltaCom processes more complex orders than do most CLECs, and as a result, more of DeltaCom's orders fall out for manual processing. BellSouth maintains that the combined flow through rate for its electronic interfaces was 92.1 percent for September 1999.

B. Rates for UNEs

On the issue of UNE rates, BellSouth's position is not drastically different from that of DeltaCom. Like DeltaCom, BellSouth also maintains that the rates for OSS as well as for all other UNEs should be determined pursuant to the Authority's orders in Docket No. 97-01262. Further, BellSouth states that once the Authority has entered a final order in that docket, the UNE rates should be applied retroactively to the effective date of the interconnection agreement between BellSouth and DeltaCom.

C. IDLC Technology

BellSouth witness Keith Milner states that BellSouth will provide access to loops served by IDLC on an unbundled basis by any means technically feasible. He goes on to state, however, that IDLC equipment allows the integration of loop facilities with switch facilities by eliminating central office terminals. Milner claims that if a CLEC wants to serve a customer using its own switch and that customer was previously served via IDLC equipment, the loop can no longer be integrated. Instead, as Milner asserts, the loop must be removed from BellSouth's switch and then connected to the CLEC switch.

Furthermore, Milner states the FCC clearly identified six technically feasible methods by which ILECs must unbundle IDLC loops. BellSouth states that they utilize these and other methods in provisioning unbundled loops where such loops are currently served by IDLC. Milner also refers to DeltaCom's witness Hyde as identifying three of the six methods set forth by the FCC. BellSouth also claims they will consider any other technically feasible method proposed by DeltaCom.

Finally, BellSouth states that CLECs and BellSouth end users are both subject to being served by a variety of methods, all of which are compliant with published technical service descriptions. Accordingly, BellSouth claims that it is providing CLECs with nondiscriminatory access to all loops, including those using IDLC.

DELIBERATIONS

In Docket 97-01262, the Authority ordered that OSS interface costs[6] should be recovered from all users of the new system, whether ILECs or CLECs. *See Clarification Order* at 34. In order to prevent nonrecurring OSS charges from being a barrier to entry, the Authority required the removal of all OSS costs from nonrecurring rates, thereby forcing recovery through recurring UNE rates. Recognizing that OSS interfaces were developed to allow carriers to order all UNEs, the Authority required that OSS costs be recovered through an additive to each UNE recurring rate. *See id.* As with OSS rates, the Authority addressed UNE rates in Docket No. 97-01262. *See Interim Order* at 7-11. These same rates are applicable to the present agreement.

The Authority also decided in Docket 97-01262 that if BellSouth used IDLC functionality for its customers, then it should be made available to CLECs. *See Clarification Order* at 22.

[6] OSS interface costs include development expenses, hardware equipment, maintenance expenses associated with new systems, and program enhancements to four Legacy Systems. Existing Legacy systems are used by BellSouth retail customers. The enhancements to the Legacy Systems are used by CLECs to order UNEs.

This decision precludes BellSouth from giving itself preferential treatment over its competitors. The Authority's *Clarification Order* regarding IDLC stated:

> Upon reconsideration, the Authority finds that BellSouth must offer IDLC to competitors on a per channel basis in central office feeder routes and serving areas where IDLC is available to BellSouth customers. Further, cost-based rates for IDLC should be submitted as part of the compliant studies. These rates should be based on the per channel cost of a virtual loop and port being provided over IDLC.

Id. (citations omitted).

BellSouth is correct in its assertion that the Authority did not specify the method(s) for provisioning IDLC. The Authority simply stated that IDLC functionality should be provided to CLECs where the functionality is available to BellSouth end users. The method(s) to be used should not be a point of contention. The FCC identified six different methods for provisioning IDLC. BellSouth admits they utilize these and other methods in provisioning unbundled loops where such loops are currently served by IDLC. As long as BellSouth provides IDLC functionality[7] to CLECs where it is available to BellSouth customers, regardless of the method, BellSouth will be in compliance with the Authority's decision.

CONCLUSIONS

The Arbitrators adopt the final rates for OSS and UNEs to be determined in Docket No. 97-01262. However, the existing proxy rates from the AT&T-BellSouth arbitration should continue to be used until such final rates are adopted in Docket No. 97-01262. The final rates resulting from Docket No. 97-01262 are to be applied retroactively to the date of the new

[7] In the Clarification Order, the Authority described IDLC Functionality as follows:

> The Authority stated that an unbundled loop of this type should deliver a digital signal to a CLEC that is functionally equivalent to the signal that is delivered to a switch when IDLC is employed. The Authority further stated that no additional digital to analog or analog to digital conversions should occur.

See Clarification Order at p. 19.

agreement resulting in a true-up. BellSouth shall provide IDLC to DeltaCom in serving areas where IDLC is available to BellSouth customers consistent with the Authority's decision in Docket No. 97-01262.

ISSUE 2(b)(ii) AND ISSUE 2(b)(iii)

Until the FCC makes a decision regarding UNEs and UNE combinations, should BellSouth be required to continue providing those UNEs and combinations that it is currently providing to DeltaCom under the interconnection agreement previously approved by this commission?

a) Should BellSouth be required to provide to DeltaCom the following combinations:
   (1) Loop/port combination
   (2) Loop transport UNE combinations
   (3) Loop UNE connected to access transport?
b) If so, at what rates?

At the Pre-Arbitration conference of August 4, 1999, the parties agreed to combine issues 2(b)(ii) and 2(b)(iii). Moreover, the parties have addressed issues 2(b)(ii) and 2(b)(iii) as one throughout their testimony.

These issues deal specifically with whether BellSouth should be required to provide network combinations for Enhanced Extended Loops ("EELs"), i.e., loop/port combination, loop transport UNE combination, and loop UNE connected to access transport. The provisioning of EELS allows CLECs to serve customers without having to be collocated in a particular BellSouth central office.

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom maintains the view that BellSouth is obligated by the 1996 Act to provide EELS. Moreover, according to pre-filed testimony of Mr. Hyde, BellSouth has provided such extended loops, and there are more than 2,500 extended loops being provided by BellSouth to DeltaCom today.[8]

[8] The 2,500 extended loops represent the number provided to DeltaCom in BellSouth regions outside Tennessee.

