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September 30, 2003

Mrs. Blanca Bayo, Director  
Division of Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

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RE: **Docket No. 030349-TP -**  
**SUPRA'S POST HEARING BRIEF**

Dear Mrs. Bayo:

Enclosed are the original and seven copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Post Hearing Brief to be filed in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

RECEIVED & FILED  
*th*  
FPSC-BUREAU OF RECORDS

*Jorge Cruz-Bustillo/LWA*  
Jorge Cruz-Bustillo  
Assistant General Counsel

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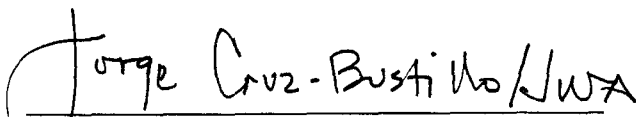
**Docket No. 030349-TP**

**I HEREBY CERTIFY** that a true and correct copy of the following was served via Hand Delivery, Facsimile, U.S. Mail, and/or Federal Express this 30<sup>th</sup> day of September 2003 to the following:

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By: Jorge Cruz-Bustillo

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Supra )  
Telecommunications ) Docket No.: 030349-TP  
And Information Systms, Inc., )  
Regarding BellSouth's Use of )  
Carrier to Carrier Information ) Filed: September 30, 2003  
\_\_\_\_\_ )

**POST HEARING BRIEF AND**  
**STATEMENT OF ISSUES AND POSITIONS<sup>1</sup>**  
**OF SUPRA TELECOMMUNICATIONS AND**  
**INFORMATION SYSTEMS, INC.**

**Jorge L. Cruz-Bustillo**  
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<sup>1</sup> References to the hearing transcript shall be in the form (HT Pg. \_\_\_ L \_\_\_), which shall designate the hearing transcript, followed by the page and line number. The transcripts used were two volumes e-mailed, to Supra, by Ruth McGill (FPSC) on Monday, September 8, 2003 (4:13 pm). References of "RT" shall designate Rebuttal Testimony. References to depositions shall indicate those taken of witnesses and entered into evidence on August 29, 2003.

## INTRODUCTION

Operation Sunrise has been generating targeted marketing leads since 1997. HT Pg. 361, L 17-19. Mr. Ron Pate, Director of wholesale Interconnections Services, never heard of Operation Sunrise or the Harmonize feed until the filing of this complaint. HT Pg. 275, L 12-22. Mr. John Ruscilli, Senior Director of Policy Implementation and Regulatory Compliance, likewise never heard of Operation Sunrise or the Harmonize feed until informed by BellSouth lawyers on June 6, 2002. Ruscilli Deposition Pg. 7, L 12-15, L 20-25, Pg. 8, L 1. No knowledge despite being in his position since June of 2000. Ruscilli Deposition Pg. 8, L 9-10. Mr. Ruscilli had no explanation as to why BellSouth Management would refuse to inform him of Operation Sunrise. Ruscilli Deposition Pg. 8, L 16-21. In Docket No. 960786A-TP, Ms. Cindy Cox (BellSouth Witness) testified as follows:

What happens is there is a list that is generated at some point in time that will say here are customers that have disconnected, and we can determine whether they moved or whether they, you know, left the area, those kind of things. So we will take those off, and all we can do is assume that the rest went to a competitor somewhere. We don't know which competitor, and we didn't know for sure that is what happened. But that is how we use that to target customers. (Emphasis added). (Pg. 306 of Docket No. 960786A-TP) See ¶12 of Supra's Amended Complaint.

BellSouth's management had actual knowledge of how and when these targeted leads were generated – and who was responsible for managing this process. Ms. Cox's testimony makes it appear as if, at best, the process is a guessing game. It is not. Yet, BellSouth felt it necessary to keep this information from Mr. Pate, Mr. Ruscilli, Ms. Cox and the Florida Public Service Commission ("Commission). If the process were legal, why be vague with this Commission? The answer is self-evident.

The central question is whether BellSouth's wholesale operations can share knowledge of switch that it obtains, as a consequence of effectuating a conversion, with its retail marketing

arm to trigger targeted reacquisition efforts. This prohibition against sharing of wholesale information has been in place since at least the release of Federal Communications Commission (“FCC”) Order 98-334 (December 23, 1998) – reaffirmed by the FCC in Order 03-42 (March 17, 2003) and incorporated by reference into PSC-03-0726-FOF-TP (June 19, 2003).

The issues in this case do not involve whether general win-back activities are legal, or whether BellSouth is entitled to use its own CPNI in such activities. Both of these practices are legal. Supra does not argue that win-back efforts by an executing carrier are prohibited. It is the source of the lead that triggers a targeted reacquisition effort that is restricted.

