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VIA HAND DELIVERY

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

Re: *Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth*
Docket No. 99-00662

Dear Mr. Waddell:

Enclosed please find the original and thirteen copies of BellSouth Telecommunications, Inc.'s Post-Hearing Brief in the above-referenced matter. Copies have been provided to counsel of record.

Cordially,

Joelle Phillips

JP/jej

Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Petition of MCI WorldCom to Enforce Interconnection Agreement with BellSouth***

Docket No. 99-00662

BELLSOUTH TELECOMMUNICATIONS, INC.'s POST-HEARING BRIEF

BellSouth Telecommunications, Inc. ("BellSouth") files this Post-Hearing Brief and respectfully shows the Hearing Officer as follows:

I. INTRODUCTION AND OVERVIEW

At the October 12, 2001 hearing, counsel for MCImetro ("MCI") opened by saying "We don't think this case is very complicated." (Tr. at p. 8, lines 8-9)[1]. At the conclusion of nearly five hours of witness testimony, much of which dealt with a lengthy and atypical interconnection agreement, it was clear that the dispute between the parties concerning the calculation of reciprocal compensation due as a result of the Tennessee Regulatory Authority's ("TRA") ruling on ISP-bound traffic, was anything but simple.

As explained in more detail below, the dispute between the parties as to the appropriate amount owed arises out of disputed interpretations of the contractual provisions governing: (1) the application of current TRA-ordered UNE rates, (2) the use of a percentage local use ("PLU") factor, and (3) the appropriate process for

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[1] References to the October 12, 2001 transcript will be designated as Tr. at p. ___, lines ___.

resolving the measurement dispute under the contract. Clearly, BellSouth's rejection of the $10.2 million figure calculated by MCI was based on its well-reasoned interpretation of specific provisions contained in the Interconnection Agreement as well as provisions in the tariff referenced and incorporated into the Interconnection Agreement.

While MCI's witness submitted pre-filed testimony asserting that BellSouth withheld payment based on "unsupportable" positions, that witness admitted on cross examination that he was familiar with only portions of the Interconnection Agreement and had insufficient familiarity with the contract from which to determine whether BellSouth's positions were "supportable" or not. (For example, *see* Tr. at p. 21, lines 14-25, Tr. at p. 22, lines 1-20, describing lack of familiarity with Section 1.1 of Attachment I; *see also* Tr. at p. 36, lines 8-12 and 17-18, noting that witness does not engage in contract interpretation; *see also* Tr. at p. 38, lines 17-19, noting that witness was unable to say how Section 1.1 would be triggered). In fact, it was clear from cross examination that MCI's witness was unaware of key provisions of both the Interconnection Agreement and the tariff, provisions that undermined MCI's interpretation of the Agreement and its position in this case.

No evidence was presented suggesting that BellSouth's payment of $2.9 million was made in disregard of the TRA order. Rather, it was clear that the dispute between the parties arose out of issues beyond the scope of the Order and that BellSouth's determination of the appropriate amount to be paid was based on

the language of the contract between the parties, the tariff, and the orders of the TRA.

II. THE PLAIN LANGUAGE OF THE CONTRACT ESTABLISHES THAT MCI'S DEMAND OF $10.2 MILLION IS BASED ON AN INAPPLICABLE RATE.

Attachment I of the Interconnection Agreement contains the price schedule and rates to be used under the Agreement. Section 1.1 of Attachment I sets forth the general principle with respect to rates under the Agreement and provides as follows:

> 1.1 All rates provided under this agreement are interim subject to true-up and shall remain in effect until the Authority determines otherwise or unless they are not in accordance with all applicable provisions of the Act, the rules and regulations of the FCC in effect or the Authority's rules and regulations, in which case Part A, Section 2 shall apply.

Section 1.1 of Attachment I was included in the contract in order to address the fact that, at the time the Interconnection Agreement was negotiated in 1996, the TRA would shortly begin the process of establishing cost-based rates in its UNE docket as required by the Telecommunications Act of 1996, § 252(d)(1). The provision was included to ensure that, at the time such rates were determined by the TRA, those rates would be substituted for the interim rates contained in the contract. In short, pursuant to this provision, the Agreement established only interim starting rates, intended to remain in effect only until the TRA determined permanent rates, as it did in December 2000. Unlike the provisions of some later interconnection agreements, Section 1.1 does not require that the parties agree to an amendment in order to make the

permanent rates available. Rather, this contract expressly provides that the rates set forth in Attachment I are "interim," and the clear intent of the parties was that those interim rates would ripen into the permanent rates at such time as permanent rates were established by the TRA. Thus, the rates "in the contract," pursuant to Section 1.1, are now the current TRA-ordered UNE rates.

Section 1.1 addresses the fact, known to all parties at the inception of the contract, that TRA-ordered rates were coming. The provision establishes that the rates referenced in Attachment I are interim only, and shall give way to permanent rates. This provision is completely distinguishable from Section 3 of Part A of the Interconnection Agreement, which addresses the obligations of the parties during the gap period after the contract expires and before a follow-on agreement is signed. Section 3 establishes the continuing application of the terms of the Interconnection Agreement during the period that a follow-on agreement is being negotiated.

Section 3 of Part A requires the parties to enter into a "Follow-on Agreement," whereas Section 1.1 of Attachment A does not.

