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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 030349-TP - Complaint by Supra
Telecommunications and Information Systems,
Inc. against BellSouth Telecommunications,
Inc. regarding BellSouth's alleged use of
carrier to carrier information.

BEFORE: COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH BRADLEY
COMMISSIONER CHARLES M. DAVIDSON

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 16

DATE: Tuesday, August 5, 2003

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

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PARTICIPANTS:

JORGE CRUZ-BUSTILLO, Supra Telecommunications
and Information Systems.

JAMES MEZA, BellSouth Telecommunications.

LINDA DODSON and BETH KEATING, FPSC Staff.

STAFF RECOMMENDATION

ISSUE 1: Should the Commission grant BellSouth's partial motion to dismiss Supra's amended petition?
RECOMMENDATION: The Commission should grant in part, and deny in part, BellSouth Telecommunications, Inc.'s (BellSouth) Partial Motion to Dismiss. To the extent that Supra asks the Commission to remedy BellSouth's alleged violations of 47 U.S.C. Section 222(b), the motion should be granted. However, to the extent that Supra's petition asks the Commission to impose applicable penalties for any anticompetitive impacts resulting from alleged violations of that provision, the Partial Motion to Dismiss should be denied.

ISSUE 2: Should Docket No. 030349-TP be closed?
RECOMMENDATION: No. If staff's recommendation in Issue 1 is approved, Docket No. 030349-TP should remain opening pending final disposition by the Commission.

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PROCEEDINGS

COMMISSIONER DEASON: We're on Item No. 16.

Staff, you may introduce the item, and then we'll hear from the parties.

MS. DODSON: Item 16 is staff's recommendation to grant in part, and deny in part, BellSouth's Partial Motion to Dismiss.

COMMISSIONER DEASON: Very well. BellSouth, it's your motion. You may proceed.

MR. MEZA: Thank you. Jim Meza on behalf of BellSouth.

BellSouth supports staff's recommendation for the reasons I will now briefly state. The basis of Supra's complaint against BellSouth is that it contends that the process by which BellSouth generates customer reacquisition for former BellSouth customers who leave BellSouth's network violates this Commission's policy and federal law by purportedly using carrier-to-carrier or wholesale information to generate this reacquisition list. Supra further alleges that the use of wholesale information constitutes anticompetitive behavior under Chapter 354, Florida Statutes, and also violates

1 47 U.S.C. Section 222(b).

2 Among other requests for relief, Supra asks
3 that this Commission address BellSouth's
4 purported use of wholesale information in its
5 marketing practices in violation of federal law,
6 specifically, 47 U.S.C. Section 222, and that
7 the Commission fine and/or revoke BellSouth's
8 certificate for its violation of 47 U.S.C.
9 Section 222. It is this specific request for
10 relief that is the subject of BellSouth's
11 Partial Motion to Dismiss.

12 In order to hear a complaint, this
13 Commission must have subject matter jurisdiction
14 to grant the relief requested. Subject matter
15 jurisdiction arises only by virtue of law, and
16 this Commission must dismiss a complaint over
17 which it has no jurisdiction or to the extent
18 the complaint seeks relief that the PSC is not
19 authorized to grant.

20 Here, as set forth in BellSouth's Motion to
21 Dismiss, the Commission does not have any
22 jurisdiction to grant the relief requested
23 regarding BellSouth's purported violations of
24 federal law. The Florida Legislature has not
25 granted this Commission any authority to

1 regulate, interpret, or enforce federal law
2 regarding a carrier's purported use of wholesale
3 information for marketing purposes, and the
4 Telecommunications Act of 1996 does not grant
5 this Commission any authority to resolve
6 purported violations of Section 222(b).

7 BellSouth does not dispute the Commission's
8 rationale in the AT&T slamming complaint against
9 Supra, wherein it found that it had the
10 authority to review conduct that violates
11 federal law if that conduct can also be deemed
12 anticompetitive behavior under Florida law. But
13 such a finding does not translate into a
14 determination that this Commission has subject
15 matter jurisdiction to find that BellSouth has
16 actually violated federal law. That is a matter
17 for the FCC or for federal courts.

18 Accordingly, BellSouth requests that this
19 Commission dismiss Supra's request that
20 BellSouth be penalized for alleged violations of
21 federal law and that -- specifically that
22 BellSouth is in violation of 47 U.S.C Section
23 222(b). This Commission simply has no
24 jurisdiction to remedy violations of federal
25 law.

1 If you have any questions, I'll be happy to
2 answer them.

3 COMMISSIONER DEASON: Thank you.
4 Commissioners, any questions at this point?
5 Supra.

6 MR. CRUZ-BUSTILLO: Jorge Cruz-Bustillo,
7 supra Telecom.

8 At the beginning of Mr. Meza's remarks,
9 he said he agreed with staff's recommendation.
10 And it was my interpretation of staff's
11 recommendation that they did find that the
12 Commission does have subject matter
13 jurisdiction, but that they were making a
14 distinction that the only penalty that the
15 Commission could impose were those under
16 364.285, which is a fine of up to \$25,000 a day
17 for the entire time that they're engaged in this
18 conduct or the revocation or suspension of their
19 certificate, but that the Commission could not
20 impose any other remedy deemed appropriate. So
21 that's a different reading that I have from what
22 Mr. Meza has.

23 Mr. Meza now says that -- he goes back into
24 his written argument saying that this Commission
25 lacks subject matter jurisdiction, and with

1 respect to that argument, that the Florida
2 Legislature did not express any intent that you
3 would have this authority and that there's no
4 authority under the Telecommunications Act. So
5 with respect to those arguments, I would like to
6 make a brief rebuttal.

7 This Commission has already determined that
8 it does have subject matter jurisdiction in PSC
9 Order 03-0578-FOF-TP on page 15. I have
10 referenced that on page 5, the middle paragraph
11 of my response, where I wrote, "This Commission
12 stated, quote, 'Under Section 364.01, Florida
13 Statutes, we, the Commission, have the
14 jurisdiction to review the conduct that is
15 alleged to violate an FCC rule,'" in this case,
16 Section 222, "'if such violation could be deemed
17 to be anticompetitive under Florida law.'"