BELLSOUTH

BellSouth contends DeltaCom's arguments are inaccurate. It is BellSouth's position that the 1996 Act, FCC rules, and Supreme Court decisions do not require it to combine network elements on behalf of CLECs. BellSouth argues that any action by the Authority requiring BellSouth to combine network elements would be improper under the 1996 Act because FCC Rules 51.315 (c)–(f) are not in effect. With regard to the pre-existing combination rule, Rule 51.315 (b), BellSouth argues that it cannot be effectively applied until the FCC establishes the UNE list in FCC Rule 51.319 that was vacated by the Supreme Court.

BellSouth admits that it has provided extended loops to DeltaCom but explains that the extended loops were provided based on a misinterpretation of the interconnection agreement by BellSouth's contract group. In other words, BellSouth argues that it is under no obligation, either by the contract, the 1996 Act, or the FCC's rules to combine UNEs with BellSouth's retail services.

DELIBERATIONS

The provision to DeltaCom of EELs by BellSouth at the sum of unbundled network element prices is consistent with federal rulings. Moreover, it might be cost prohibitive for DeltaCom to enter the local market in Tennessee if it has to provide entrance facilities, i.e. collocation, itself. Clearly, such a barrier to entry would be inconsistent with public interest and the 1996 Act, the aim of which is to promote competition.

BellSouth has persistently argued that the 1996 Act does not require ILECs like itself to combine UNEs on behalf of CLECs. In particular, it objects to combining UNEs with tariffed services. FCC rules governing combinations of network elements have been the subject of continuous litigation since they were first promulgated in 1996. When ILECs first challenged the

rules, the Eighth Circuit Court vacated Rules 51.315(b)-(f). The Court stated, "47 C.F.R. § 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3)" of the 1996 Act. *Iowa Utils. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 813 (8th Cir. 1997) *aff'd in part rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999). The Supreme Court reversed this decision in part by finding: "Rule [51.]315(b), which forbids incumbents to separate already-combined network elements before leasing them to competitors, reasonably interprets § 251(c)(3)." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 368, 119 S. Ct. 721, 725 (1999). In its latest report, the FCC has concluded that "under existing law, a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at unbundled network element prices." *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd. 3696, ¶ 487 (Nov. 5, 1999) (hereinafter *UNE Remand Order*). The FCC reached its conclusion based on the following two facts. First, the reinstatement of combination Rule 51.315(b) by the Supreme Court, and second, ILECs combine loop and transport for themselves to provide services to their customers. The FCC has made the observation that "incumbent LECs routinely provide combinations of loop and transport elements for themselves in order to: (1) deliver data traffic to their own packet switches; (2) provide private line services; and (3) provide foreign exchange service." *Id.* ¶ 481.

In addition, BellSouth has not denied that it can perform combinations of network elements referred to as EELs. BellSouth has admitted that it has performed hundreds of such combinations on behalf of DeltaCom. Clearly, this affirms the statement made by the FCC that

ILECs routinely combine loop and transport in their networks. Therefore, such provisioning is technically feasible.

It is appropriate public policy to order BellSouth to provide EELs to DeltaCom based on past and prevailing experience in the telecommunications market. If DeltaCom is unable to get the EELs, it must either install its own switches, trunking and loops or collocate in central offices owned and operated by BellSouth. Either of these options demands that DeltaCom expend a substantial amount of money in the form of fixed or sunk costs. As a result, DeltaCom will be forced to incur a significantly higher cost of providing services per customer than BellSouth, which has a larger customer base over which to spread its fixed and sunk costs.

Residential customers of Tennessee will greatly benefit if DeltaCom is allowed to obtain combinations of loop and transport in BellSouth's network. Evidence suggests that the availability of EELs to CLECs is the key factor in opening the residential market to competition. According to the FCC, "[s]ince [EELs] have become available in certain areas, competitive LECs have started offering service in the residential mass market in those areas." *UNE Remand Order.* ¶ 12. The report went on to state that MCI had acquired upwards of 60,000 new local residential customers in a short period of time only after Bell Atlantic provided access to combinations of unbundled loops, switches, and transport elements out of certain end offices in New York City. *Id.* Hence, it is logical to expect DeltaCom to begin serving residential as well as small business customers of Tennessee, if it obtains access to EELs out of BellSouth's central offices.

In a post hearing brief submitted to the Authority on December 7, 1999, BellSouth contended that "DeltaCom's ability to convert special access facilities to unbundled elements should be constrained until the FCC completes its Fourth Notice of Proposed Rule Making."[9]

[9] The Fourth Further Notice of Proposed Rule Making is contained within the *UNE Remand Order.*

BellSouth is arguing that the FCC has constrained the use of combinations of unbundled loops and transport elements in the supplemental order to its *UNE Remand Order*. This contention is without merit. The supplemental order provides: "[the] constraint does not apply if an IXC uses combinations of unbundled loop and transport network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order*, 15 FCC Rcd. 1760, ¶ 5 (Nov. 24, 1999). Such is the case in the present action.

In summary, ordering BellSouth to offer DeltaCom combinations of loop and transport between BellSouth's wire center and the end user is not only within the scope of existing federal rulings but also appropriate public policy. BellSouth should not charge a monopoly price to combine these elements, but the sum of UNE prices.

CONCLUSIONS

The Arbitrators adopt the resolution reached in the ICG/BellSouth Arbitration, Docket No. 99-00377. Consistent with that decision and pursuant to FCC orders and the Supreme Court, the Arbitrators find that in locations where loops and transport co-exist, BellSouth shall, when requested by DeltaCom, combine the loop and transport elements at the sum of the associated unbundled network element prices.

ISSUE 3(1)

Should BellSouth be required to pay reciprocal compensation to DeltaCom for all calls that are properly routed over local trunks, including calls to Information Service Providers ("ISPs")?

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom maintains that BellSouth should pay compensation for all forms of traffic including traffic to its Internet Service Provider ("ISP") customers. DeltaCom states that the party or company responsible for originating a call should be responsible for the costs associated with the call, including calls to the Internet. DeltaCom argues that this responsibility does not change when a BellSouth customer calls an ISP customer served by DeltaCom. Although DeltaCom maintains that each Internet session contains multiple parts that may be handled by one or more carriers and that each should be compensated for the role played in delivering the call to its destination, it maintains that ISPs are not carriers since they do not obtain certificates of authority to provide telecommunication services nor are they regulated as carriers by the FCC. DeltaCom states that the ISP pays part of the cost of providing these calls through the rate the ISP pays for its line and that the variable costs associated with each call should be borne by the calling party.