While both Section 1.1 of Attachment I and Section 3 of Part A involve the retroactive application of changes in the contract, the provisions deal with two completely separate issues. Section 1.1 of Attachment I deals with the implementation of permanent rates to replace the interim rates contained in the contract. In contrast, Section 3 of Part A merely addresses the operation of the contract during the gap period after the contract has expired and before a new

agreement has been negotiated. Both sections require a retroactive crediting or "true-up" process. The two sections, however, are not necessarily applicable in every situation and the fact of the application of one section does not necessarily limit the application of the other section. For example, the fact that Section 3 of Part A has not been triggered by the execution of a new contract does not in any way suggest that Section 1.1 of Attachment I has not been triggered.

Both in the hearing and in its pre-filed testimony, MCI based its entire argument concerning the appropriate process for retroactively applying the new rates on Section 3 of Part A of the contract. (Tr. at p. 20, lines 1-25; Tr. at p. 21, lines 1-7). MCI's argument at the hearing, testimony at the hearing, and testimony before the hearing, ignored Section 1.1 of Attachment I, the section that expressly deals with the application of permanent rates.

Notwithstanding the fact that BellSouth had twice explicitly raised the application in Section 1.1 of Attachment I in its pre-filed testimony, (Direct Testimony of Patrick Finlen at p. 6; Rebuttal Testimony of Patrick Finlen at p. 5), MCI presented absolutely no substantive response to BellSouth's position concerning this provision of the contract. Counsel for MCI relied solely on Section 3 of Part A. Moreover, the testimony of MCI's witness, Mr. Aronson, on cross examination indicated that Mr. Aronson was completely unfamiliar with the provision of the contract establishing that the rates would be interim and subject to true-up, even though Section 1.1 was addressed in Mr. Finlen's direct testimony. (Tr. at p. 21, lines 14-25; Tr. at p. 22, lines 1-20). Mr. Aronson

was unable to testify as to the application or existence of Section 1.1, even though he testified that he had read BellSouth's pre-filed testimony. (Tr. at p. 44, lines 20-21).[2]

MCI's only response concerning the application of Section 1.1 of Attachment I was to: (1) question why BellSouth had not raised the provision sooner, and (2) repeatedly urge that Section 3 had not been triggered. Obviously, neither of these points relates to the question of whether Section 1.1 applies as contended by BellSouth.

Rather than arguing the meaning of Section 1.1 of Attachment I, MCI instead attacked the fact that Jerry Hendrix of BellSouth did not mention Section 1.1 of Attachment I in a letter explaining BellSouth's basis for calculating payment for reciprocal compensation. It appears then that MCI is saying that BellSouth has somehow waived the right to rely upon Section 1.1 of Attachment I, because Mr. Hendrix did not mention it in his letter. Just as MCI's Mr. Aronson is entitled to rely upon regulatory counsel in interpreting the contract (Tr. at p. 22, lines 9-10), so, too, is Mr. Hendrix allowed the benefit of the argument advanced by his counsel.

Moreover, the contract speaks to waiver and expressly provides that no course of dealing or failure of any party to strictly enforce any term, right or

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[2] Further support for BellSouth's interpretation of Section 1.1 of Attachment I is found in Section 2.2.1 of Attachment IV, which reiterates that the rates for reciprocal compensation are as set forth in the agreement "... and the Order of the TRA."

condition of this Agreement, in any instance shall be construed as a general waiver or relinquishment of such term, right or condition. Section 16.2, Part A, Interconnection Agreement. Accordingly, the application of Section 1.1 is not affected by any failure of Mr. Hendrix to mention it. Moreover, MCI has been aware for some time of BellSouth's reliance on Section 1.1 as it is clearly referenced in BellSouth's pre-filed testimony. (Direct Testimony of Patrick Finlen at p. 6; Rebuttal Testimony of Patrick Finlen at p. 5). As noted above, MCI's witness testified that he had read that testimony. (Tr. at p. 44, lines 20-21).

The text of Section 1.1, Attachment I, establishes that BellSouth is well within its right to apply the new TRA-ordered rates, whether or not MCI consents to such new rates. Moreover, as BellSouth's witness Pat Finlen testified, BellSouth stands willing to work with MCI to calculate the true-up and apply it to all rates under the contract. (Tr. at p. 115, lines 24-25; Tr. at p. 116, lines 1-4; Tr. at p. 117, lines 20-25; Tr. at p. 118, lines 10-21). What BellSouth does not agree to do, however, is to make a payment representing reciprocal compensation due over a period, without applying the TRA-ordered rates currently applicable pursuant to Section 1.1.

MCI's position and argument begs the question of why MCI would take the position that it does not want to see the new TRA-ordered rates applied in total to the Interconnection Agreement. MCI's position contradicts testimony by MCI in other dockets, and it is inexplicable given MCI's contention that it intends

to compete to provide local phone service in Tennessee and it needs lower UNE rates to do so.

When asked at the hearing, MCI's witness, Mr. Aronson, testified that he didn't know whether MCI needed lower UNE rates in order to compete in Tennessee. (Tr. at p. 38, lines 23-25). He further testified that MCI wanted the rates that are "in the contract." (Tr. at p. 39, lines 5-14).