18 This Commission has already recognized that
19 the sharing of carrier-to-carrier information
20 harms competition. This was done in Order
21 PSC-03-0726-FOF-TP, page 45. I have placed that
22 quote at the bottom of page 5 and the top of
23 page 6. The Commission, quoting the FCC and
24 incorporating by reference that language into
25 its order stated, quote, "We conclude that

1 competition is harmed if any carrier uses
2 carrier-to-carrier information, such as switch
3 orders, to trigger retention marketing
4 campaigns, and consequently prohibit such
5 actions accordingly."

6 Because the use of carrier-to-carrier
7 information has already been found to harm
8 competition, it only follows under the
9 Commission's -- under this Commission's test
10 that the Commission does have subject matter
11 jurisdiction to review conduct that is alleged
12 to violate a federal regulation, in this case,
13 section 222, because such violation would be
14 anticompetitive under 364.01(4)(g). If
15 something harms competition, it has to be
16 anticompetitive.

17 The argument regarding the Florida
18 Legislature did not grant this Commission
19 authority to enforce such regulations, this
20 Commission stated in Order No.
21 PSC-03-0578-FOF-TP -- and I have that in the
22 middle of page 6, quote -- this is this
23 Commission speaking. "The main thrust of the
24 Federal Telecommunications Act is the promotion
25 of fairness and competition in the

1 telecommunications industry." Quote, "Chapter
2 364.01, Florida Statutes, grants broad powers to
3 this Commission in the enforcement of the intent
4 of the Federal Telecommunications Act." Supra
5 submits that this Commission's quote is
6 recognition that the Florida Legislature has
7 indeed granted this Commission the authority to
8 act consistent with the Federal Act and all
9 regulations applicable thereto.

10 The only thing -- so that's my argument
11 regarding subject matter jurisdiction. I
12 believe it's all written out in my response. I
13 believe this Commission has already found that
14 it has subject matter jurisdiction.

15 The only thing that I would say, in my
16 interpretation of the staff's recommendation in
17 saying that you can only impose a fine or revoke
18 their certificate as opposed to doing some other
19 remedy, is that in my complaint I asked for the
20 Commission to order BellSouth to cease engaging
21 in this conduct, and possibly to have a monitor
22 chosen by Supra at the expense of BellSouth to
23 do unannounced inspections twice a year to make
24 sure that they maintain an internal firewall.

25 And the issue is this: In the DSL case

1 that we had in front of this Commission, the
2 Commission came out and ordered, okay, cease
3 this anticompetitive conduct. Well, that
4 conduct can be policed by other CLECs. If
5 BellSouth is not doing it, the CLECs can file a
6 complaint with the Commission. In this case,
7 it's an internal system. If BellSouth says it's
8 not doing it, but it's doing it, nobody can
9 know. And back in the 1980s, Ronald Reagan used
10 to say, "Trust, but verify."

11 And all we're saying is that the Commission
12 has the authority, the broad powers of this
13 Commission in the enforcement of the Federal
14 Telecommunications Act. And in fact, staff
15 quotes that on page 7 of its recommendation:
16 "The main thrust of the Telecommunications Act
17 is the promotion of fairness and competition in
18 the telecommunications industry." Staff writes,
19 "Chapter 364.01 grants broad powers to this
20 Commission in the enforcement of the intent of
21 the Act."

22 If the Commission finds that BellSouth is
23 engaged in anticompetitive conduct, then -- and
24 it orders them to cease this conduct, then I
25 believe that it has the discretion and the

1 authority to order a remedy that verifies on a
2 continuing basis that BellSouth has in fact
3 ceased this internal conduct that can only be
4 policed by such a system like that. So I would
5 ask that the Commission move staff, with the
6 exception that the Commission will determine at
7 the conclusion of the hearing what the
8 appropriate relief shall be and not be limited
9 to only a fine and revoking the certificate.

10 COMMISSIONER DEASON: Commissioner
11 Davidson.

12 COMMISSIONER DAVIDSON: Thank you,
13 Chairman.

14 The first question is for staff. Staff,
15 at page 6, you write, "To the extent that Supra
16 asks the Commission specifically to remedy
17 BellSouth's violations, staff recommends the
18 Partial Motion to Dismiss should be granted, as
19 this Commission lacks subject matter
20 jurisdiction to remedy violations of federal
21 law." What is your legal authority for that
22 proposition?

23 MS. DODSON: I'm not sure I understand your
24 question, Commissioner. We have -- our
25 authority is only under state law. Our

1 jurisdiction is only under --

2 COMMISSIONER DAVIDSON: well, I understand
3 that general notion, but do you have any case
4 authority, any statutory authority for that
5 proposition that you make? It's a fairly
6 sweeping statement regarding our jurisdiction,
7 and I just want to know what staff uses as its
8 strongest legal support for that proposition.

9 MS. DODSON: I basically just understood
10 that that was the general proposition. I can
11 find some for you.

12 COMMISSIONER DAVIDSON: Okay. All right.
13 Thanks.

14 This next question is for Mr. Meza of
15 BellSouth. In the case -- and I'll give a cite
16 here. LaRoche v. Barnett Bank, 661 So.2d 855,
17 Florida 4th DCA 1995, the Court, citing to a
18 litany of cases, stated, "The Supreme Court has
19 long applied a rebuttable presumption that when
20 Congress is silent on whether federal court
21 jurisdiction is exclusive, state courts have
22 concurrent jurisdiction of claims arising under
23 federal law." And I understand we're a
24 Commission, not a court, but if you could
25 address that general principle and what you see

1 as its applicability here, that would be
2 helpful.

3 And then, Supra, after Mr. Meza finishes,
4 if you could also address that proposition. And
5 again, the proposition is, according to the
6 Supreme Court, when Congress is silent on
7 whether federal court jurisdiction is exclusive,
8 state courts have concurrent jurisdiction of
9 claims arising under federal law.