DeltaCom states that the FCC has indicated that, until it proposes rules, the states are free to determine whether to require reciprocal compensation payments for ISP-bound traffic. DeltaCom maintains that the FCC has given the states the authority and the option either to adopt the reciprocal compensation rates already in place or to construct another means of compensation specific to ISP-bound traffic. Finally, DeltaCom argues that good public policy and sound

economic principles dictate that it be allowed to recover the costs associated with carrying the traffic of BellSouth.

BELLSOUTH

BellSouth maintains that it should not be required to pay reciprocal for ISP-bound calls, for two reasons: 1) the FCC has determined that calls made to internet destinations are more likely to be jurisdictionally interstate than local and 2) the economic principle of cost causation implies that the relationship between the end user and the ISP is analogous to that of the end user and an inter-exchange carrier. BellSouth states that the FCC has held that ISP traffic is not governed by the reciprocal compensation obligations of Section 251 of the 1996 Act and that ISP-bound traffic is under FCC jurisdiction. Additionally, BellSouth argues that there is no reason for the Authority to address this issue because the FCC established in its declaratory ruling that it will retain and exercise jurisdiction over traffic to ISPs. BellSouth maintains that compensation for such traffic is not subject to arbitration under Section 252, even though the FCC's declaratory ruling attempts to authorize states to arbitrate the issue.

BellSouth also argues that the connection that permits an ISP to communicate with its subscriber actually falls within the scope of exchange access and involves interstate communications, even though the FCC has exempted ISPs from paying interstate switched access charges in connection with the service. BellSouth maintains that, in accordance with the 1996 Act, reciprocal compensation is payable only for the transport and termination of local calls and does not apply to interstate or interLATA traffic. Finally, BellSouth argues that payment of reciprocal compensation for ISP-bound traffic is inconsistent with the law and is not sound public policy.

DELIBERATIONS

The Arbitrators have heard this issue in the present case as well as in the ICG Telecom and Time-Warner dockets.[10] In Time Warner, the Arbitrators concluded that "compensation should be paid for the carriage of ISP-bound traffic and that in the absence of a federal rule governing intercarrier compensation for ISP-bound traffic reciprocal compensation is an appropriate mechanism to effect that recovery." *In re Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P.*, Docket No. 99-00797, Transcript of Deliberations, at 4 (March 14, 2000). In response to BellSouth's contentions that the Authority lacks authority to impose reciprocal compensation for the carriage of ISP-bound traffic, the Arbitrators cited the following FCC language:

> Even when parties to interconnection agreements do not voluntarily agree on an intercarrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. . . . While to date the commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in a separate context of reciprocal compensation, suggest that such compensation is due for that traffic.
>
> . . . A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding, or a subsequent state commission decision, that those obligations encompass ISP-bound traffic, does not conflict with any commission rule regarding ISP bound traffic.

In re Local Competition Provisions in the Telecommunications Act of 1996, 14 FCC Rcd. 3689, ¶ 25, 26 (1999) (declaratory ruling in CC Doc. No. 96-98 and notice of proposed rulemaking in CC Doc. 99-68) *vacated sub nom. Bell Atlantic Tel. Cos. v. Federal Communications Comm'n.*, 206

[10] The issue as phrased by the parties seems to involve reciprocal compensation for all types of traffic. The parties arguments, however, pertained only to ISP-bound traffic. For this reason, the Authority's decision only addresses reciprocal compensation for ISP-bound traffic.

F.3d 1, 9 (DC Cir. 2000).[11] Finally, the Arbitrators determined that reciprocal compensation would best serve the interest of telecommunications competition in Tennessee by compensating CLECs for the use of their network when they deliver the traffic of an ILEC to CLEC customers.

CONCLUSIONS

The Arbitrators resolve this issue consistent with their decisions in the Time-Warner arbitration and, therefore, answer issue 3(1) in the affirmative. Based upon the foregoing, BellSouth shall compensate DeltaCom through reciprocal compensation for all calls that are properly routed over local trunks, including ISP-bound traffic.

[11] Although the United States Court of Appeals for the District of Columbia Circuit recently vacated and remanded this FCC ruling, the Court did not disturb the FCC's holding that state commissions could require reciprocal compensation for ISP-bound traffic until the FCC completes its rule-making proceedings. *See Bell Atlantic Tel. Cos v. Federal Communications Comm'n.*, 206 F.3d 1, 9 (DC Cir. 2000). The Court stated: "We do not reach the objections of the incumbent LECs—that §251(b)(5) preempts state commission authority to compel payments to competitor LECs; at present we have no[t] adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state authorized compensation that they believe to be wrongfully imposed." *Id.* In addition, the United States Court of Appeals for the Fifth, Seventh and Ninth Circuits have upheld the authority of state commission's to arbitrate the recovery of ISP-bound traffic compensation. *See Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 2000 WL 332062, at *6-7 (5th Cir. March 30, 2000); *Illinois Bell Tel. Co. v. Worldcom Techs., Inc.*, 179 F.3d 566, 572 (7th Cir. 1999); *US West Communications v. MFS Internet, Inc.*, 193 F.3d 1112, 1122-24 (9th Cir. 1999).

ISSUE 3(2)

What should be the rate for reciprocal compensation per minute of use, and how should it be applied?

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom witness Rozycki claims the rate for reciprocal compensation should be set at $0.0045 for the two-year term of the negotiated contract and be reduced by $0.0005 per year until it reaches BellSouth's TELRIC-based rates for transport and switching.[12] According to Mr. Rozycki, DeltaCom faces much higher costs than does BellSouth because DeltaCom's network operates at a lower capacity compared to the near full capacity of BellSouth's Network. DeltaCom contends that BellSouth originally pressed hard for higher reciprocal compensation rates and is now pressing for unreasonably low compensation to CLECs by charging a low "proxy transport based on the way BellSouth's network is configured, not based on [DeltaCom's] actual transport."[13]

BELLSOUTH

In response, BellSouth contends the rate for reciprocal compensation should be based on "rates to be approved by the Authority for network elements used to transport and terminate local traffic originated by the other party."[14] BellSouth suggests that it has not proposed any proxy transport rates as claimed by DeltaCom and that if DeltaCom wants to charge a reciprocal compensation rate based on its own cost studies, it is free to do so, but there is no basis for the Authority to adopt DeltaCom's proposed rate of $0.0045. In addition, DeltaCom's proposal to

[12] TELRIC is an acronym for Total Element Long Run Incremental Cost.
[13] Christopher Rozycki, direct testimony, p. 23, lines 11-12.
[14] Aphonso Varner, rebuttal testimony, p. 30, lines 5-7.

reduce the rate by $0.0005 per year until rates equal TELRIC rates is proof that DeltaCom's proposed rate exceeds costs. Further, BellSouth disputes the claim that DeltaCom is entitled to rates charged for tandem switching. BellSouth argues that it should pay a tandem interconnection rate only if DeltaCom performs both the tandem and end office functions.