While Mr. Aronson may be unaware of MCI's interest in lower rates, MCI has presented testimony before the TRA strongly urging that the TRA's existing UNE rates were, in fact, so high that MCI could not compete at the same level at which it was able to compete in other states. Specifically, on May 7, 2001, MCI presented the testimony of Ms. Sherry Lichtenberg in Docket No. 00-00309. Ms. Lichtenberg testified that MCI had been able to provide residential service on a large scale in Georgia based on the "very favorable pricing structure" provided by the Georgia Commission. (Transcript of Proceedings, May 7, 2001, Docket No. 00-00309, p. 21, lines 12-15). Ms. Lichtenberg went on to testify that "we very much want to be able to do that in other states, particularly here in Tennessee so that I'll get a chance to come back and enjoy this place some more. But until we have the proper costing, we won't be able to do that." (*Id.* at p. 21, lines 9-19). Ms. Lichtenberg further explained that MCI viewed the UNE rates to be so high in Tennessee as to preclude WorldCom from coming into the market to offer competitive local service, prompting the following question:

Director Greer: I see Mr. Twomey shaking his head so I'm not sure he was going to ask another question. I take it from what you're saying that MCI at this point thinks that the prices in Tennessee do not afford you an opportunity to come in and be competitive, is that a summary of what you said?

The Witness: That is the summary, sir. We have a very big financial team that helps us make those decisions.

(*Id.* at p. 26, lines 8-18).

As demonstrated by Ms. Lichtenberg's testimony, MCI previously told the TRA that the UNE rates in Tennessee as of May 7th of this year were so high as to preclude MCI from offering competitive local service. Notwithstanding that testimony, in the present case, MCI objects to the application of Section 1.1 of the contract to the extent that it would implement the lower TRA-ordered UNE rates and has insisted that, rather than having the benefit of the lower rate, instead "we want the rates that are in the contract." (October 12, 2001 Transcript, p. 39, line 8). While Ms. Lichtenberg urges that the TRA-ordered rates are too high in one docket, Mr. Aronson insists that MCI wants the higher contract rates applied in this docket.[3]

Since filing its Motion for Sanctions, MCI has vigorously resisted accepting the TRA-ordered UNE rates, even though they are, as a whole, far more favorable to competitive local exchange carriers. Rather than take the new

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[3] As noted above, BellSouth does not contend that it should get the benefit of lower rates for reciprocal compensation without applying the lower UNE rates to the Interconnection Agreement in total. BellSouth stands ready to apply all the TRA-ordered UNE rates to the contract.

rates anytime during the 11 months following the TRA's December 2000 Order, MCI instead is engaging in a timing game designed to require a larger payment of reciprocal compensation even though MCI concedes that it will be required to refund that larger payment as soon as the new rates are applied. (Tr. at p. 19, lines 1-9).

The testimony presented by MCI at the hearing highlighted the disconnect between MCI's position in this case and both MCI's position and the position of organizations such as SECCA in other dockets. While MCI's witness claimed that he had no idea whether or when MCI would want to see the TRA-ordered UNE rates applied (Tr. at p. 41, lines 13-16), as a member of SECCA, MCI has already made its position quite clear. On February 19, 2001, SECCA filed a motion requesting that the TRA "take immediate action to enforce the agency's decision [on UNE rates]." (*See* Motion for Enforcement of TRA Order, attached as Exhibit "A"). While SECCA argued vehemently to see the new TRA-ordered rates applied, MCI is currently resisting the application of precisely those same rates.

The sole witness presented by MCI testified that he did not know whether MCI wanted lower rates in Tennessee (Tr. at p. 38, lines 23-25), that he didn't want lower rates instead of the rates contained in the contract (Tr. at p. 39, line 8), and that the need for lower rates was beyond his knowledge or concern (Tr. at p. 36, lines 3-4; Tr. at p. 39, lines 9-14). This perplexing rejection of the TRA's ordered UNE rates can be explained only as an attempt to inflate the

figure being sought for reciprocal compensation. Even Mr. Aronson conceded that, under his own interpretation of the contract, all amounts for reciprocal compensation paid at this outdated rate would be required to be repaid as soon as a new Interconnection Agreement was reached. (Tr. at p. 19, lines 1-9).[4] Mr. Aronson further conceded that MCI's only complaint as to the application of the TRA-ordered rates is the timing. (Tr. at p. 19, lines 5-9).

While Ms. Lichtenberg in Docket No. 00-00309 testified that MCI was anxious to see lower rates in Tennessee, Mr. Aronson testified that he didn't know when MCI would want the TRA-ordered rates (Tr. at p. 41, lines 13-16). Put another way, MCI's position in this docket, contrasted with SECCA's position in the UNE docket, is that the TRA should wait for another day to provide cost-based UNE rates to CLECs. The only possible basis on which MCI would eschew the TRA's ordered rates, rates it has actively sought to see implemented, in favor of outdated, higher rates is to obtain the short-lived benefit of requiring BellSouth to pay reciprocal compensation on an outdated rate scheme.

The only rational reason that MCI would be content to maintain rates that provide higher amounts for reciprocal compensation to ISP-bound traffic, but also require higher payment by MCI for UNEs needed to compete in Tennessee,

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[4] While the timing of the execution of a follow-on agreement is not known, it is clearly coming soon. MCI has already agreed to a new interconnection agreement in Florida, and has been engaged in negotiations concerning the Tennessee agreement.

seems clear: If MCI doesn't want lower UNE rates, then MCI isn't actually serious about competing in Tennessee.