10 MR. MEZA: Thank you for the opportunity to
11 respond. And the distinction I believe is
12 exactly what you highlighted to and the fact
13 that this Commission is not per se a court. And
14 under the applicable interpretation of this
15 Commission's jurisdiction, as established by the
16 Florida Supreme Court, there are certain
17 limitations that the Court has imposed upon
18 jurisdiction that would not otherwise be
19 applicable to the Court.

20 For instance, the Legislature has never
21 conferred upon the Commission any general
22 authority to regulate public utilities,
23 including telephone companies. That's in the
24 City of Cape Coral vs. GAC Utilities, 281 So.2d
25 493. Instead, the Court has found that the

1 Commission only has those powers that are
2 granted by statute expressly or by necessary
3 implication. That is the Deltona Corp. vs. Mayo
4 case, 342 So.2d 510, of 1977. Moreover, any
5 authority granted to it by necessary implication
6 must be derived from fair implication and
7 intendment incident to any express authority.
8 And finally, any reasonable doubt as to the
9 existence of a particular power of the
10 Commission must be resolved against them. And
11 that's in the State vs. Mayo case, 354 So.2d
12 359, again in 1977.

13 So the appropriate analysis here is whether
14 or not there is any express authority under
15 state law giving this Commission the ability to
16 resolve violations of federal law. Seeing no
17 express authority, you need to go to necessary
18 implication to determine if there's any general
19 grant of authority within Chapter 364 that
20 implies that the Commission has the ability to
21 regulate or fine or address violations of
22 federal law.

23 It is BellSouth's contention that once you
24 do that analysis as set forth by the Supreme
25 Court, there is nothing, either express or

1 implied, in Chapter 364 indicating that the
2 Legislature gave this Commission the authority
3 or intended to give this Commission the
4 authority to address violations of federal law.
5 It's because of those specific limitations as to
6 the Commission's jurisdiction as set forth by
7 Chapter 364 and as interpreted by the Florida
8 Supreme Court as to why the general statement of
9 law, which I don't disagree with regarding
10 concurrent jurisdiction, is inapplicable to this
11 case.

12 MR. CRUZ-BUSTILLO: Commissioner Davidson,
13 I would agree with your case, that it applies to
14 this instance.

15 Let me just say that I believe that Mr. --
16 that BellSouth's arguments are more appropriate
17 for an appellate brief than it is for an
18 argument on a motion to dismiss, precisely
19 because what I gave you before was, I gave you a
20 statement of this Commission in a prior case,
21 but I didn't give you the two facts that are
22 relevant to that case.

23 The conclusion in that 03-0578 order was
24 that under 364, this Commission does have
25 subject matter jurisdiction to review the

1 conduct that is alleged to violate an FCC rule
2 if such violation could be deemed to the
3 anticompetitive under Florida law. In that
4 case, AT&T had asked, quote, under paragraph 4D
5 of the complaint, "Cease utilizing the CPNI of
6 AT&T customers to conduct a marketing campaign
7 for its own long distance customers (sic)."
8 AT&T wrote on paragraph 20 of that complaint,
9 "AT&T asserts that the use is illegal under
10 federal law and the orders and rules of the
11 FCC."

12 Under that complaint, under the AT&T
13 complaint, it was completely void of any
14 reference to any state statute, rule, or
15 Commission order as the basis for the alleged
16 illegal use of the carrier-to-carrier
17 information. With those facts of that
18 complaint, this Commission found that under
19 364.01, Florida Statutes, the Commission had
20 subject matter jurisdiction to review the
21 conduct that is alleged to violate an FCC rule
22 if such conduct would be deemed to be
23 anticompetitive under Florida law.

24 The FCC found the use of carrier-to-carrier
25 information to harm competition. I believe the

1 phrase "harm competition" is synonymous with
2 "anticompetitive," and therefore, this
3 Commission does have subject matter jurisdiction
4 to go forward with this case and to impose the
5 relief deemed appropriate. And BellSouth is
6 more than within its rights to raise all of
7 these issues on appeal, but this Commission has
8 already found subject matter jurisdiction with
9 respect to this issue.

10 COMMISSIONER DAVIDSON: A follow-up
11 question. Mr. Meza, in -- this is a Tennessee
12 Regulatory Authority case, BellSouth Advertising
13 and Publishing Corp vs. Tennessee Regulatory
14 Authority. It's not reported in Southwest
15 Third, but it's the Tennessee Court of Appeals,
16 2001, February 16, 2001, and I believe it can be
17 pulled off of Westlaw or Lexis. I found it on
18 Westlaw.

19 In that case, the Tennessee Regulatory
20 Authority exercised jurisdiction over a federal
21 obligation. And there I'll just read from the
22 case. "In these cases consolidated on appeal,
23 BellSouth Advertising and Publishing Corp.
24 appeals from the action of the Tennessee
25 Regulatory Authority requiring it to brand the

1 covers of its white Pages Directory with the
2 names and commercial logos of local telco
3 companies. BellSouth's obligation under the
4 Federal Act is to provide white Pages directory
5 listings for customers of the other carriers'
6 telephone exchange service."

7 The case is factually very different than
8 this case, but I point it out because the TRA
9 there was relying on a specific provision in
10 federal law.

11 And I'm generally concerned here -- and I
12 guess if you could further elaborate on the
13 scope of your argument. What I heard initially
14 was that -- what I think I heard was that
15 BellSouth was conceding we had jurisdiction to
16 determine whether this carrier-to-carrier
17 information conduct might be anticompetitive
18 under Florida law, but that we lack the specific
19 jurisdiction to say whether that's a violation
20 of federal law. We can assess -- you're
21 basically saying we can look at it and say,
22 "Look at the competitive impact," which I think
23 supra would agree with, but that we can't call
24 it a violation of federal law.