**Issue 1: Whether BellSouth can share carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, with its retail division to market to its current and potential customers?**

**\*\*No. BellSouth’s wholesale operations cannot share information (e.g. knowledge of a switch) that it obtains, as a consequence of effectuating a conversion, with its retail marketing operations in order to trigger marketing reacquisition efforts. \*\***

**I. Subject Matter Jurisdiction**

In Order PSC-02-0875-PAA-TP (“PAA Order”) (issued June 28, 2002), this Commission concluded that it had subject matter jurisdiction to enforce the FCC existing prohibition against the sharing of wholesale information with its retail marketing operations. The PAA Order was divided into two distinct sections: “(1) regain a customer, [and] (2) retain a customer.” PAA Order, Pg. 16. Under “regain a customer” this Commission cited FCC Order No. 02-147. In that order, the FCC recognized a State prohibition against marketing reacquisition efforts:

We find that, in the absence of a formal complaint to [ ] [the FCC] that BellSouth has failed to comply with section 222(b), the winback issue in this case has been appropriately handled at the state level,<sup>1</sup> . . . PAA Order, Pg. 18. (Emphasis added).

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<sup>1</sup> “The Georgia Commission issued an interim measure to prohibit BellSouth from engaging in any winback activities once a customer switches to another local telephone service provider.” (Emphasis added). FCC Order 02-147, ¶303, cited favorably in PSC-02-0875-PAA-TP, Pg. 18. The Georgia Order was based, in part, on BellSouth’s use of competitive proprietary information in its win-back program. Georgia Order, ¶3, Docket 14232-U.

The FCC subsequently reiterated this theme of no federal preemption:

We will continue to enforce these provisions [§222], and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules. (Emphasis added) FCC Order No. 03-42

Thus, this Commission has subject matter jurisdiction.

#### Prohibition Includes Retention & Reacquisition

The FCC in 02-147 also cites favorably to a Louisiana Order that “prohibited BellSouth’s wholesale divisions from sharing **information** with its retail division.” Id. (Emphasis added). “Information” is not defined. In this instance, reference can be made to a dictionary or case law. See Rollins v. Pizzarelli, 761 So.2d 294, 297 (Fla. 2000). The American Heritage Dictionary, Third Edition, defines “information” as: “Knowledge of an event or situation; Intelligence.” Accordingly, the proscription in the Louisiana Order includes knowledge of a switch that BellSouth obtains in its role as the neutral administrator of the carrier change transaction.

The Louisiana Order [U-22252(E), ¶3], also prohibited the sharing of wholesale information at any time before or after the switch. The order states:

[P]rohibit BellSouth from engaging in any win back activities for 7 days once a customer switches to another local telephone service provider, including (1) prohibiting BellSouth’s wholesale divisions from sharing information with its retail divisions, at any time, such as notice that certain end users have requested to switch local service providers, . . . (Emphasis added).

The Louisiana Commission uses the broad encompassing phrase “at any time” to explain the prohibition; as important, the order recognizes that a “notice” of a switch is included in the definition of “information.” The American Heritage Dictionary, Third Edition, defines “notice” to include: “To comment on; knowledge; come to know.” The language used in imposing the prohibition encompasses “knowledge” of the decision to change – not to whom the customer

chose, but the switch itself. Thus, BellSouth's wholesale operations cannot be the source, of the knowledge, that a customer has switched.

On June 19, 2003, this Commission issued Order No. PSC-03-0726-FOF-TP – in which it reaffirmed its prior “finding contained in Order No. PSC-02-0875-PAA-TP.” Id. at 47.

Finally, Section 364.01(4)(g), Florida Statutes, grants the Commission the authority to prohibit anti-competitive practices. Relevant to this proceeding, the FCC found that:

[I]n the situation of executing carriers and carrier change requests, section 222(b) works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing use of carrier proprietary information. (Emphasis added). See FCC Order No. 98-334, ¶106, cited in 03-42, cited in PSC-03-0726-FOF-TP.

The Commission has already found that it has subject matter jurisdiction to enforce conduct that is alleged to violate an FCC rule, if such violation could be deemed anti-competitive behavior under Florida law. See PSC-03-0578-FOF-TP. Because the use of a carrier change request, to trigger targeted reacquisition efforts, has already been found to be anti-competitive, this Commission has subject matter jurisdiction under Section 364.01(4)(g), Florida Statutes.

## **II. Executing Carrier's Source Is Limited**

Commission Order No. PSC-03-0726-FOF-TP reaffirmed its prior “finding contained in Order No. PSC-02-0875-PAA-TP.” In its reaffirmation, this Commission cites to FCC Order No. 03-42, ¶¶ 27 and 28 (released on March 17, 2003).

BellSouth's position is that FCC Order 03-42 contained a clarification that granted BellSouth's wholesale operations a right to share information it obtained, exclusively in its role as a neutral administrator of carrier changes, with its retail marketing arm in order to trigger targeted reacquisition efforts. BellSouth's arguments focus upon reading certain terms in the first sentence of ¶27 out of context. The canons of construction require that this first sentence be read in context with all of ¶¶27 and 28. See State v. Goode, 830 So. 2d 817, 824 (Fla. 2002)

("[A] basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.") These same statutory principles can be applied to FCC orders.