III. THE CONTRACT CLEARLY REQUIRES THE PARTIES TO USE A PLU.

All parties concede that the contract requires each party to ***provide*** the other with a PLU, but MCI contends that the parties are not intended to ***use*** the PLU.

Attachment IV, Section 7, of the Interconnection Agreement addresses usage measurements and Section 7.3 requires the parties to prepare a usage report with the following information: (1) total traffic volume, and (2) a percentage of local use factor. Attachment IV, Section 8, of the contract provides that the parties are to exchange those usage reports "to facilitate the proper billing of traffic." These provisions read together clearly indicate that the parties intended that a PLU would be used in the preparation of proper billing for traffic.

Notwithstanding the provisions noted above, MCI takes the position that the PLU, which the contract requires the parties to provide, is only intended to be used one percent of the time, or less, if at all. (Tr. at p. 61, lines 2-10). MCI's witness admitted that he couldn't recall any instance in which MCI had ever used the PLU and reflected such on a bill. (Tr. at p. 60, lines 6-22). Specifically, Mr. Aronson explained that use of the PLU was so rare that PLU billing was "one of those details I'm a little fuzzy on." (Tr. at p. 60, line 12). Mr. Aronson explained that use of the PLU wasn't "something I've focused on, that we used to measure jurisdiction." (Tr. at p. 60, lines 21-22). In short, notwithstanding the fact that the contract specifically requires the parties to provide a PLU and to engage in

audits to ensure the accuracy of the PLU, MCI contends that the PLU is a mere detail of so little consequence that it can be ignored 99% of the time. Such a reading of the contract would render the PLU provisions practically meaningless contrary to the contract's plain language.

MCI contends that a PLU is not required in instances in which actual charge information can be determined. MCI cites no provision of the contract defining "actual charge information." MCI has cited no provision of the contract stating that a PLU shall not be used in order to prepare billing. Rather, the only provision of the contract establishing the use of the PLU is the reference relied upon by BellSouth in Attachment IV, Sections 7 and 8 of the contract. While MCI contends that other portions of the contract suggest when a PLU should be used, the provisions of the contract on which MCI relies do not reference the PLU.

Based on the presumption that the contract would permit billing without reference to a PLU if the parties were capable of determining actual charge information, MCI contends that its method for determining the jurisdiction of calls produces "actual charge information." MCI's presumption that it is excused from using a PLU under such circumstances is not supported by the contract. Moreover, as explained in the testimony of BellSouth's witnesses, MCI's purported method of determining actual charge information is flawed. Notwithstanding the direction of the contract that the parties are to provide and use for purposes of billing a PLU factor to determine the portion of traffic that is local, MCI instead contends that its process is more accurate and, accordingly, that it can disregard the direction of the

contract with respect to the PLU. In short, MCI wants to use its method, which BellSouth has demonstrated is flawed, instead of the method required under the contract.

As MCI's witness conceded, the contract in question was an early generation interconnection agreement, which was negotiated soon after the Telecom Act came into existence. (Tr. at p. 63, lines 21-25; Tr. at p. 64, lines 1-2). As a result, the intent of the parties at the time was, as Mr. Aronson conceded, the prevailing view among CLECs -- that a PLU was the proper and best way to determine the jurisdiction of traffic. (Tr. at p. 63, lines 15-24).

During the same period of time that the contract was negotiated, MCI took the position before the TRA that a PLU was the best method for measuring the portion of traffic that was local. At the time, MCI was concerned that it would be required to implement expensive new technology in order to actually measure the jurisdiction of calls on a call-by-call basis. Rather than be required to do that, MCI urged that a PLU was the best method and submitted expert testimony to that effect. On September 12, 1996, MCI submitted the direct testimony of Stephen R. Brenner in Docket No. 96-01152. Mr. Brenner testified as follows:

> Q. How should local exchange terminating traffic be measured?
>
> A. I urge that only the most efficient measurement and billing procedures be used to implement compensation, and that the incumbent LECs be allowed to recover in any rates charged to compensate for transport and termination only the forward-looking costs of the most efficient measurement and billing procedures. Specifically, I urge that auditable percent local usage reports be used to determine the portion of traffic for

which local interconnection compensation is due, rather than new measurement systems married to the billing system for switched access that would have to be developed and implemented at substantial cost. To do otherwise would prevent consumers from gaining the benefits sought from the 1996 Act.

(Brenner Testimony at p. 37, lines 11-21) (emphasis added).

Q. What should state regulators order for determining the amount of local exchange traffic passing from one network to another?

A. To avoid the imposition of disparate and inefficient administrative costs, state regulators should require all carriers, incumbents and entrants alike, to report a percentage local traffic amount subject to an auditing requirement as the basis for compensation payments for transport and termination. This would mirror the current practice for jurisdictional reporting of terminating switched access.

(Brenner Testimony at p. 43, lines 9-16) (emphasis added).

Mr. Brenner's testimony represented the position of MCI in 1996, when the contract at issue was negotiated, that a PLU should be used in all instances to measure the jurisdiction of traffic. The Interconnection Agreement between the parties adopts this same position and presumes that a PLU will be used to jurisdictionalize traffic between the parties. Accordingly, even if another method were feasible, such method would not be permissible under this contract, which requires what MCI intended at the time -- that the parties use a PLU to determine the jurisdiction of traffic.