25 And if you could help me out on that, it

1 would be helpful, because right now as I sit
2 here, I would read the Florida Statutes and the
3 prior decision of this Commission in 03-0578, as
4 well as just the basic state of common law as it
5 applies to courts, that while we might not have
6 certain remedial powers under our statute, we
7 certainly have jurisdiction to determine whether
8 conduct violates state law, federal law, or any
9 other applicable law that we're charged with
10 interpreting.

11 MR. MEZA: Yes, sir. The first question
12 regarding the Tennessee case, I am not familiar
13 with that case. I'll be happy to submit a
14 brief, if you like, on its applicability or
15 inapplicability to this matter. But BellSouth's
16 position regarding the grant of authority given
17 to this Commission pursuant to the
18 Telecommunications Act is very specific, in that
19 when Congress intended for this Commission to
20 act essentially as a deputized federal regulator
21 in addressing and handling on a day-to-day basis
22 the interconnection between RBOCs and CLECs, it
23 said so. And Congress never mentioned or even
24 suggested that this Commission should have the
25 ability to enforce violations of express federal

1 law.

2 COMMISSIONER DAVIDSON: Let me jump in on
3 that point, if I may, for a moment. Is there
4 anything in other competition regimes at the
5 federal level, the Sherman Act, the Clayton Act,
6 for example, that in the different provisions
7 expressly state the states shall do this? I
8 can't go through the litany of federal law, but
9 as I sit here, I would bet that there are a lot
10 of federal laws on the books that are
11 interpreted by state courts -- and again, we're
12 a Commission, not a court -- that don't
13 specifically empower state courts.

14 MR. MEZA: Yes, sir. I agree with you that
15 in that context, there are -- I'm sure there are
16 some courts that have interpreted and enforced
17 causes of action raised under Florida law, or
18 state law as well as federal law.

19 I would characterize BellSouth's argument
20 as follows: You have an allegation of some
21 wrongdoing. The wrongdoing, the action
22 constituting the wrongdoing could be a violation
23 of state law, or it could be a violation of
24 federal law. For instance -- I don't want to
25 use murder, but there's a crime that has

1 occurred that is a cause of action under both
2 federal and state law. A criminal court in
3 Florida I would not think would find that an
4 individual is in violation of the federal law
5 regarding that specific crime.

6 That is how I characterize BellSouth's
7 argument. We have a specific course of conduct
8 that supra is complaining about and is alleging
9 that this course of conduct violates Commission
10 policy and law and federal law.

11 BellSouth does not contest or argue that
12 this Commission does not have the ability to
13 interpret and enforce this course of conduct to
14 determine if it constitutes anticompetitive
15 behavior. But what BellSouth challenges this
16 Commission to address is, at the end of the day,
17 do you have the ability to find that not only
18 does this course of conduct violate state law,
19 but it also is an express violation of federal
20 law?

21 COMMISSIONER DAVIDSON: Let me give an
22 example. I think I would agree with you if a
23 party came in and said this alleged conduct
24 violates the RICO statute. We don't have
25 jurisdiction to, I believe, apply the RICO

1 statute. However, we do have fairly broad
2 jurisdiction to apply the 1996
3 Telecommunications Act. There seems in that Act
4 to be a general grant, a general expression of
5 intent as to what's required of state
6 commissions. We also have a general grant of
7 authority in Chapter 364.

8 The RICO analogy doesn't seem to apply to
9 the Telecommunications Act of 1996. Is it
10 BellSouth's position that that is exactly the
11 case for the same reasons? We couldn't apply
12 the RICO statute. We couldn't -- we couldn't
13 enforce particular provisions. Is it
14 BellSouth's argument we also can't enforce
15 particular provisions of the 1996
16 Telecommunications Act?

17 MR. MEZA: No, that is not BellSouth's
18 position. BellSouth's position is that the 1996
19 Act does not address violations of Section
20 222(b), and that although the same course of
21 conduct could constitute violations of two
22 separate bodies of law, that this Commission
23 cannot sit and adjudicate whether or not that
24 same course of conduct is a violation of federal
25 law and penalize BellSouth for that violation.

1 The Commission -- and I go back to the
2 Florida Statutes and the Supreme Court cases
3 interpreting it. If there's any doubt as to
4 whether the Commission has the ability to do
5 something, you must decide that you don't have
6 such authority.

7 COMMISSIONER DAVIDSON: Do you have any
8 specific case authority for the exact
9 proposition that you stated regarding the 1996
10 Telecommunications Act specifically stating that
11 a Commission cannot adjudicate a provision of
12 that Act?

13 MR. MEZA: 47 U.S.C. is not part of the
14 Act. I believe that's the case. So I would
15 disagree with you on that.

16 And secondly, I am not aware of any case in
17 which a CLEC has alleged violations of this
18 specific statute, federal statute, in a state
19 commission proceeding, in an enforcement
20 proceeding. We're not talking about a 251
21 arbitration, wherein Supra could say,
22 "Commission, please impose upon BellSouth
23 certain obligations to prevent this activity
24 from happening." We're talking about an
25 enforcement action.

1 COMMISSIONER DAVIDSON: Supra, Mr. Meza has
2 noted that BellSouth doesn't contest the
3 jurisdiction of this Commission to adjudicate
4 whether the alleged conduct violates state law.
5 You agree that the Commission may not have the
6 jurisdiction to impose the specific remedy
7 allowed by federal law. So it seems that -- is
8 it supra's contention that we have authority to
9 impose the remedy required by federal law?

10 MR. CRUZ-BUSTILLO: Well, I don't know that
11 there is a remedy. I'm saying that if you find
12 a violation, you are entitled to say that this
13 is a violation of 47 U.S.C. 222, which is part
14 of the Act, and impose a penalty, that penalty
15 being cease this conduct, and then impose
16 whatever other appropriate remedies there are, a
17 fine or some sort of monitoring mechanism to
18 verify that they're not doing it.