To begin the analysis, it is noteworthy that ¶28 uses the same broad language, utilized by the Louisiana Public Service Commission, when addressing targeted reacquisition efforts. It is undisputed that ¶28 places limitations on marketing reacquisition efforts. If ¶27 addresses certain activity after a switch is complete, then ¶28 is referring to reacquisition efforts when it uses the phrase: ". . . , when engaging in such marketing, . . ." (Emphasis added). With respect to targeted reacquisition efforts, the FCC makes two important statements. The first is:

Executing carriers may not **at any time** in the **carrier marketing process** rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. (Emphasis added). ¶28 Order 03-42.

The "**carrier marketing process**" includes both marketing efforts **before** and **after** the switch. The import of the plain language is precise: BellSouth is prohibited from relying on specific information "obtained" from submitting carriers "at any time" in the carrier marketing process. The "specific information" BellSouth's wholesale operations obtained, from Supra, was the fact that a BellSouth retail voice customer has switched. The FCC also made sure to point out that a "carrier change request" cannot be used for any purpose other than to effectuate the switch:

We reiterate our finding in the *Second Reconsideration Order* that **carrier change request** information transmitted to executing carriers in order to effectuate a carrier change **cannot be used for any purpose** other than to provide the service requested by the submitting carrier. (Emphasis added). *Id.* ¶28.

If you could use a CLEC service order to generate a marketing lead after a switch, then there would have been no need to place the limitation that a change request "cannot be used for any purpose other than to provide the service requested by the submitting carrier." Using the "request" to trigger a notification to BellSouth's retail marketers of a completed switch violates



the plain meaning of the above referenced limitation. See *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11<sup>th</sup> Cir. 2001) (“The ‘plain’ in ‘plain meaning’ requires that we look to the actual language used . . .”).

#### Other Sources

The first sentence of ¶28 sets out a source BellSouth could use to legitimately obtain notice that a customer has switched:

We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. (Emphasis added).

An example for the phrase “in the normal course of business” can be found in fn. 89, of ¶27, in which the FCC states:

[W]e recognize that a carrier’s retail operations may, without using information obtained in violation of section 222(b), legitimately obtain notice that customer plans to switch to another carrier or contact a defecting customer in the ordinary course of business. (Emphasis added). fn. 89, of ¶27.

The example in the footnote must be contrasted with the prohibition in ¶28 that the change request cannot be relied upon “at any time in the carrier marketing process” and “cannot be used for any purpose” except to effectuate a change in service. Two sources available to BellSouth’s retail marketing arm could be either an external source or through an in-bound call from the former retail customer. Both sources are exceptions to the prohibitions of ¶28 because the “notice” of the switch would not have originated with BellSouth’s wholesale operations. Thus, the legal threshold would have been met.

Aside from an in-bound call, the footnote indicates that notice of a switch can be legitimately obtained in the context of contacting “a defecting customer in the ordinary course of business.” In the context of local service, Supra is unable to think of any legitimate reason that would prompt BellSouth, in the ordinary course of business, to contact a customer while a switch

is pending or after the customer has switched. Notwithstanding, Supra submits that the phrase “through its normal channels” (of ¶27) is subsumed in the meaning of “in the normal course of business” (of ¶28). The executing carrier cannot contact a customer “through its normal channel” (¶27) unless it is done “in the normal course of business” (¶28). Quite simply, in the absence of BellSouth’s wholesale operations as a source, where would BellSouth’s retail marketing arm obtain information regarding a completed switch? The available sources are: (1) an external source available to all competitors throughout the retail industry, (2) an in-bound call or (3) through contacting a defecting customer in the ordinary course of business. All three of these sources meet the legal threshold that BellSouth not utilize its wholesale operations as a source for targeted reacquisition efforts.

This same limiting theme is followed in the second sentence of ¶27, in which the FCC emphasizes the prohibition against BellSouth using information of a completed switch exclusively from its status as the executing carrier:

This is consistent with our finding in the *Second Report and Order* that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier. (Emphasis added). FCC Order No. 03-42, ¶27.

The Second Report and Order,<sup>2</sup> referenced above provides that “section 222(b) does not prohibit all winback attempts, but only those that are based on carrier proprietary information.” Second Report and Order ¶107 (hereinafter FCC Order 98-334). Supra’s Local Service Request is considered carrier proprietary information.

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<sup>2</sup> *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumer’s Long Distance Carriers*, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rule Making, 14 FCC Rcd 1508, ¶106. Released December 23, 1998. (Also cited as Order 98-334).

### Carrier Change Request Is Supra Proprietary Information

Carrier-to-carrier information includes a carrier change request. This carrier change request, in the CLEC community, is known as a Local Service Request (“LSR”). The FCC stated in Order 98-334 the following:

[W]e find that carrier change information is carrier proprietary information and therefore, pursuant to section 222(b), the executing carrier is prohibited from using such information to attempt to change the subscriber’s decision to switch to another carrier. Order 98-334, ¶106 cited in FCC Order 03-42 ¶27. (Emphasis).

The submitting carrier’s change request is **proprietary information because it must submit that information to the executing carrier** in order to obtain provisioning of service for a new subscriber. *Id.* ¶106, Lines 15-17. (Emphasis).