No evidence was presented at the hearing or in the pre-filed testimony to suggest that MCI's technology is now different than when Mr. Brenner offered testimony in 1996 and endorsed the PLU as the best method to determine the

jurisdiction of traffic. Accordingly, it is clear that, in 1996, MCI recognized that it was not technologically possible to measure traffic using the method that it contends it now uses. As MCI's expert, Mr. Brenner, testified, a PLU is necessary because it is not possible for CLECs such as MCI to accurately measure the actual charge information in order to determine the jurisdiction of calls. As Mr. Brenner recognized, MCI's contention that it can do this is simply flawed.[5]

MCI contends that it is able to determine the actual jurisdiction of each call by first gathering the NPA/NXXs from the Automatic Message Accounting ("AMA") data and then comparing this information to the Local Exchange Routing Guide ("LERG") to determine the exchange as set out in BellSouth's General Subscriber Services Tariff.[6]

The Interconnection Agreement does define local traffic in reference to the exchanges as they are "defined and specified in Section A3 of BellSouth's General Subscriber Services Tariff." Interconnection Agreement at 2.2.1. Yet, MCI assumes that the definition of "exchange" is limited to the one subsection of BellSouth's General Subscriber Services Tariff, § A3.6, which lists various local

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[5] While BellSouth's witness discussed the 1996 testimony of Mr. Brenner in pre-filed testimony, Mr. Aronson contended that he was unable to testify concerning Mr. Brenner's testimony, even though he had read BellSouth's pre-filed testimony. (Tr. at p. 44, lines 13-25; Tr. at p. 45, lines 1-6).

[6] Mr. Aronson was asked by TRA staff member, Mr. Mundy, whether MCI uses only the AMA data "without massaging it with anything." (Tr. at p. 14, lines 2-6). While Mr. Aronson initially responded that MCI used only AMA data, he went on to explain that the data was, in fact, compared to a reference table in order to classify the AMA recordings as local or non-local. (Tr. at p. 94, lines 2-9). This

exchange areas under BellSouth's tariff. Reference to the tariff in its entirety, however, reveals that the tariff further "defines and specifies" the exchanges in other provisions of the A3 tariff. The tariff, when read in full, sets out a list of local exchanges ***and also*** provides several exceptions to those local exchanges, including extended area calling plans and county-wide calling. When determining which calls are local, however, MCI ignores these exceptions, even though they are contained in the tariff. (Tr. at p. 46, lines 13-22). MCI's position that it can determine whether a call is local by reference to a local exchange area, as defined in the tariff -- without referencing the tariff in its entirety (including exceptions to such exchanges in the tariff) -- is also inconsistent with the language of the Interconnection Agreement.

While MCI's witness contended that his testimony regarding MCI's process for determining local traffic was based on the tariff, cross examination revealed that he was unfamiliar with the tariff. He was unsure whether the tariff treated calls made on an extended area calling plan as local. (Tr. at p. 46, lines 22-23). He did not know that the tariff set forth exceptions to the local exchanges. (Tr. at p. 47, lines 11-14). He testified that portions of the A3 tariff addressing exceptions were not relevant for MCI. (Tr. at p. 49, lines 1-3). He conceded that MCI did not use the A3 tariff in its entirety in defining local traffic, but rather used only the list of rate centers. (Tr. at p. 49, lines 21-25). After initially testifying

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testimony clearly states that MCI does not use AMA data, alone, to determine jurisdiction of calls.

that he was unsure about the existence of exceptions to the exchanges in the A3 tariff, he ultimately conceded that the tariff did identify county-wide calling and extended local calling as exceptions to the exchanges. (Tr. at p. 51, lines 3-23).

MCI also contends that it can state with certainty the geographic location of a calling party based on the NPA/NXX. This position ignores the issue of virtual designated exchanges, and it is also inconsistent with MCI's position in Docket No. 00-00309. In the context of that arbitration, MCI contended that it "should be permitted to assign NPA/NXX codes to end users anywhere within the LATA." (*See* Tennessee Matrix of Unresolved Issues, Issue 46, attached as Exhibit "B").

In fact, the only accurate way to determine the geographic location on the county level of a particular end-user is to reference the Tax Area Record ("TAR") code established for each telephone number. These codes correlate a particular telephone number with a particular geographic location within a county. BellSouth maintains the TAR code database for this purpose, and MCI does not participate. MCI's witness was unaware of the TAR code database and conceded that he was unfamiliar even with the term "TAR." (Tr. at p. 55, lines 1-11).

MCI's position is also based in part on its argument that it need not consider local area calling plans or county-wide calling because its local calling area in the county surrounding Memphis, Tennessee, is the only area in which it has customers. MCI contends that it can determine this with certainty based upon the NPA/NXXs of its customers. (Tr. at p. 55, lines 19-20). At least for purposes of

its wireline activity reports, however, MCI has been unable to determine the counties in which its customers are located.