19 And the Florida Legislature -- and I didn't
20 mention it in my first argument, but it's in my
21 brief on the last page -- passed Section
22 120.80(13)(d). And it has always been my
23 understanding of the Commission's interpretation
24 of that section that you -- through that section
25 you have, if effect, adopted all of the rules

1 and regulations and the statutes of the Act and
2 are entitled to enforce them through that
3 section.

4 And that section reads as follows:
5 "Notwithstanding the provisions of this chapter,
6 in implementing the Telecommunications Act, the
7 Public Service Commission is authorized to
8 employ procedures consistent with that Act,"
9 implementing the Telecommunications Act with the
10 promotion of competition by enforcing provisions
11 of the Act. And it has been my understanding
12 that this Commission staff and the Commission
13 have relied on that provision in finding
14 violations and enforcing the Act.

15 So where -- I didn't think there was any
16 gap. My opinion is you can find a violation.
17 This Commission has already found -- it's not
18 that there's any doubt. The Commission has
19 already found it has jurisdiction. This
20 argument is for appeal. So I don't think that
21 there's any doubt here regarding the
22 Commission's jurisdiction.

23 Now, I believe that you can find it's a
24 violation of 364, and you can find it's a
25 violation of 222, because that was precisely the

1 argument raised by AT&T in which this Commission
2 said, "We have subject matter jurisdiction."
3 And AT&T did not raise any state statute, any
4 state rule, anything having to do with state
5 law, and this Commission found that we do have
6 subject matter jurisdiction.

7 COMMISSIONER DEASON: Commissioner Bradley,
8 do you have any questions?

9 COMMISSIONER BRADLEY: A question of
10 staff. And I listened to the discussion that
11 has transpired. Staff basically recommends that
12 we grant the Motion to Dismiss as it applies to
13 violations of federal law, since the PSC can't
14 enforce federal law; is that correct?

15 MS. DODSON: That's correct.

16 COMMISSIONER BRADLEY: Staff also
17 recommends that we deny the motion as it applies
18 to violations of state law from anticompetitive
19 behavior, since Chapter 364 clearly allows the
20 PSC to remedy anticompetitive behavior; is that
21 also correct? Am I --

22 MS. DODSON: That's correct.

23 COMMISSIONER BRADLEY: Is the -- well, does
24 staff feel that the best way to resolve this
25 issue is to take this matter to a hearing to

1 determine what the facts are?

2 MS. KEATING: That's correct, Commissioner.
3 I believe that looking at the allegations in the
4 complaint, we do believe that they are issues
5 that the Commission can address pursuant to
6 state law. It's just that staff's
7 interpretation of the Commission's jurisdiction
8 is that the Commission cannot remedy the
9 specific violations as arising out of 222 in the
10 Federal Act. However, to the extent that those
11 violations also create violations of state
12 statute, we believe that the Commission can
13 provide remedies to those violations pursuant to
14 364.285.

15 COMMISSIONER BRADLEY: Well, it's staff's
16 belief then that by taking this issue or this
17 matter to a hearing that we can more clearly
18 determine what --

19 MS. KEATING: That's correct.

20 COMMISSIONER BRADLEY: -- the facts are and
21 render an appropriate decision or ruling?

22 MS. KEATING: That's correct.

23 COMMISSIONER DEASON: I have a question for
24 staff. I'm trying to understand the effect of
25 the recommendation. I understand the

1 distinction that is being made between enforcing
2 federal law and enforcing state law. If we were
3 to accept staff's recommendation, is there any
4 effect, in reality, as to what we can do as a
5 result of these allegations in the hearing that
6 is yet to be held? Are we limited in any way as
7 to what remedies we can impose for -- if there
8 is in fact a finding that there has been some
9 violation of state law, are we somehow limited
10 in what we can do? And precisely the question
11 that Mr. Cruz asked about -- or the point that
12 he makes concerning the ability of this
13 Commission to impose some type of a verification
14 or monitoring process, is that available to us
15 under state law?

16 MS. KEATING: I believe it is,
17 Commissioner, because if it does turn out as a
18 result of the hearing that you find that these
19 allegations are violative of the Commission's
20 jurisdiction to remedy anticompetitive acts, you
21 can make sure that that act is corrected in such
22 a way that it is no longer anticompetitive. And
23 that may be something beyond a penalty or a
24 fine. There may be some other remedy that you
25 find more appropriate to actually correct the

1 activity that's doing on.

2 COMMISSIONER DEASON: I'll address that
3 same question to Mr. Meza.

4 MR. MEZA: BellSouth does not dispute that
5 this Commission could fashion the appropriate
6 remedy that it sees fit for what it finds to be
7 violations of the anticompetitive prohibition.
8 And maybe my argument is simply too subtle. I
9 mean, agree with you that the practical effect
10 of this is probably not that great, because, in
11 effect, you're going to look at federal law in
12 determining whether or not something is
13 anticompetitive. But where I take issue is that
14 I don't want that this Commission can find and
15 say, "BellSouth, you are in violation of Section
16 222(b), and because of that, we're going to
17 require you to do X, Y, and Z."

18 COMMISSIONER DEASON: Well, you used the
19 characterization earlier in your argument that
20 this Commission is like a deputized regulator.

21 MR. MEZA: That's correct.

22 COMMISSIONER DEASON: I never heard that
23 before, but -- and I guess we're the Festus
24 Haggens of the world. For those of you who
25 don't know maybe, that's a Gunsmoke character.

1 Probably some of you aren't old enough to
2 realize that.

3 If we are deputized regulators, what, if
4 anything, under the Federal Act are we entitled
5 to adjudicate and enforce if we find that there
6 has been some violation?

7 MR. MEZA: I'm sorry. I wasn't able to
8 hear your entire question.

9 COMMISSIONER DEASON: If we are deputized
10 regulators, what under the Federal Act does this
11 Commission have jurisdiction to make a finding
12 of some violation and then to engage in some
13 type of enforcement?

14 MR. MEZA: Yes, sir. First of all, I can't
15 take credit for that phrase, because it was used
16 in a case, I think the Iowa Utilities case in
17 the lower proceedings, in describing the State
18 Commission's role, and specifically it relates
19 to the State Commission's role as in 252
20 arbitrations. That is where you're authorized
21 by Congress to act as a deputized federal
22 regulator.