BellSouth proposes that the existing elemental rates in the current agreement be maintained until a final order is issued in Docket No. 97-01262. Once the Authority has issued a final order in Docket No. 97-01262, the existing rates will be trued-up retroactively to the date of the new agreement and consistent with such agreement.

DELIBERATIONS

Section 251(b)(5) of the 1996 Act states that all telecommunications carriers have the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 U.S.C. § 251(b)(5). In addition, Section 252 of the 1996 Act states:

> (A) IN GENERAL.- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless
>
> > (i) such terms and conditions both: provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
> >
> > (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. § 252 (d)(2)(A).

The FCC has acknowledged that local exchange carriers incur a cost when delivering traffic to an ISP that originates on another local exchange carrier's network regardless of the payment arrangement. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC

Rcd. 3689, ¶29 (Feb. 26, 1999). On the other hand, the FCC determined that states electing to set rates through a cost study must use the forward-looking economic cost-based methodology to deal with the "reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii).

CONCLUSIONS

After carefully reviewing the evidentiary record and considering the policy and public interests concerns presented, the Arbitrators conclude that the most appropriate manner in which to proceed at this time is to adopt the proxy rates set forth in the Second and Final Order of Arbitration Awards in Docket Nos. 96-01152[15] and 96-01271.[16] Upon the filing of a final order in Docket No. 97-01262 establishing a permanent rate for reciprocal compensation, that rate shall become the effective rate with a true-up retroactive to the effective date of the new agreement. The Arbitrators also adopt the two proxy rates for reciprocal compensation based on the type of connection, the end office switched reciprocal compensation rate, and the tandem switch compensation rate. The end office reciprocal compensation rate shall equal the sum of the rates for local end office switching and common transport. The tandem reciprocal compensation rate shall equal the sum of the rates for tandem switching at the tandem common transport between the tandem and end office switching. A majority of Arbitrators also find that DeltaCom did not carry the burden in demonstrating that its network and the configuration of its network provided the tandem functions. Should DeltaCom be capable of carrying the burden on that particular

[15] *In re Interconnection Agreement Negotiation Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. § 252, Docket No. 96-01152* (Jan. 23, 1997).
[16] *In re Petition of MCI Telecomms. Corp. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecomms., Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket No.* 96-01271 (Jan. 23, 1997).

point at a later time, it may be appropriate for DeltaCom to also receive the tandem rate for reciprocal compensation when the tandem function is utilized.[17]

[17] Director Kyle voted in favor of allowing DeltaCom to receive the tandem switching rate element as part of its reciprocal compensation rate.

ISSUE 4(a)

Should BellSouth provide cageless collocation to DeltaCom thirty (30) days after a firm order is placed?

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom has requested that BellSouth commit to a 30-day turnaround time for cageless collocation. DeltaCom contends thirty (30) days is reasonable even though such a provisioning interval is significantly shorter than for walled or caged collocation.

BELLSOUTH

BellSouth contends they are not required by the FCC's Advanced Services Order to provide cageless collocation within 30 days. BellSouth states that because space preparation and work on network infrastructure must be completed regardless of the type arrangement selected, BellSouth's provisioning intervals of 90 business days under normal conditions or 130 business days under extraordinary conditions are appropriately applied to either caged or cageless physical collocation.

DELIBERATIONS

Pursuant to the 1996 Act, ILECs have "[t]he duty to provide, on rates, terms and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier . . . ." 47 U.S.C. § 251(c)(6). Based on the record, DeltaCom's request for thirty days may not be unreasonable in some circumstances. On the other hand, there are scenarios that would require extraordinary actions making a thirty-day deadline impossible.

Recognizing the validity of both positions, the Arbitrators request the submission of final best offers.

CONCLUSIONS

The parties shall submit their final best offers on or before the thirtieth day following receipt of the transcript by the Authority

ISSUE 5

Should the parties continue operating under existing local interconnection arrangements?

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom states that this issue is set forth in Attachment 3 of DeltaCom's petition and concerns regarding this issue are set forth in Exhibit B to the petition. DeltaCom admits, however, that it does not identify or elaborate on any specific concern or issue. Instead, DeltaCom only states that it generally proposes the interconnection language in the existing agreement as a solution to Issue 5 and that Exhibit B lists the proposed language.

BELLSOUTH

BellSouth argues that DeltaCom failed to provide a real indication as to what it is seeking by including this issue in its petition and failed to propose any contract language in connection with this issue.

DELIBERATIONS

Upon review of Exhibit B to the proposed Interconnection Agreement, it appears there are nineteen (19) concerns referencing Issue 5. For each of the nineteen (19) concerns, DeltaCom's position varies, but in the majority, DeltaCom wants the language as contained in the current interconnection agreement. The concerns listed in Exhibit B may be fundamental to completion of the interconnection agreement. The record, however, is insufficient to formulate a sound recommendation. Therefore, the Arbitrators request submission of final best offers on each of the nineteen (19) concerns listed for Issue 5 in Exhibit B of DeltaCom's petition for arbitration.

CONCLUSIONS

The parties shall submit their final best offers on or before the thirtieth day following receipt of the transcript by the Authority.

ISSUE 6(b)

What are the appropriate recurring and nonrecurring rates and charges for: (1) two-wire ADSL/HDSL compatible loops, (b) four-wire ADSL/HDSL compatible loops, (c) two-wire SL1/loops, (d) two-wire SL2 loops, or (e) two-wire SL2 loop Order Coordination for Specified Conversion Time?

POSITIONS OF PARTIES

DELTACOM

DeltaCom argues that BellSouth should provide dedicated technicians to DeltaCom, a position supported by BellSouth's proposal in Docket No. 97-01262 that includes work times for coordination of installation of the UNE center. DeltaCom contends that ADSL "is only an overlay on a voice grade loop and the appropriate nonrecurring rate for ADSL is the nonrecurring rate for an equivalent voice grade loop plus an incremental cost for checking to see if the loop will meet the ADSL criteria."[18] For this reason, DeltaCom proposes that the Authority set the nonrecurring rate for ADSL at a fraction of the voice grade SL2 or SL1 nonrecurring rate, depending on the provisioning method chosen by the CLEC.