According to the FCC, **Supra’s LSR** (i.e. carrier change request, itself) **is proprietary** to Supra **because** Supra **is required to submit that LSR** to BellSouth in order **to obtain provisioning** of service for the new customer. Thus, it is the submission, itself, that makes the LSR or carrier change request proprietary information to Supra.

### But-for the LSR, BellSouth Would Have “No Knowledge”

The FCC has addressed the use of “knowledge” of the switch. The FCC writes:

The executing carrier otherwise would have **no knowledge at that time** of a consumer’s decision to change carriers, were it not for the executing carrier’s position as a provider of switched access service. (Emphasis added). Order 98-334, ¶106, Lines 22-24.

The focus is on the “knowledge” of the decision to change carriers – not to whom the customer chose, but the switch itself. The FCC’s emphasis that the executing carrier would otherwise have **“no knowledge”** of the switch, were it not for BellSouth’s role as a **“neutral administrator”** (FCC Order 98-334 ¶109) of carrier changes, reinforces the proposition that BellSouth is **prohibited from using** the **“knowledge”** of the switch - obtained as a consequence of the carrier change request – to trigger **targeted** reacquisition efforts.

BellSouth did not learn of the switch as the customer's retail telecommunications provider, but in its capacity as the wholesale executing carrier. The FCC writes:

In the *CPNI Order*, we [the FCC] stated that Congress' goal of promoting competition and preserving customer privacy would be furthered by protecting the competitively-sensitive information of other carriers [i.e. CLECs] from network providers that gain access to such information through the provision of wholesale information. (Emphasis added). Order 98-334 ¶106.

. . . [I]n the situation of executing carriers and carrier change requests, section 222(b) works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing use of carrier proprietary information. (Emphasis added). Order 98-334, ¶106.

As the executing carrier BellSouth has a duty to protect information that a customer has switched. BellSouth's retail operations does not "legitimately obtain notice" (fn. 89, ¶27) of a switch, when it uses information that its wholesale operations has a duty to protect.

The FCC further explains that an executing carrier is prohibited from using information gained solely from the carrier change "transaction:"

The rule, governed by section 222(b), promotes competition and protects consumer choices by prohibiting executing carriers from using information gained solely from the carrier change transaction to thwart competition by using the carrier proprietary information of the submitting carrier to market to the submitting carrier's subscribers. Order 98-334, ¶109. (Emphasis added).

Noteworthy is that the prohibition under section 222(b) applies to marketing efforts directed to a "submitting carrier's subscribers." An individual can only be a subscriber of a submitting carrier if the conversion has been completed. This prohibition, therefore, includes "reacquisition." The release date of Order 98-334 is December 23, 1998.

If this were not enough, the FCC further explains the neutral role of the executing carrier:

The rule places a limited prohibition on executing carriers because an executing carrier should be a neutral party without any interest in the choice of carriers made by a subscriber. Because of its position as a monopoly service provider, however, it may gain access through the carrier change process to a submitting

carrier's proprietary information, *i.e.* that the submitting carrier needs service provisioning for a new subscriber. Order 98-334, ¶109 (Emphasis added).

The rule we adopt ensures that the executing carrier remains in its role as a neutral administrator of carrier changes, and prevents the executing carrier from shifting into a competitive role against the submitting carrier using carrier proprietary information. Order 98-334, ¶109 (Emphasis added).

The policy that the executing carrier is a neutral administrator is undermined, if the incumbent carrier is able to exploit its wholesale "monopoly" status. For this reason, the FCC prohibited executing carriers from using information it obtains in the carrier change process.

#### General Win-back v. Targeted Win-back

This prohibition does not prevent general marketing reacquisition efforts:

[T]he rule would not prohibit a general marketing scheme that may coincidentally target a subscriber who has requested a carrier change because such activity would not entail the use of information gained solely by a carrier from a carrier change transaction. (Emphasis added). Order 98-334, ¶110.

If BellSouth does a blanket mailing, including its own customers and "coincidentally" former customer that recently switched, such a "general" mailing would not be a violation of section 222(b). This is an important distinction made by the FCC: win-back efforts are not, *per se*, a violation of section 222(b). Supra has not argued and does not argue that win-back efforts by an executing carrier are prohibited. It is the source of the lead that triggers a targeted reacquisition effort that is restricted.

The FCC's refusal to make all win-back efforts *per se* violations of section 222(b) was reaffirmed in Order No. 03-42, fn 89:

deeming any winback or retention efforts, including those based on information learned through the carrier's retail operations, . . . presumptively unlawful would deprive customers of . . . pro-consumer, pro-competitive benefits.

The phrase "information learned through the carrier's retail operations" (fn 89) is consistent with the strong limitations of ¶28 and the second sentence of ¶27 that reiterates

present FCC policy that win-back efforts have always been permissible, so long as BellSouth does not rely “exclusively” on its wholesale operations to trigger targeted reacquisition efforts. Thus, FCC Order 03-42 was not a change in policy, but simply a reaffirmation that its previous policy remains the same.