23 This is not a 252 proceeding. This is an
24 enforcement proceeding, and that's where I draw
25 the distinction. The Act, as I see it, gives

1 this Commission certain powers that it believes
2 it was more appropriate to handle rather than
3 the FCC in determining the type of relationship
4 between an RBOC and a CLEC. That's not what
5 we're talking about here. And I don't believe
6 that any provision in the Act provides this
7 Commission with the ability to do what Supra is
8 asking it to do, which is to expand its
9 pseudo-federal powers in a 252 context to an
10 enforcement case.

11 COMMISSIONER DEASON: Does staff agree
12 with that distinction that Mr. Meza is making?

13 MS. KEATING: If I'm understanding him
14 correctly, I think I do. It sounds like a
15 matter of semantics, and in this case it may be,
16 and in another case it may not be, but you just
17 can't impose a federal remedy, but you can do
18 whatever remedy you find appropriate if you find
19 it's also a violation of state law.

20 COMMISSIONER DEASON: I guess the
21 difficulty that I'm having is that I -- you
22 know, as everyone in this room is probably well
23 aware, I have sat for a number of years and
24 since the very beginning of the passage of the
25 Act. In fact, Florida passed its act in '95

1 even before the Federal Act, and then the
2 Federal Act was passed. And there were a lot of
3 arguments as to jurisdiction and preemption and
4 what this Commission can and can't do. It's
5 been a very frustrating process. I've expressed
6 that on numerous occasions.

7 what I do not want to do is, where this
8 Commission has the responsibility to regulate
9 under the Federal Act, I do not want to make any
10 decision here today that is going to prevent
11 this Commission -- if we have to regulate the
12 Federal Act, we have to enforce it, because if
13 you don't have the ability to enforce, how are
14 you going to regulate? I mean, that's going
15 into a fist fight with one hand tied behind your
16 back, and that's not fair to us as a regulatory
17 body. That's the concern that I have. Can you
18 address that?

19 MS. KEATING: well, Commissioner, I'm real
20 familiar with those discussions and your
21 concerns as well. And as we have interpreted
22 120.80(13)(d) in the past, particularly we've
23 looked at the State Commission's specifically
24 stated role under 251, 252, and 271 of the Act.
25 And we've also looked to the state authority

1 that we have under 361 and -- 364.162 and 161.

2 In 251 and 252 and in 271, Congress clearly
3 stated that there would be a role for state
4 commissions. And our State Legislature
5 recognized that, I believe, in 120, (13)(d).
6 222 doesn't have that same stated role for the
7 state commissions, and that's not recognized --
8 our Legislature has not recognized any role for
9 the State Commission to implement 222. So I
10 think --

11 COMMISSIONER DEASON: So you agree with
12 Mr. Meza that that's not part of the Act as it
13 relates to a grant of authority to this
14 Commission?

15 MS. KEATING: I have to confess, I am not
16 positive whether 222 was included in the grand
17 scheme of the Telecommunications Act of 1996. I
18 don't believe it was, but I can't say for sure
19 because I have not researched the question of
20 what all was included. However, I can say that
21 there are specific provisions in the Telecom Act
22 that state that there will be a role for the
23 state commissions. Our State Legislature
24 recognized that. 222 does not say that there
25 will be a role for the state commissions.

1 COMMISSIONER DEASON: And can you address
2 Mr. Cruz's argument? He made a reference -- and
3 I apologize. I don't have the exact reference.
4 Maybe he can help us. There was a reference to
5 120, or was it 1 --

6 MR. CRUZ-BUSTILLO: It was 120. Beth just
7 mentioned it.

8 MS. KEATING: It's the same provision.

9 MR. CRUZ-BUSTILLO: It's 120.80. But could
10 I add something, Commissioner Deason, about her
11 comment about that the FCC hasn't really spoken
12 or the Act hasn't spoken to the State's role
13 with respect to 222? I quoted on page 8 of my
14 Response to the Motion to Dismiss an FCC order
15 incorporated by reference into 03-0726 on page
16 47, in which the FCC said, after finding that
17 you cannot use carrier-to-carrier information,
18 quote, "we note that our decision here is not
19 intended to preclude individual state actions in
20 this area that are consistent with our rules."

21 So clearly, they're giving you a signal
22 that you can go ahead and enforce this
23 prohibition. And the Commission did. It has
24 issued two orders, one last year and one this
25 year, saying this is our policy, and it's the

1 same as 222, and you've incorporated by
2 reference the FCC's decisions. And I don't --

3 COMMISSIONER DEASON: Well, let me
4 interrupt you for a second.

5 MR. CRUZ-BUSTILLO: Sure.

6 COMMISSIONER DEASON: I don't think the FCC
7 can grant us authority. I mean, either Congress
8 or our State Legislature. Do you agree with
9 that?

10 MR. CRUZ-BUSTILLO: That is correct. I
11 would refine it to say that that's the FCC's
12 interpretation that the Congress has granted you
13 that authority, because otherwise --

14 COMMISSIONER DEASON: Is it their
15 interpretation that Congress did that, or is it
16 their interpretation that if a state legislature
17 has granted that authority to a specific state
18 commission, that their decision is in no way
19 intended to hamper or interfere with that state
20 authority?

21 MR. CRUZ-BUSTILLO: The latter part with
22 respect to the state, so long as it's not
23 inconsistent. And the Legislature has done that
24 under 364. And with respect to dovetailing into
25 that the Federal Act, I don't believe the FCC

1 would have the authority to make that statement
2 if that wasn't their interpretation of the
3 federal law.