DeltaCom maintains that the record in Docket No. 97-01262 is insufficient to address the nonrecurring rates for ADSL/HDSL. Therefore, DeltaCom proposes that the nonrecurring rate for ADSL should be the nonrecurring rate for an equivalent voice grade loop plus the cost BellSouth incurs when determining whether the loop will meet ADSL criteria. DeltaCom references FCC Tariff No. 1 and states that within the $50.00 charge there is an incremental charge for this loop verification. DeltaCom further states, however, that BellSouth has not provided cost studies to enable it to determine the exact charge. DeltaCom maintains that BellSouth does not perform any conditioning or additional work beyond that which is required

[18] Thomas Hyde, direct testimony, p. 17, lines 16-19.

for a voice grade loop, and if such work is performed, special construction charges are designed to recover the cost. Additionally, the advanced services associated with ADSL are functions of the central office and customer premise equipment, they are not a functions of the loop.

DeltaCom contends that BellSouth's Permanent Price cost studies are inconsistent with the forward-looking methodology because the studies assume a technician is dispatched to the customer's premise for ADSL one hundred percent (100%) of the time. DeltaCom also asserts that the proposed nonrecurring rates for ADSL inappropriately recover costs associated with digital loop carriers and maintains that the nonrecurring charges for ADSL should be the same or lower than those for a voice grade equivalent.

DeltaCom points out that the FCC's pricing rules were stayed at the time the parties submitted the evidence in Docket No. 97-01262 and that the application of the FCC rules may impact the cost of UNEs. DeltaCom asserts that the work functions included in BellSouth's cost studies should be removed from such studies unless BellSouth demonstrates that it will perform the work functions in a forward-looking environment.

BELLSOUTH

BellSouth submitted nonrecurring rates for ADSL/HDSL consistent with the rates it provided in Docket No. 97-01262. BellSouth states that the Authority reviewed the costs and BellSouth completed the ordered adjustments. BellSouth points out that DeltaCom developed its proposed nonrecurring cost based on the costs that a hypothetical local exchange company would incur to provide service, if it were to build an ideal network from the ground up. BellSouth refers to DeltaCom's assertion that systems should be compliant with Total Network Management ("TNM") guideline and maintains that BellSouth's network is TNM compliant. BellSouth explains, however, that the network is not one hundred percent (100%) TNM

compliant and avers that it will never achieve that standard because of the requisite substantial capital outlay and labor costs.

BellSouth rebuts DeltaCom's argument by stating that: 1) disconnect costs have already been removed and provided as a separate rate element; 2) BellSouth's studies reflect any efficiencies from provisioning multiple loops; and 3) although many of the work times between voice grade and xDSL are identical, there are some major differences. BellSouth contends that such differences are due to "the fact that Special Service Installation and Maintenance ("SSM") technicians are dispatched 100% of the time for xDSL loops. A dispatch is always required on xDSL loops because BellSouth must conduct end-to-end testing of the loop to ensure that the transmission levels will support xDSL service . . . ."[19] BellSouth avers that the cost studies proposed by BellSouth in Docket No. 97-01262 as well as the one presented in this case are forward looking and compliant with TELRIC.

BellSouth maintains that the rates in the current interconnection agreement for the two-wire ADSL, two-wire HDSL, and four-wire HDSL should be used until the Authority renders a decision in Docket No. 97-01262. BellSouth's witness Varner concluded that "rates included in the final order in Docket 97-01262, which are not included in the current agreement, [for two-wire SL1 Loops, two-wire SL2 loops, two-wire SL2 loop order coordination for specified conversion time] would be trued-up retroactive to the expiration date of the current agreement."[20]

BellSouth maintains that the $50.00 installation charge referred to by DeltaCom would be inappropriate. BellSouth's position is that the $50.00 charge is for overlaying ADSL onto a

[19] Daonne Caldwell, rebuttal testimony, p. 6. lines 6-15.
[20] Alphonso Varner, direct testimony, p. 64, lines 17-19.

customer's existing facility, whereas the ADSL compatible loop requires several functions that an ADSL overlay does not require.

DELIBERATIONS

The Arbitrators divide this issue into three categories: 1) recurring rates; 2) nonrecurring rates for SL1, SL2, and Order Coordination for Specified Conversion Time; and 3) ADSL/HDSL nonrecurring rates.

A. Recurring Rates

DeltaCom provides testimony and rates for nonrecurring rates only. Other than the joint matrix in which DeltaCom requests that rates be FCC compliant TELRIC rates, there is no record or evidence presented for recurring rates. The Authority currently has an open docket addressing the rates for UNEs, Docket 97-01262. The recurring rates for SL1, SL2, and Order Coordination are included in this docket.

B. Nonrecurring rates for SL1, SL2 and Order Coordination with a Specified Conversion Time

DeltaCom presented nonrecurring rates for SL1, SL2, and Order Coordination for a Specified Conversion Time. DeltaCom states that it developed its rates by adjusting the inputs in BellSouth's cost calculator. The adjustments removed the disconnect cost, assigned order coordination on a per order basis (rather than a per loop basis), and reduced the work times (typically fifty percent for multiple loops on a single order) in order to recognize efficiencies. Unfortunately, DeltaCom failed to provide the Authority with any detail explaining how the inputs were adjusted. The schedules presented by DeltaCom provide labor rates and list work times for installation and disconnect, but there is no supporting documentation on how DeltaCom determined these labor rates or work times.

BellSouth counters DeltaCom's proposal by asserting that BellSouth's cost studies reflect the efficiencies of providing multiple loops, and by stating that consistent with the Authority's order, BellSouth removed disconnect costs from the loop rate and provided the costs as a separate element. BellSouth proposes SL1 and SL2 rates as those decided in Docket 97-01262. Until the Authority makes a final determination of these rates, BellSouth proposes that the rates in the current agreement be continued with a true-up retroactive to the expiration date of the current agreement.

C. ADSL/HDSL Nonrecurring Rates

ADSL/HDSL (referred to as xDSL) is a high-speed data service that is provisioned over one pair or two pair copper loop, hence two-wire, four-wire. The functionality to provide high-speed data transfer is contained in the customer's premise equipment and the telecommunications carrier's terminating equipment. The loop is the transport medium for the data transfer between this equipment. In order to transfer the data, the loop has to meet certain transmission requirements, including no loading coils, no bridge tap, and length less than 18,000 feet.