#### Proper To Use Own CPNI For Winback

Since September 3, 1999, BellSouth has been permitted to use its own CPNI to engage in win-back efforts. BellSouth position is that this right somehow translates into a right for its retail-marketing arm to use BellSouth’s wholesale operations as the source for generating targeted marketing leads. The former does not authorize the latter. Supra agrees that BellSouth is permitted to use its “own” CPNI, for reacquisition win-back efforts, that it obtains in its capacity as the customer’s retail telecommunications provider. This matter, however, is not an issue in this proceeding.

Prior to the adoption of rules promulgated under the 1996 Act, incumbent carriers were able to use CPNI in crafting promotions to regain customers. FCC Order 99-223, ¶70. “The *CPNI Order* adopted section 64.2005(b)(3) to prohibit a carrier from using or accessing CPNI to regain the business of a customer who has switched to another provider.” *Id.* at ¶63. The prohibition applied to the CPNI that the incumbent obtained prior to the switch. *Id.*

The FCC reversed its previous policy and eliminated section 64.2005(b)(3). *Id.* at ¶73. The FCC reasoned that “[t]he carrier legitimately obtained that CPNI in its capacity as the customer’s telecommunications provider.” (Emphasis added) *Id.* at ¶71. “Importantly, such CPNI use does not impact customer privacy in any substantial respect because the former customer-carrier relationship previously enabled the carrier to use this same telecommunications usage information.” (Emphasis added) *Id.* The rationale for the reversal is significant. In this

proceeding, BellSouth's wholesale operations obtained the "knowledge" of the switch from its status as the executing carrier. This "knowledge" does not come about in any way because of the retail customer-carrier relationship, because during and after the switch the retail customer-carrier relationship exists with the competitor – not with BellSouth. The other customer-carrier relationship that exists at the time of the switch is between the competitor and BellSouth's wholesale operations. The rationale used to justify the use of its "own" previously obtained CPNI, is not present with respect to the carrier change request.

While Order No. 98-334 did not prohibit all win-back efforts (§107), it did prohibit executing carriers from using carrier change requests for their own marketing purposes. *Id.* §106. See also Order 98-334, §107 (“[W]e conclude that section 222(b) only prohibits an executing carrier from marketing using information from a carrier change request because the executing carrier is not using its own information, but rather the submitting carrier’s proprietary information, which GTE and US WEST agree is a reasonable limitation.”). Consequently, when the FCC (in Order No. 99-223) finally authorized BellSouth to use its “own” CPNI previously obtained in win-back efforts, this grant of authority did not in any way overrule the FCC’s prior prohibition against the use of carrier change requests to trigger targeted reacquisition efforts.

FCC Order 03-42, §27, cites favorably to Order 98-334 (Second Report and Order). The prohibitions imposed in 1998 remained in effect after the entry of Order 99-223. If not, there would have been no reason to cite to the earlier 1998 Order in Order 03-42.

#### Return To First Sentence of §27

The first sentence of §27 that BellSouth relies upon reads as follows:

We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented

(such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. (Emphasis added) Order 03-42 ¶27.

The first observation is that ¶¶ 27 & 28 were written in response to, among others, Worldcom's request that the FCC reassert its policy that "an executing carrier is prohibited from using information obtained from a carrier change request to 'winback' the customer after carrier change completion and disconnection, . . ." Order 03-42, ¶26. To this extent, the FCC sought to reaffirm its previous policy.

BellSouth maintains a burden to demonstrate that its retail arm obtains notice of carrier change "through its normal channels." This burden rests with BellSouth because it is an executing carrier. Supra is not an executing carrier and therefore is not burdened with this regulatory restriction. HT Pg. 177, L 3-5.

What are normal channels? Supra submits that the phrase "through its normal channels" (of ¶27) is subsumed in the meaning of "in the normal course of business" (of ¶28). See Supra's analysis of the phrases "normal channels" and "ordinary course of business" found in the earlier portion of the brief under the heading Other Sources. In the absence of BellSouth's wholesale operations as a source, where would BellSouth's retail marketing arm obtain information regarding a completed switch? The available sources are: (1) an external source available to all competitors throughout the retail industry, (2) an in-bound call or (3) through contacting a defecting customer in the ordinary course of business (¶27, fn. 89). All three of these sources meet the legal threshold that BellSouth not utilize its wholesale operations as a source for targeted reacquisition efforts.

BellSouth seeks to have the Commission focus in on the words "in a form." BellSouth's asks this Commission to over analyze these words. There is no need to engage in a tortured reading of the FCC's language. The use of the phrase "in a form" is consistent with "in a



manner.” In plain language, the external source, BellSouth utilizes to generate its targeted leads, must be in a manner/form that all competitors can gain access to. BellSouth admits that, in addition to the Harmonize feed, it “purchases general subscriber list information, compares it against [its] existing residential customer base to identify potential new BellSouth local service customers.” HT Pg. 345, L 20-23. “No service order information is used in this process.” HT Pg. 345, L 23-24. This is an acceptable external source available throughout the retail industry – whereas Operation Sunrise is not acceptable.