4 And I just want to throw out one thing,
5 because I hear something that's being used
6 interchangeably. Beth said and Mr. Meza has
7 said that we can't impose a federal remedy. I
8 haven't asked for this Commission once you find
9 a violation of federal law to impose a federal
10 remedy. I've asked you to impose the remedy and
11 the authority -- the remedies and the discretion
12 that you have under your state law, 364. But
13 you clearly have the authority to find a
14 violation, which is basically the enforcement
15 of federal law under 222, and you can utilize
16 the language in your Order 03-0726 at page 47
17 for your authority.

18 COMMISSIONER DEASON: Just let me say that
19 I understand and appreciate the nuances of this
20 argument and the distinction, but I just don't
21 really see much of a practical effect. I think
22 all parties agree that we have authority under
23 Chapter 364 as it pertains to competition,
24 promoting competition and preventing
25 anticompetitive behavior, and that we have broad

1 discretion and that we can craft remedies,
2 depending upon the record that's developed. So
3 even under staff's recommendation, I don't see
4 that we are making a decision that would prevent
5 us from adequately enforcing state statutes.

6 Commissioner Davidson.

7 COMMISSIONER DAVIDSON: Thank you,
8 Chairman. I would agree with you. I also share
9 your concerns about what exactly our duties and
10 obligations are, when we're preempted and when
11 we're not, and what our jurisdiction is. At
12 this point, I'm not comfortable moving staff on
13 this issue, simply because I'm not convinced
14 that we have no jurisdiction as a matter of law
15 to determine whether a violation of this
16 provision has occurred.

17 Citing back to the case that I did at the
18 outset, there's a rebuttable presumption that
19 absent some express prohibition, state courts
20 have concurrent jurisdiction on federal issues.
21 We've got Chapter 120 of the APA which provides
22 that the Public Service Commission is authorized
23 to employ procedures consistent with the 1996
24 Act. We have an FCC order providing that our
25 decision is not intended to preclude individual

1 state actions in the area that are consistent
2 with our rules.

3 As a matter of policy, it may be that we
4 lack jurisdiction. I'm not just persuaded of
5 that at this point. And I don't believe that if
6 we perhaps hold off ruling on that issue until
7 the hearing in which the full Commission rules
8 on this that we're going to impair the parties
9 in any way. This is purely a legal matter.

10 COMMISSIONER DEASON: Let me clarify one
11 thing. I think this is a panel hearing.

12 COMMISSIONER DAVIDSON: Okay.

13 COMMISSIONER DEASON: And what you see is
14 what you get.

15 COMMISSIONER DAVIDSON: Okay. All right.

16 MS. KEATING: Can I -- oh, I'm sorry. Go
17 ahead.

18 COMMISSIONER DAVIDSON: Because this really
19 is -- I agree with you wholeheartedly. There is
20 no practical import to this. But I am also
21 concerned about the effect that this -- that a
22 ruling granting a motion to dismiss on these
23 specific grounds would have down the line.

24 I'm not convinced that we don't have
25 jurisdiction to determine whether a violation of

1 federal law has occurred. I don't think -- and
2 I think I did hear you agree this time that
3 you're not arguing we have jurisdiction to
4 impose a federal remedy. We have jurisdiction
5 to impose a remedy that we deem appropriate
6 under our statutes.

7 MR. CRUZ-BUSTILLO: That's correct.

8 COMMISSIONER DAVIDSON: So we're narrowed
9 down to the specific issue of does this
10 Commission have jurisdiction to determine
11 whether a violation of federal law occurred.

12 MR. CRUZ-BUSTILLO: That's correct.

13 COMMISSIONER DAVIDSON: I'm not convinced
14 that in this case or in every case going forward
15 we can ever do that, and that's why I would at
16 this point -- since we are the panel, as you
17 pointed out, I would deny the Motion to Dismiss
18 in its entirety. That's just my view, and I
19 welcome you all's thoughts on that.

20 COMMISSIONER DEASON: Commissioner Davidson
21 -- I mean Commissioner Bradley, do you have
22 anything to add?

23 COMMISSIONER BRADLEY: Your recommendation
24 would be that we deny the Motion to Dismiss in
25 its entirety? That's my question, just to make

1 sure I heard what you said.

2 COMMISSIONER DAVIDSON: That is it. My
3 preference would be, if we had another
4 opportunity, to simply not decide at this point
5 and have additional questions addressed, such as
6 whether this provision, 222, is a part of the
7 Act. As Ms. Keating said, she's uncertain.
8 Supra contends it clearly is. Mr. Meza contends
9 it clearly isn't. And I have some additional
10 questions that I think it would be helpful to
11 have additional submissions on.

12 COMMISSIONER DEASON: Maybe I can make a
13 suggestion. I think all parties agree that
14 whether we approve staff's recommendation or
15 deny it, it's not going to have any effect on
16 the issues that have been laid out for hearing,
17 the factual issues. They remain the same.
18 There has been testimony filed, a number of --
19 we just had a prehearing conference yesterday,
20 and I believe that the parties are very well
21 prepared to lay out the factual case in front of
22 us. Perhaps we should just maybe not make a
23 ruling on this Motion to Dismiss, because it's
24 not going to affect the hearing itself and the
25 issues which will be litigated, and we can just

1 invite the parties to further brief this matter
2 at the conclusion of the hearing, and then we'll
3 be better prepared when we make our decision at
4 the conclusion of the hearing.

5 I agree with what you say. My only concern
6 is that if we go through the factual hearing and
7 we make a determination, and we make a finding
8 there has been a violation of federal law, and
9 that's the subject of an appeal, and then that
10 has the effect of delaying the effectiveness of
11 the decision, that's a little bit of a risk that
12 maybe I'm not willing to take. But I'll be
13 better prepared I think after the factual
14 hearing and after we get briefs on this legal
15 question as to what findings we should make at
16 the conclusion of the hearing.

17 And it may be that if we don't want to take
18 that risk that we can just -- if there is a
19 violation -- and I don't know if there is or is
20 not, but if there's a violation of state law,
21 that we can craft a remedy just under state law,
22 and we perhaps can avoid the possibility of an
23 appeal on the very narrow question as to whether
24 we have jurisdiction concerning a finding of a
25 violation of federal law.