In short, MCI wants to substitute a flawed method to jurisdictionalize traffic, for the method required by the contract. The contract requires the use of a PLU. (*See* Interconnection Agreement, Sections 7.3 and 8.2, Attachment IV). As noted above, MCI's position assumes that the parties intended that a PLU would be used less than one percent of the time. Notwithstanding this marginal use, the contract requires, as MCI concedes, that the parties exchange a PLU. This interpretation of the contract would mean that the parties went to the trouble of requiring the quarterly exchange of new PLU factors and provided an elaborate process for auditing the PLU, even though the PLU was virtually useless. Such a reading of the contract strains logic. Rather, it is clear that the parties addressed the PLU in the contract because they intended that a PLU would be used.

IV. MCI FAILED TO USE THE APPROPRIATE DISPUTE RESOLUTION PROCESS PROVIDED IN THE CONTRACT.

Rather than rely on the dispute resolution process in the contract, Section 3.1.18 of Attachment VIII, by which a dispute is escalated through the company and ultimately presented to the TRA, MCI chose instead to seek sanctions. (Tr. at p. 92, lines 7-12). Having disregarded the dispute resolution process in the contract, MCI has avoided the preparation of an appropriate record of the usage dispute at issue. For that reason, the record does not contain sufficient evidence to determine that BellSouth's position regarding usage is unsupportable as

contended by MCI. In short, MCI had a remedy under the contract, which it ignored, and, instead, MCI sought the extraordinary remedy of sanctions before the TRA because BellSouth declined to pay while the parties disputed the usage recorded by MCI.

No provision of the contract's dispute resolution process requires a party to pay in advance of invoking the dispute resolution process. In fact, MCI routinely withholds payment on disputed amounts, as demonstrated by the e-mail message of Deborah Whitaker at MCI, exhibited to Patrick Finlen's rebuttal testimony and attached hereto as Exhibit "C." Notwithstanding this practice, MCI's witness at the hearing testified that such a practice would be improper under the contract. (Tr. at p. 76, lines 16-21). Mr. Aronson went on to testify that he was unaware whether such a practice was engaged in by MCI. (Tr. at p. 75, lines 14-21).[7] MCI cannot seriously expect the TRA to impose sanctions on BellSouth for engaging in precisely the same practice under the contract that MCI routinely utilizes: that is, BellSouth withheld payment while it sought to resolve the dispute under the contract. Far from being sanctionable, such conduct is expressly anticipated under the contract.

With respect to the dispute resolution process, MCI's witness conceded that his testimony, which stated that BellSouth had not sought to use the dispute resolution process, was inaccurate and that, in fact, BellSouth had triggered the

dispute resolution process prior to the time that Mr. Aronson testified that BellSouth had not done so. (Tr. at p. 64, lines 16-25; Tr. at p. 65, lines 1-17).

V. MCI'S MEASUREMENT IS INACCURATE AND NO EVIDENCE HAS BEEN SUBMITTED TO DEMONSTRATE ITS ACCURACY.

Because of its failure to use the dispute resolution process as anticipated by the contract, MCI has short-circuited the fact-finding process necessary to explain the discrepancy between the usage measurements by the parties. MCI asserts that, even if BellSouth determines by its own usage measurement that MCI has measured usage incorrectly, BellSouth is, for all practical purposes, powerless to require MCI to correct the error. While BellSouth does not contend that the parties are permitted to bill based on the terminating party's usage measurement, BellSouth does reject MCI's position that the parties are "stuck with" that measurement when it is inaccurate. Rather, the dispute resolution process is contained in the contract precisely to address such disputes. While BellSouth sought to utilize this process, MCI ignored the process.

The testimony at the hearing was indicative of the problems experienced by BellSouth in resolving the dispute with MCI. Mr. Aronson testified that, while MCI had, in fact, agreed to some testing, using numbers from select states to try to address discrepancies, he also conceded that he had, nonetheless, insisted that BellSouth provide actual Tennessee-specific data for every date in question. (Tr. at

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[7] Again, Mr. Aronson contended he was unaware of such practices, notwithstanding the documentary evidence attached to Mr. Finlen's testimony. MCI did not refute the authenticity of the e-mail.

p. 72, lines 6-21; Tr. at p. 74, lines 2-5). Such information would have been unduly voluminous and, in fact, the point of testing in other states was to avoid such a burdensome process.[8]

Had MCI used the dispute resolution process, the usage dispute would have progressed through the companies and ultimately to the TRA to determine whether MCI's usage was inaccurate. Having sought sanctions, instead, MCI should bear the burden of proving the accuracy of its measurements. MCI offered no corroborating evidence showing the reliability of its measurements. Rather the parties each testified that the other party's calculations were wrong. In addition, BellSouth's witness Mr. McIntire testified that the minutes reported by MCI appeared to include all traffic transversing BellSouth's switches, not just the traffic originated by BellSouth. (Direct Testimony of Richard McIntire at 6).

VI. MCI OFFERED NO TESTIMONY TO SUPPORT ITS CLAIM THAT BELLSOUTH'S REFUSAL TO PAY THE AMOUNT DEMANDED WAS "UNSUPPORTABLE."