Next, receiving an in-bound call “in a manner/form” that it is received throughout the retail industry is, likewise, a fair reading of these words. Finally, making an out-bound call to a defecting customer in the ordinary course of business “in a manner/form” that all other competitors make similar out-bound calls in the ordinary course of business is similarly a fair reading of these words. Further support for this reading can be found in the FCC explanation on the need to maintain the executing carrier’s neutral role as the administrator of the carrier change process. See Order 98-334, ¶109.

#### Line Loss Report Irrelevant

The burden rests with the executing carrier to identify a legitimate source. The source of an end-user switch cannot be its own wholesale operations. See ¶28 and second sentence of ¶27. The Line Loss Report (“LLR”) that BellSouth’s wholesale operations provide to competitors includes losses of the competitor and not losses of BellSouth retail end-users. Therefore, the competitive LLR cannot be a source for BellSouth’s targeted reacquisition leads. The LLR was developed to assist competitors in learning when to cease billing a particular customer that has left their network. The fact that competitors receive such a report does not in any way alleviate

the executing carrier's burden to identify a legitimate source for a targeted reacquisition that is not its wholesale operations.

BellSouth's Affirmative Defenses filed in this case were limited to failure to state a cause of action and subject matter jurisdiction. The rules of civil procedure dictate that any affirmative defense not raised at the time of an Answer is considered waived. As such, in addition to being legally irrelevant, BellSouth is precluded from raising the existence of the LLR as a defense.

#### Demarcation Point

The next phrase involves the use of the words "disconnect reports" included within the parenthetical. In this case, a fair reading of this language – consistent with the same FCC theme against the use of wholesale information - is that the FCC intended to provide incumbent executing carriers an objective evidentiary device for determining a demarcation point for "when" the change order "has been implemented." To the extent that some competitor brings an enforcement action claiming that the incumbent initiated targeted reacquisition efforts prior to the completion of the conversion, the incumbent in defense can proffer an internal report, however characterized (i.e. disconnect reports), identifying all of the carrier switches and the dates upon which those switches were completed. This same concept is incorporated in FCC Rule 64.2009(c), which requires that a record be kept, to defend against future actions, for all sales and marketing campaigns in which an executing carrier uses its own CPNI. See Order 99-223, ¶126.

The next phrase BellSouth focuses upon is the words "that information" immediately following the parenthetical. What information? Are we talking about (1) the carrier change information – specifically the knowledge of the switch - that must be obtained from a legitimate source other than BellSouth's wholesale operations, or (2) are we discussing, as claimed by

BellSouth, the internal disconnect reports – identifying the completion date, among other information, of a competitive switch – exclusively derived from BellSouth status as the executing carrier. The only reasonable conclusion that can be drawn from the operative phrase “that information” is that the FCC was referring to the first of the two choices just outlined.

The last sentence of ¶27 is consistent with the contextual understanding previously outlined herein regarding the executing carrier’s burden in utilizing a source other than its wholesale operations. Order 98-334, ¶109, delineates the FCC’s concern with maintaining the integrity of the executing carrier in its role as a neutral administrator of the carrier change process. The last sentence (of ¶27) follows this theme in stating that:

[T]he potential for anti-competitive behavior by an executing carrier [i.e. not a non-executing carrier like Supra] is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations.

The focus is on curtailing the anti-competitive behavior of BellSouth - not Supra. If BellSouth had no burden of utilizing a source, other than its wholesale operations, then there would have been no need to include this sentence.

There is also no need to over analyze the words “equivalent information.” A reasonable interpretation of these words means that competitors have access to the same external source, of customers switching away from BellSouth; and that competitors can also use this external source in their own marketing efforts. BellSouth seeks to use these two words to override and negate what is clearly a burden on the executing carrier: the duty to identify a legitimate source for its targeted reacquisition efforts. As described earlier herein, the Line Loss Report generated for competitors is completely irrelevant to the executing carrier’s burden. BellSouth’s focus and interpretation would render meaningless all of the other language in ¶27, and all of ¶28. See State v. Goode, 830 So. 2d 817, 824 (Fla. 2002) (“[A] basic rule of statutory construction

provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.”).

For all of the foregoing reasons, Supra submits that BellSouth’s wholesale operations cannot share information (e.g. knowledge of a switch) that it obtains, as a consequence of effectuating a conversion, with its retail marketing operations in order to trigger targeted reacquisition efforts.

**Issue 2: Whether BellSouth can use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, to furnish leads and/or marketing data to its in-house and third-party marketers?**

\*\* No. BellSouth may not use carrier-to-carrier information to furnish leads and/or marketing data to its in-house or third-party marketers. The legal basis for this prohibition is the same as that outlined under issue one (1). \*\*

Leads are electronically transmitted to outside third-party direct marketers. HT Pg. 369, L 6-14. Presently, BellSouth generates over 100,000-targeted marketing leads, each week, as a direct consequence of the Harmonize feed and Operation Sunrise. HT Pg. 370, L 21-25.