Each party's position is based on its interpretation of "overlay." BellSouth disagrees with DeltaCom's contention that xDSL is an overlay on a voice grade loop. Both parties may be correct in their interpretation of "overlay." DeltaCom states that a two-wire or four-wire loop is used to transport xDSL service. BellSouth, however, is correct in its assertion that the two-wire or four-wire, as it is currently provided, may not be suitable to transmit the high-speed data because of transmission requirements. BellSouth contends that an exact overlay of the existing loop is not possible.

DeltaCom presented nonrecurring rate schedules for xDSL UNEs. These schedules, however, do not provide any detail as to how DeltaCom calculated the rates. DeltaCom states

that when providing xDSL, BellSouth does not perform any additional work beyond that which is required to provide voice grade service. Further, DeltaCom states that special construction charges recover the cost of additional work if BellSouth performs such work. DeltaCom arrives at its nonrecurring rates by making five adjustments to the rates calculated by BellSouth. Referred to as model adjustments, the first three adjustments relate to removal of disconnect costs, order coordination and recognizing efficiencies of multiple loop orders. Referred to as provisioning adjustments, the remaining two adjustments relate to the use of the voice grade loop rate to provide xDSL, adjusted to reflect appropriate verification.

BellSouth points out that two of DeltaCom's proposed model adjustments, disconnect and multiple loop orders, are currently reflected in BellSouth's cost studies. The focal point of the provisioning adjustments is each party's understanding of the term "overlay." DeltaCom proposes to adjust the voice grade loop rate by including a verification cost. Based on the Arbitrators understanding of DeltaCom's position, verification would equate to a charge for the "overlay" and a charge for ensuring that the loop is capable of the "overlay." If the loop is not capable of transmitting the data and requires additional work, DeltaCom proposes that special construction charges be applied. Contrary to this proposal, BellSouth proposes that the nonrecurring rates for xDSL include the cost of provisioning changes necessary to make the loop capable of transmitting data. BellSouth proposes that until the Authority concludes Docket No. 97-01262 the rates in the current interconnection agreement be applied for two-wire ADSL, two-wire HDSL, and four-wire HDSL.

The Arbitrators believe that issues relating to the provisioning of xDSL UNEs are more appropriately addressed in Docket No. 97-01262. Additionally, the Authority is considering issues surrounding the recovery of costs associated with provisioning a loop with the capability

of transmitting data, disconnect costs, and order coordination in Docket 97-01262. In addressing these issues, the Authority has developed an extensive evidentiary record.

CONCLUSIONS

The Arbitrators adopt BellSouth's position on this issue. Specifically, the recurring rates for (1) two-wire ADSL/HDSL compatible loops, (2) four-wire ADSL/HDSL compatible loops, (3) two-wire SL1/loops, (4) two-wire SL2 loops, and (5) two-wire SL2 loop order coordination for specified conversion time should be the proxy rates. These rates should be used in this interconnection agreement until the completion of Docket No. 97-01262 with a true-up retroactive to the expiration date of the current agreement. The nonrecurring rates for SL1, SL2, and order coordination with a specified conversion time in the current agreement shall be used with a true-up retroactive to the expiration date of the current agreement. Finally, until the Authority concludes Docket 97-01262, the nonrecurring rates in the current interconnection agreement be applied for two-wire ADSL, two-wire HDSL and four-wire HDSL, with a true-up retroactive to the expiration date of the current agreement.

ISSUE 6(d)

What should be the appropriate recurring and nonrecurring charges for cageless and shared collocation in light of the recent FCC Advanced Services Order No. FCC 99-48, issued March 31, 1999, in Docket No. CC 98-147?

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom states that pursuant to the FCC's Advanced Wireline Order, DeltaCom will be utilizing cageless collocation in BellSouth central offices in order to offer its services. Cageless collocation permits CLECs to place certain equipment in the BellSouth central office for the purpose of interconnecting with the BellSouth network. DeltaCom states that this equipment, in contrast to "caged" or "walled" collocation, is not physically separated from BellSouth's network equipment by the erection of physical barriers or the deployment of separate supporting facilities, such as HVAC.

DeltaCom also maintains that the tariffed rates for virtual collocation as listed in FCC Tariff No. 1, Section 20, with appropriate adjustments, should be adopted as interim rates until BellSouth can produce rates for cageless collocation. DeltaCom contends the adjustments to the virtual collocation rate would reflect that BellSouth owns/leases and maintains the CLEC's equipment in virtual collocation whereas the equipment is totally owned and maintained by the CLEC in cageless collocation. Accordingly, DeltaCom asserts that the equipment maintenance cost should be deducted from the virtual collocation rate.

BELLSOUTH

BellSouth contends that applicable recurring and nonrecurring rates should be those in effect under the current agreement until the Authority issues a final order in Docket 97-01262 establishing rates for collocation offerings. BellSouth also states that once the Authority has

entered a final order in Docket 97-01262, there should be a true-up consistent with the parties' interconnection agreement. BellSouth also points out that the parties did not submit cost studies for fiber cross-connects and fiber point of termination bays, and as a result, it is not expected that the Authority will establish rates for these collocation elements. BellSouth contends that because DeltaCom may request fiber cross-connects and fiber point of termination bays in connection with cageless or shared collocation, it is necessary for the Authority to review cost studies, such as those provided as Exhibit DDC-1, and establish rates for these elements.

DELIBERATIONS

BellSouth's argument that "the rates found in the current interconnection agreement should be used until the Authority issues a final order in [Docket No. 97-01262]" is somewhat flawed in that neither the current agreement nor Docket No. 97-01262 contain rates that exactly cover the definition of virtual collocation. The rates for physical collocation in either of the documents would have to be prorated, in some fashion, to be used for shared collocation.[21] DeltaCom states that they will use cageless collocation. Until rates for cageless collocation can be produced, DeltaCom should use the existing rate for virtual collocation with adjustments to remove maintenance costs.

[21] In CC Docket No. 98-147, the FCC stated:

> First, we require incumbent LECs to make shared collocation cages available to new entrants. A shared collocation cage is a caged collocation space shared by two or more competitive LECs pursuant to terms and conditions agreed to by the competitive LECs. In making shared cage arrangements available, incumbent LECs may not increase the cost of site preparation or nonrecurring charges above the cost for provisioning such a cage of similar dimensions and material to a single collocating party. In addition, the incumbent must prorate the charge for site conditioning and preparation undertaken by the incumbent to construct the shared collocation cage or condition the space for collocation use, regardless of how many carriers actually collocate in that cage, by determining the total charge for site preparation and allocating that charge to a collocating carrier based on the percentage of the total space utilized by that carrier.