The only evidence advanced by MCI was the testimony and documents sponsored by Mr. Aronson. While Mr. Aronson testified in general terms that BellSouth's position was unsupportable, by his own admission Mr. Aronson was

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[8] MCI's only substantive response to the testimony concerning the burdensome nature of MCI's request for information was to assert that BellSouth should be able to provide such information given that MCI could provide such information if the roles were reversed. (Tr. at p. 73, lines 12-19). The fact that one party could respond to a request for information does not mean that that request when made of another party is per se reasonable. Rather, it is necessary to consider the burden as to the particular party being asked to respond. In

unfamiliar with the specific contract provisions underlying BellSouth's position. Mr. Aronson admitted that it was not his function at MCI to interpret the contract. Mr. Aronson admitted that he was unaware of the meaning of Section 1.1 of Attachment 1 of the Interconnection Agreement and that his position did not rely in any fashion on that contractual provision. (Tr. at p. 21, lines 14-25; Tr. at p. 22, lines 1-20; Tr. at p. 24, lines 11-12; Tr. at p. 36, lines 8-12; Tr. at p. 38, lines 15-19). Mr. Aronson was unaware of the provisions of the tariff setting forth exceptions to local exchange areas. (Tr. at p. 46, lines 17-25; Tr. at p. 47, lines 4-20; Tr. at p. 50, lines 13-25; Tr. at p. 51, lines 3-23). Mr. Aronson was even unfamiliar with the positions advanced by BellSouth in its direct and rebuttal testimony, notwithstanding the fact that Mr. Aronson testified that he had reviewed that testimony.

In short, Mr. Aronson's testimony regarding BellSouth's actions was premised on his admittedly limited knowledge of the contract. Accordingly, Mr. Aronson lacked knowledge as to whether BellSouth acted in a manner not permitted under the contract, and his opinion, given his lack of knowledge, should be afforded no weight. Moreover, even Mr. Aronson conceded that, to the extent MCI is awarded a payment representing reciprocal compensation at the old rate, MCI will be required to refund all amounts that exceed what would be due under the TRA-ordered rates when the true-up occurs. (Tr. at p. 19, lines 5-24).

BellSouth's case, the volume of calls handled by BellSouth would make the preparation of the records being sought by MCI unreasonable.

VI. CONCLUSION.

This matter is a dispute about how to calculate what is owed under the Interconnection Agreement. It is a dispute founded in the language of the contract and the evidence of usage between the parties. Nothing in the TRA's Order concerning reciprocal compensation for ISP-bound traffic addressed any of the issues raised in the context of the Motion for Sanctions. Rather, when the testimony is considered and the contract is reviewed, it is clear that MCI chose to pursue the dispute, not in the process provided by the contract's dispute resolution process, but instead by mischaracterizing the dispute as a failure to abide by the ISP-bound traffic order. Prior to filing its Motion for Sanctions, MCI was repeatedly told by BellSouth that the disputes at issue were about the amount owed, not about whether reciprocal compensation was owed for ISP-bound traffic. (*See* correspondence exhibited to Rebuttal Testimony of Patrick Finlen). MCI was well aware that this was a contract-based dispute about the calculation of reciprocal compensation, not about the application of reciprocal compensation, which was formerly litigated. BellSouth wrote several times to MCI raising questions concerning its process for jurisdictionalizing calls and questioning its unwillingness to accept the TRA-ordered rates that MCI, as a member of SECCA, had sought. Rather than responding to these issues, MCI instead chose to pursue sanctions and mischaracterized this dispute as one growing out of the ISP-bound traffic issue. MCI knew better.

The Interconnection Agreement between BellSouth and MCI is a first generation interconnection agreement. Its language is, in many respects, different from the interconnection agreements under which most parties currently operate. In particular, the MCI Interconnection Agreement contained Section 1.1 of Attachment I, which was designed to ensure that the rates would change when the TRA changed them. BellSouth's position that those rates apply is well supported in the contract language. By contrast, MCI's position that it is not time for TRA-ordered rates, contradicts its testimony in other dockets, and is not supported by the language in the contract.

MCI's attempt to escalate this dispute into a Motion for Sanctions is unfounded, and BellSouth respectfully urges the Hearing Officer to deny the Motion for Sanctions, permit the application of Section 1.1 of the contract, endorse the use of the PLU, and direct the parties to utilize the dispute resolution process to finally determine the usage dispute.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Joelle Phillips
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6311

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[ ] Mail
[X] Facsimile
[ ] Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Ave., #1600
P. O. Box 198062
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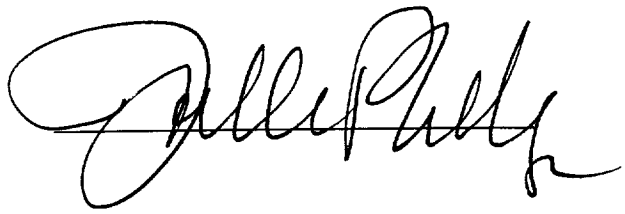

EXHIBIT "A"

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: Petition to Convene a Contested Case Proceeding to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements	)))	DOCKET NO. 97-01262

MOTION FOR ENFORCEMENT OF TRA ORDER

On behalf of its members, the Southeastern Competitive Carriers Association ("SECCA") requests that the Tennessee Regulatory Authority ("TRA") take immediate action to enforce the agency's decision announced on December 19, 2000. On that date, the Directors issued a decision requiring BellSouth to submit final rates, terms and conditions for interconnection services and unbundled network elements ("UNEs") and to "file tariffs...reflecting these decisions and previous orders in this docket and containing the UNE rates approved by the Authority, as well as the terms and conditions applicable for each UNE." Tr. at 36 (emphasis added).