**Issue 3: Whether BellSouth shared and/or used carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail division, with its in-house marketers and/or third-party marketers for marketing purposes? If such practices are improper, what penalties should be imposed?**

\*\* Yes. BellSouth has shared and used carrier-to-carrier information, acquired from its wholesale operations, with its retail-marketing group (known as MKIS) for the purpose of generating marketing leads. These marketing leads are furnished to third-party marketers. \*\*

Carrier-to-Carrier information includes both wholesale information and CPNI. Carrier proprietary wholesale information includes the “knowledge” that a customer has switched. FCC Order 98-334, ¶106, lines 22-24. The evidence demonstrates that “[T]hrough Operation Sunrise BellSouth uses the fact [i.e. the knowledge] that a customer has left its retail network to target that customer and attempt to win them back, . . .” (Emphasis added) HT Pg. 342, L 8-11.

Since 1997, Mr. Edward Wolfe has managed Operation Sunrise. HT Pg. 361, L 17-19. Wolfe helped design Operation Sunrise and authored its manual. HT Pg. 361, L 5-14. By design the system is completely automated [HT Pg. 359, L 9-15] with no manual intervention from the moment an order is extracted from SOCS, funneled to the Permanent Sunrise Table and electronically shipped to the outside direct mail marketing vendors. HT Pg 367, L 23-25, Pg 368, L 1-2, 369, L 2-14. Mr. Wolfe admits that he has “actual knowledge” that “all” of the records of local service switches that populate the Permanent Sunrise Table (“PST”) are the product of CLEC service orders “originating from the wholesale side of the fence.” HT Pg. 366, L 2-15.

The evidence substantiates Wolfe’s admission. The following orders are harvested on a nightly basis from SOCS and placed in the Harmonize database: “N”, “T”, “D”, Single “C”, LPIC “C”. HT Pg. 362, L 9-14. All orders in the Harmonize database are pending. HT Pg. 355, L 13-15. Once complete the orders are moved to the Temporary Sunrise Table. HT Pg. 355, L 19-21. The orders are filtered out in the following manner. “T” and “N” orders are filtered out because they have no disconnect reason (“DCR”) code. HT Pg. 357, L 1-2, Pg. 352, L 7-9, Pg. 351, L 20-23, Pg. 350, L 12- 13, L 15-19. All “D” and “C” orders without a DCR are eliminated. HT Pg. 357, L 1-2, Pg. 343, L 22-25. Next, LPIC “C” orders are eliminated. HT Pg. 358, L 10-13. All “D” orders with a retail generated non-competitive DCR are eliminated. HT Pg. 356, L 17-21, Pg. 363, L 7-13, Pg. 362, L 23-24. Finally, all “D” orders with a retail generated DCR of “CO” are filtered out. HT Pg. 359, L 21-24, Pg. 363, L 7-13, Pg. 343, L 21-25. All of these orders are permanently deleted. HT Pg. 359, L 5-8. What is left is Single “C” and “D” orders with a competitive DCR. HT Pg. 359, L 25, Pg. 360, L 4-6, Pg. 343, L 21-22. These two groups of orders then moved to the Permanent Sunrise Table. HT Pg. 360, L 11-13, L 16-17.

Because BellSouth's retail marketing arm is using its wholesale operations as its source for generating marketing leads to trigger targeted reacquisition efforts, it is in violation of section 222(b) and this Commission's previous orders.

The recipient of DAN-2 was Mr. Dave Nilson who had been a Supra customer for over two years. Internally, Supra converted Mr. Nilson's line from Resale to UNE-P. A Single "C" service order is used when "a CLEC sends an LSR for: "Resale to UNE-P: Same CLEC or different CLEC." Pate RT Pg. 33, L 24-25 & HT Pg 267, L 16-19. All Single "C" orders with a competitive disconnect reason code ("DCR") are funneled to the Temporary Sunrise Table and in turn to the Permanent Sunrise Table. HT Pg. 360, L 11-13. BAPCO receives "notification" for targeted marketing efforts. These targets include new BellSouth customers and customer switches that generate a Single "C" or "D" order. Ruscilli RT, Pg. 11, L 7. New CLEC customers are not targeted by BAPCO. Ruscilli RT, Pg. 11, L 8. This is self-evident because "N" orders are not assigned a DCR [HT Pg. 350, L 12-13] and never make it to the PST. HT Pg. 352, L 7-9. The CLEC has the option to populate a field in the LSR if a directory is needed. HT Pg. 295, L 20-25. Mr. Pate acknowledged that a single "C" does not generate more directories being sent to the end-user customer, unless so requested by the CLEC. HT Pg. 296, L 1-3. Despite the single "C" used to process the internal wholesale billing change for Supra, BAPCO received notification from BellSouth's retail arm of a conversion on this customer's record. This is evidence that BellSouth's retail arm used its wholesale operations as its source to generate a targeted marketing lead for BAPCO. This is prohibited by section 222(b).