In re Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 4761, ¶ 41 (Mar. 31, 1999) (hereinafter *First Report*).

After reviewing the rates in FCC Tariff No.1, it appears the rates for virtual collocation have been established on a per square foot basis for floor space and on a per AMP basis for power. FCC Tariff No. 1 § 20.31(E). Maintenance of the collocator's equipment, when necessary, is billed separately from the actual collocation fees using FCC Tariff No.1, Section 13.3.1. Therefore, the virtual collocation rates listed in FCC Tariff No.1, section 20.31 are appropriate to use as interim rates as they do not contain inappropriate maintenance charges.

BellSouth's proposed rates for point of termination bays and fiber cross-connects are acceptable for use by DeltaCom, if they so choose. The TELRIC methodology used in these cost studies is consistent with the costing methodology as set forth in FCC Rule 51.505 as well as cost of money, depreciation lives, and shared and common factors ordered by the Authority in Docket No. 97-01262.

CONCLUSIONS

Until a separate proceeding can be concluded by the Authority, the Arbitrators find that the rates for virtual collocation, as listed in FCC Tariff No. 1, section 20.31, shall be utilized for cageless collocation, and the rates for physical collocation, found in the current interconnection agreement, with appropriate prorations as ordered in the *First Report* shall be utilized for shared collocation. Finally, the Arbitrators adopt BellSouth's proposed rates for point of termination bays and for fiber cross-connects.

ISSUE 7 (b)(iv)

Which party should be required to pay for the Percent Local Usage ("PLU") and Percent Interstate Usage ("PIU") audit, in the event such audit reveals that either party was found to have overstated the PLU or PIU by twenty (20) percentage points or more?

POSITION OF THE PARTIES

DELTACOM

DeltaCom asserts that the requesting party, regardless of the outcome, should pay for the audit. DeltaCom contends BellSouth's proposal that either party found to have overstated the PLU/PIU percentages by more than twenty percent pay for the audit constitutes a penalty. DeltaCom believes BellSouth's position of requiring a penalty for overstating PLU/PIU percentages is inconsistent with BellSouth's argument that the Authority is not allowed to approve enforcement mechanisms.

Further, DeltaCom disagrees with BellSouth's claim that it is industry practice to require the party in error to pay for the audit. DeltaCom bolsters its claim by stating, "our current agreement with BellSouth does not include such language, nor does any other interconnection agreement that DeltaCom has entered into with other ILECs."

BELLSOUTH

BellSouth proposes that the party requesting an audit should pay for it if no substantial errors are found. If either party is found to be have overstated the PLU or PIU by twenty (20) percent or more, BellSouth contends the party in error should be required to pay for the cost of conducting the audit. BellSouth attempts to justify its position based on BellSouth's standard agreement and industry practice. Further, BellSouth differentiates its position from that of penalties or liquidated damages by arguing that there are real costs incurred in conducting the

audit and the basis for the recovery is part of an audit function. BellSouth does not believe that such a recovery of costs results in any punitive damages.

DELIBERATIONS

Because the PIU and PLU percentages are important factors for the purposes of billing, it is important that the factors provided by each party are correct. Both parties recognize this importance by agreeing that they should have audit rights to make sure the reported usage numbers are correct. The only issue is who should pay for the audits.

CONCLUSIONS

The Arbitrators adopt the following language:

> On thirty (30) days written notice, each party must provide the other the ability and opportunity to conduct an annual audit to ensure the proper billing of traffic. BellSouth and ITC^DeltaCom shall retain records of call detail for a minimum of nine months from which a PLU can be ascertained. The audit shall be accomplished during normal business hours at an office designated by the party being audited. Audit requests shall not be submitted more frequently than one (1) time per calendar year. Audits shall be performed by a mutually acceptable independent auditor paid for by the party requesting the audit. If, as a result of an audit, either Party is found to have overstated the PLU and/or PIU by twenty (20) percentage points or more, that Party shall reimburse the auditing Party for the cost of the audit. The PLU shall be adjusted based upon the audit results and shall apply to the usage for the quarter the audit was completed, to the usage for the quarter prior to the completion of the audit, and to the usage for the two quarters following the completion of the audit.

ISSUE 8(b)

Whether the losing party to an enforcement proceeding or proceeding for breach of the interconnection agreement should be required to pay the costs of such litigation?

POSITIONS OF THE PARTIES

DELTACOM

According to DeltaCom, parties should be deterred from bringing frivolous claims before the Authority or the courts. Thus, DeltaCom proposes the use of a "loser pays provision" in the agreement to deter parties to the interconnection agreement from pursuing frivolous claims. The loser pays provision states that the losing party to an action resulting from a dispute under the agreement "shall pay all reasonable costs of the arbitration or other formal complaint proceeding, including reasonable attorney's fees and other legal expenses of the prevailing party."[22] According to DeltaCom, the inclusion of this provision will make the pursuit of strong claims that are supported in fact and law more economically feasible. DeltaCom bases this position on the assertion that some legitimate claims fall by the wayside because a complainant fears the excessive costs associated with pursuing a claim against BellSouth.

As further support, DeltaCom offers the argument that this approach is conducive to bringing about settlements between the parties and discouraging frivolous litigation and acts as a self-effectuating enforcement mechanism. Finally, DeltaCom asserts that the previous interconnection agreement entered into between DeltaCom and BellSouth contained the same provision.

[22]Interconnection Agreement Between ITC^DeltaCom Communications, Inc. and BellSouth Telecommunications, Inc., General Terms and Conditions, Part A., Para. 11, p. 11.

BELLSOUTH

BellSouth asserts that the inclusion of the "loser pays provision" will have a chilling effect on both parties to the extent that even meritorious claims would not be filed. Further, BellSouth argues that in disputes arising under the 1996 Act, there are no clear winners and losers, thus, the implementation of the "loser pays provision" is troublesome. The final claim raised by BellSouth is that such a provision serves no useful purpose and would only discourage carriers from seeking to establish or clarify their rights under existing interconnection agreements.