On January 18, 2001, BellSouth– instead of filing tariffs-- submitted the company's current standard interconnection agreement containing the revised UNE rates. In a document styled, "Filing in Response to Action Taken at December 19, 2000 Director's Conference," BellSouth stated that "a traditional tariff could be confusing, would be difficult for the Authority and BellSouth to administer, and is unnecessary."

Because BellSouth refused to obey the agency's order, there is no tariff now in effect containing the UNE rates approved by the Authority. Claiming that there is not yet a final written order of the Authority approving the final rates, BellSouth has refused to make these rates

available to competing carriers.[1] If, on the other hand, BellSouth had filed tariffs and if the tariffs were now in effect, BellSouth could not have refused to provide service pursuant to those tariffs.

No one has questioned the TRA's legal power to order BellSouth to file tariffs containing UNE rates.[2] BellSouth argues only that such a filing would be "confusing" and "unnecessary." To the contrary, such a filing is necessary in order to insure that the new rates are available immediately on a non-discriminatory basis to all requesting carriers.

Had BellSouth done as the agency instructed, the new UNE tariffs would presumably have been filed on January 18 and would have become effective shortly thereafter. Therefore, SECCA asks that the TRA, once again, direct BellSouth to file tariffs containing the UNE rates and that the tariffs be made effective retroactively to January 18, 2001.In this case, retroactive application of the tariffs would be consistent with the intent of the TRA's December order and would insure that BellSouth does not receive any financial gain from company's refusal to comply with the TRA's order.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

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1 See attached affidavit.

2 See T.C.A. §65-5-202.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered or mailed to the following persons on this the 19 day of February, 2001.

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Henry Walker

AFFIDAVIT

My name is J. Rodney Page, Vice President-Marketing and Strategic Development at Access Integrated Networks, Inc. My company is licensed as a CLEC in Tennessee and wishes to interconnect with BellSouth under the terms and conditions spelled out in the TRA's UNE pricing docket, TRA docket no. 97-01262. In early February I received a copy of the revised UNE rates filed by BellSouth with the TRA and contacted Ms. Michael Willis with BellSouth and asked that those rates be applied to Access Integrated Networks, Inc. Ms. Willis informed me that, since no final order had yet been issued in the UNE pricing docket, that I could not incorporate the recently announced rates into our interconnection agreement.

FURTHER AFFIANT SAITH NOT.

J. Rodney Page

Sworn to and subscribed
before me this 19th day of February, 2001

Mary T Arnold
Notary Public

My Commission Expires: 4/16/02

Affidavit.doc
• 02/19/2001

EXHIBIT "B"

		language in Attachment 4, Section 10.7.3.
ISSUE 46: Under what conditions, if any, should the parties be permitted to assign an NPA/NXX code to end users outside the rate center in which the NPA/NXX is homed?	The parties should be permitted to assign NPA/NXX codes to end users anywhere within the LATA. BellSouth does this today with respect to services such as foreign exchange (FX) services and its primary rate ISDN extended reach service (ERS). BellSouth should not be permitted to impose restrictions on WorldCom's ability to assign NPA/NXX codes to WorldCom's end-users. **Proposed Remedy:** BellSouth's proposed language should be rejected.	BellSouth is not attempting to restrict WorldCom's ability to allocate numbers out of its assigned NPA/NXX codes to its end users. However, if WorldCom gives a telephone number to a customer who is physically located in a different local calling area than the local calling area where that NPA/NXX is assigned, calls originated by BellSouth end users to those numbers are not local calls and thus no reciprocal compensation would apply. Furthermore, WorldCom should identify such long distance traffic and pay BellSouth for the originating switched access service BellSouth provides on those calls. **Proposed Remedy:** Adopt BellSouth's proposed language in Attachment 4, Section 9.4.6.
ISSUE 47: Should reciprocal compensation payments be made for ISP bound traffic?	Yes. Reciprocal compensation payments should be applicable to calls made from one carrier's customers to the ISP customer of the other carrier. The terminating carrier incurs the cost of termination for ISP-bound calls in the same way as for any other local call. **Proposed Remedy:** WorldCom's proposed language should be adopted and BellSouth's proposed	Reciprocal compensation should not apply to ISP-bound traffic. Based on the Act and the FCC's First Report and Order, reciprocal compensation obligations under Section 251(b)(5) only apply to local traffic. ISP-bound traffic constitutes exchange access service, which is clearly interstate and not local traffic. Nevertheless, without waiving its rights, BellSouth is willing to abide

EXHIBIT "C"

Hicks, Guy

From: debra.whitaker@wcom.com
To: Ramsey, Valerie
Cc: Clark, Cindy; Cliett, Robyn; Moorman, Michelle; Alhagi.Mbowe@wcom.com; Donna.Kelsick@wcom.com
Subject: LIDB and Outstanding Disputes

Valerie,

All LIDB credits have been deducted from the 4/19 cycle. The total amount that was deducted was $697,882.57. Also, I would like to get an update on several other issues that are still outstanding with BST.

1. INVALID USOCS
2. DISCONNECTED CIRCUITS
3. CANCELLATION CHARGE

If these are claims that you are not currently working with, would you please point me in the right direction, so that we can get an ideal how much longer it will take to get these issues resolved.

Thank you,

Deborah Whitaker
(7707) 625-6852