1 I'm willing to just wait until after the
2 hearing, I guess in a nutshell is what -- staff,
3 does that raise any red flags or concerns?

4 MS. KEATING: No, sir, not at all. I was
5 actually going to say that if the Commissioners
6 would like staff to provide some additional
7 analysis on this, we would be more than happy
8 to. It's not the first time we've had the
9 question come before us. It wouldn't take us
10 long to put something together.

11 But I also wanted to -- if you don't mind
12 -- I don't want to belabor the point, but if I
13 could just point out, it sounds a little bit to
14 me like staff's recommendation may not be as
15 clear as it could be. We're not saying that you
16 can't find that there are violations under the
17 Federal Act. We're saying that you can't
18 provide a remedy for those violations unless you
19 find that those violations also are violative of
20 state law. I know again that may be matter of
21 semantics, but --

22 COMMISSIONER BRADLEY: Right.

23 MS. KEATING: But you can --

24 COMMISSIONER DEASON: That didn't come
25 across clearly in the recommendation, at least

1 to me when I read it.

2 Commissioner Davidson, did you want to
3 follow up on --

4 COMMISSIONER BRADLEY: well, I want to ask
5 the Commissioner a question. Is it your opinion
6 then that this Commission does not have the
7 jurisdiction and the authority to determine if
8 there's a violation of federal law? This is not
9 the appropriate venue, is that your thinking?
10 That kind of contradicts what staff just said.

11 COMMISSIONER DAVIDSON: well, Commissioner,
12 one, I agree with Commissioner Deason. My
13 reading of the staff rec was not as clear as
14 just articulated by Ms. Keating, and thank you
15 for that articulation. But on the merits of the
16 recommendation, as I sit here today, my reading
17 of the law is, whether we have jurisdiction to
18 find specifically a violation of federal law
19 occurred, as I sit here today, that's unclear to
20 me.

21 I'm leaning toward, I believe, based on
22 notions of jurisdiction, common law in Florida,
23 the intent of the '96 Act and other provisions,
24 that we would have jurisdiction. As to the
25 remedy, I don't believe we do have jurisdiction

1 to impose a specific federal remedy for a
2 violation of federal law absent a grant of
3 authority. So I'm really only unclear, but
4 leaning toward exercising jurisdiction over the
5 issue of finding whether there's a violation of
6 federal law.

7 MR. CRUZ-BUSTILLO: Commissioner Deason,
8 could I add something?

9 COMMISSIONER DEASON: Quickly.

10 MR. CRUZ-BUSTILLO: I agree with everything
11 Beth just said. If staff's recommendation was
12 what Beth just said, Supra would say we agree,
13 move staff, but with writing what Beth just
14 said, because that was our point. And I think
15 it went too far, which is you couldn't find --
16 you couldn't go into the specifics of the FCC
17 decisions without the language from 222, so you
18 would have to find a violation of 222. If the
19 authority for imposing the remedy is 364, that's
20 fine. But, you know, you've incorporated 222 by
21 reference into -- with the orders into PSC
22 Commission orders, so that makes it Commission
23 policy.

24 So I would -- Supra would ask the
25 Commission to move staff as is if the staff's

1 recommendation, because I didn't understand it
2 either, was as what Beth just said.

3 COMMISSIONER DAVIDSON: I believe,
4 Mr. Meza, though, would disagree with that
5 interpretation, because now there's a
6 distinction drawn between finding a violation
7 and remedying that violation. And Mr. Meza's
8 position, if I'm correct, is that we have no
9 jurisdiction in the first instance to even
10 determine whether there was a violation of
11 federal law.

12 MR. MEZA: That's correct.

13 COMMISSIONER DEASON: So now Supra
14 supports staff, and BellSouth opposes staff.
15 We've come full circle. Okay.

16 Commissioners, further questions or a
17 motion?

18 COMMISSIONER DAVIDSON: Do we need a motion
19 on this? You had proposed an alternative
20 procedure which works for me.

21 COMMISSIONER DEASON: well, in that case, I
22 guess we perhaps do not need a motion. We would
23 just choose not to rule on the motion at this
24 point, recognizing that it has no practical or
25 substantive effect on the conduct of the factual

1 hearing. And after the conclusion of the
2 factual argument, and we can invite parties to
3 further brief the matter if they're so inclined,
4 and we can ask staff to do further analysis, and
5 at some point we can address the motion again.

6 would that be appropriate? Parties, are
7 there any concerns you have with that process?
8 Let us know at this point before we go further.

9 No concerns. Okay.

10 well, I guess we really don't need a
11 motion. Commissioner --

12 COMMISSIONER BRADLEY: I'm fine.

13 COMMISSIONER DEASON: -- Bradley, you're
14 fine with that process?

15 COMMISSIONER BRADLEY: Yes.

16 COMMISSIONER DEASON: Commissioner
17 Davidson, you're fine with that process?

18 okay. Thank you all for your
19 participation. This concludes agenda, and we
20 will convene internal affairs at 10:40.

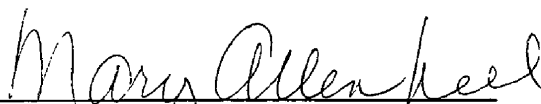
21 (Conclusion of consideration of Item 16.)
22
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24
25

1
2 CERTIFICATE OF REPORTER3
4 STATE OF FLORIDA)5 COUNTY OF LEON)
6

7 I, MARY ALLEN NEEL, do hereby certify that the
8 foregoing proceedings were taken before me at the time
9 and place therein designated; that my shorthand notes
10 were thereafter transcribed under my supervision; and
11 that the foregoing pages numbered 1 through 46 are a
12 true and correct transcription of my stenographic
13 notes.

14 I FURTHER CERTIFY that I am not a relative,
15 employee, attorney or counsel of any of the parties,
16 or relative or employee of such attorney or counsel,
17 or financially interested in the action.

18 DATED THIS 11th day of August, 2003.
19
20

21 
22 _____
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