DELIBERATIONS

It is the opinion of a majority of the Arbitrators[23] that it would be inappropriate and imprudent for the Arbitrators to require a provision assessing the payment of litigation costs. The award of attorney's fees to the prevailing party is prohibited unless the payment is authorized by statute or by agreement of the parties. *See John Kohl & Co. v. Dearborn & Ewing*, 977 S.W.2d 528, 534 (Tenn. 1998). There is no statute applicable to the present facts, and the parties do not agree to a cost of litigation provision.

CONCLUSIONS

A majority of the Arbitrators refuse to require the inclusion of a "loser pays provision" in the interconnection agreement.

[23] Director Greer voted against the prevailing motion relative to this issue.

ISSUE 8(e)

Whether language covering tax liability should be included in the interconnection agreement, and if so, should that language simply state that each party is responsible for its own tax liability?

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom maintains that there is no need for the interconnection agreement to include language relating to the payment of taxes. DeltaCom reasons that because the previous agreement did not contain a provision related to the payment of taxes, neither should this agreement. DeltaCom insists that there is simply no need to address tax liability in the agreement, and that this is a matter between the parties and the relevant taxing authorities. Finally, DeltaCom argued that BellSouth failed to bring its proposed language regarding the tax liability provision into the evidentiary record of this matter.

BELLSOUTH

BellSouth argues that the inclusion of a tax liability provision is necessary because of the variety of taxes that are imposed upon telecommunications carriers, both directly and indirectly. BellSouth notes that the Authority has approved interconnection agreements containing provisions concerning tax liability. BellSouth asserts that due to its experiences with tax matters and liability issues in connection with parties' obligations under interconnection agreements, the inclusion of such a provision will lead to a fair and quick resolution of any resulting disputes.

DELIBERATIONS AND CONCLUSIONS

The Arbitrators believe the submission of final best offers is appropriate. The parties shall submit their final best offers setting forth language that clearly and concisely sets forth the tax liabilities on or before the thirtieth day following receipt of the transcript by the Authority.

ISSUE 8(f)

Whether BellSouth should be required to compensate DeltaCom for breach of material terms of the contract?

POSITIONS OF THE PARTIES

DELTACOM

DeltaCom asked that the interconnection agreement include a provision providing for the assessment of a penalty when a party has taken action that results in a material breach of the interconnection agreement. The provision at issue in this arbitration in pertinent part states:

> Notwithstanding Section 6.3.1 hereof, if either Party fails to perform its obligations under any material provision of this Agreement in any material respect arising from its gross negligence, willful misconduct or otherwise and the Parties cannot resolve the dispute within thirty days following written notice thereof, the non-defaulting Party at is option may (i) file a claim for a complaint with the appropriate commission requesting penalties; (ii) file a complaint for damages with the appropriate court or commission; or (iii) pursue any other remedies provided by law or in equity. **Penalties shall consist of $100,000 for each default for each day the breach or default continues after said thirty (30) days notification.**[24]

According to DeltaCom, BellSouth will not be prejudiced by the inclusion of this provision.

BELLSOUTH

BellSouth has consistently maintained that the Authority or the Arbitrators in the context of an interconnection agreement cannot award penalties. BellSouth states: "[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.'"[25] According to BellSouth,

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[24] Interconnection Agreement Between ITC^DeltaCom Communications, Inc. and BellSouth Telecommunications, Inc., General Terms and Conditions, Part A., Para. 25, p. 15 (emphasis added).

[25] BellSouth Pre-Hearing Brief, at 2 (November 23, 1999) (citing *Guiliano v. Cleo*, 995 S.W.2d 88, 98 n. 9 (Tenn. 1999)).

"Tennessee law disfavors the enforcement of provisions which serve to 'penalize the defaulting party for a breach of contract'"[26] and "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."[27]

DELIBERATIONS

Although the inclusion of enforcement mechanisms as discussed under Issue 1(a) are compatible with the goals of the 1996 Act, the inclusion of penalties for breach of contract that amount to punitive damages are not compatible with Tennessee law. The Tennessee Court of Appeals has held: "As to the issues relative to the directed verdict as to the punitive damages feature of the breach of contract claim, we first note that as a general rule punitive damages are not proper in breach of contract cases. There are exceptions, however, in cases involving 'fraud, malice, gross negligence or oppression.'" *Medley v. A.W. Chesterton Co.*, 912 S.W.2d 748, 752 (Ct. App. 1995), *perm. app. denied*, (Tenn. Dec. 18, 1995) (quoting *Bryson v. Bramlett*, 204 Tenn. 347, 351, 321 S.W.2d 555, 557 (1958) quoting from *Louisville, N. & G.S.R. Co. v. Guinan*, 79 Tenn 98 (1883)) (citations omitted). The language proposed by DeltaCom does not comply with Tennessee law because the proposed language simply requires the payment of the penalty for each day the breach continues after thirty days notice. There is no requirement that payment of the penalty be linked to fraud, malice, gross negligence or oppression. Moreover, if the sentence is stricken, then all other remedies provided in that section are remedies that are freely available to any party at any time ever. Therefore, there is no justification for the inclusion of any part of the provision.

CONCLUSIONS

The Arbitrators order that the language presented by DeltaCom in issue 8(f) be disregarded and not included within the interconnection agreement.

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[26] *Id.* (citing *Guiliano v. Cleo*, 995 S.W.2d 88, 98 (Tenn. 1999)).
[27] *Id.* (citing *Guiliano v. Cleo*, 995 S.W.2d 88, 101 (Tenn. 1999)).

ORDERED

The foregoing First Order of Arbitration Award reflects resolution of issues 2, 2(a)(iv), 2(b)(ii), 2(b)(iii), 3(1), 3(2), 6(a), 6(b), 6(d), 7(b)(iv), 8(b) and 8(f) and partial resolution of issues 1(a). The Arbitrators request final best offers as to issues 4(a), 5, 8(e) and a portion of issue 1(a). The parties shall file final best offers as to issue 4(a), 5 and 8(e) on or before the thirtieth day following receipt of the transcript by the Authority and as to issue 1(a) on or before the forty-fifth day following receipt of the transcript by the Authority. All resolutions contained herein comply with the provisions of the Federal Telecommunications Act of 1996 and are supported by the record in this proceeding.

TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS ARBITRATORS

Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director[28]

Sara Kyle, Director[29]

ATTEST:

K. David Waddell, Executive Secretary

[28] Director Greer voted against the prevailing motion on issue 8(b).
[29] Director Kyle voted against part of the prevailing motion on issue 3(2).