Supra's Exhibit DAN-3 was received by a Supra attorney within days after converting from BellSouth to Supra. It is a violation of section 222(b) because it is the product of Operation Sunrise and the Harmonize feed.

### DCR and Customer Code are Wholesale Information

BellSouth admits that the DCR and the customer code – both generated on the wholesale side of the fence – remain on the CLEC service order and/or record that reaches the Permanent Sunrise Table.

The DCR is generated because the CLEC populates one of two fields on the LSR: RESH or AECN. The first denotes a reseller and the second a UNE-P provider or facilities based provider. HT Pg. 265, L 12-18, 25 Pg. 266, L 1-4, Pg. 283, L 6-9. Pg. BellSouth considers DCRs to be wholesale information. HT Pg. 385, 1-3; See also DAN-6 Bate Stamp 000079 & 000144. Interestingly, a “C” or “D” wholesale order cannot be completed unless it has a DCR assigned to it. HT Pg. 368, L 17-18.

BellSouth Witness Pate is primarily responsible for BellSouth’s wholesale operations. Pate declared: “my area of expertise is in the wholesale operations support systems, and Harmonize is not part of that.” (Emphasis added) HT Pg. 276, L 1-4. Harmonize is a retail operation. BellSouth Witness Wolfe admits that the Temporary Sunrise Table is a part of Operation Sunrise. HT Pg. 369, L 12-14. As important, is that the DCR is not removed from the order/record until after the order/record populates the Permanent Sunrise Table. HT 360, L 11-13, 16-17. It is the DCR that is used to move the service order from SOCS, through the Harmonize Database to the Temporary and then to the Permanent Sunrise Table. HT Pg. 359, L 16-20, Pg. 371, L 21-23. Thus, the evidence is that the orders also contain wholesale information (i.e. DCR) in violation of section 222(b).

When a customer changes ownership (i.e. BellSouth to Supra) the customer code is changed. HT Pg. 288, L 19-25, Pg. 291, L 1-5. The customer code is system generated by SOCS. HT Pg. 285, L 16, Pg. 286, L 21-25. If it is a CLEC-owned account, then you can say it

is a CLEC customer code. HT Pg. 285, L 9-16. This code is used by BellSouth's Interconnection Carrier Services to bill for wholesale services. This wholesale billing is carried out using BellSouth's Customer Service Information Systems ("CRIS").

CRIS is updated upon the completion of a conversion. HT Pg. 273, L 10-12. For each working telephone number account CRIS will create two records: new and old. HT Pg. 278, L 4-11. The new record will have a customer code "one up" from the retail BellSouth customer code (i.e. retail code 100, wholesale code will be 101). HT Pg. 286, L 1-14. This customer code, generated as a part of the wholesale transaction, remains on the record that populates the Permanent Sunrise Table. HT 375, L 9-14. This customer code is then used to match [HT Pg. 344, L 10-15] that Permanent Sunrise Table record with a record contained in the monthly snapshot [HT Pg. 367, L 12-13, Pg. 368, L 16-17] of CRIS. Thus, the evidence is that the orders also contain wholesale information (i.e. CLEC customer code) in violation of section 222(b).

#### Match

A match cannot be made unless the customer code is identical. The customer's account number will be the telephone number, plus the customer code. HT Pg. 286, L 7-8. "MKIS then matches the telephone number associated with the disconnect order to BellSouth's former customer service record for that number in CRIS." Summers RT, Pg. 14, L 13-14. This matching is automated. HT Pg. 368, L 18-20. The customer's current mailing address is confirmed. BellSouth then uses the wholesale CRIS record to identify the retail record that contains the previously obtained CPNI - which will be one number down from the customer code matching the record in the Permanent Sunrise Table. HT Pg. 286, L 1-14. This data is then added to the record in the Permanent table and a marketing lead is generated. HT Pg. 344, L 13-15. The process of generated the marketing leads is all automated. HT Pg. 368, L 21-23. These leads will



contain, among other things, the customer's name, current billing address and telephone number – without the wholesale customer code. HT Pg. 344, L 15-19. There is no manual review of the marketing list before it is sent to the third-party marketers. HT Pg. 368, L 24-25, Pg. 369, L 1. The leads are then electronically transmitted to outside third-party direct marketers. HT Pg. 369, L 6-14. Presently, BellSouth generates over 100,000-targeted marketing leads, each week, as a direct consequence of the Harmonize feed and Operation Sunrise. HT Pg. 370, L 21-25. BellSouth is exploiting its status as the neutral administrator of the carrier change process.

#### Business Leads

The evidence is that the Marketing Communications Database (“MCDB”) is used to generate targeted marketing leads for business reacquisition efforts. HT Pg. 312, L 1. The MCDB takes the leads out of the monthly snapshot of CRIS. HT Pg. 307, L 1-8, Pg. 367, L 12-13. It is the billing record that is used to identify that a customer has switched. HT Pg. 310, L 24. This billing record in CRIS does contain a visible DCR. HT Pg. 310, L 8-10. This CRIS record, containing a DCR, is then matched with a record from Harmonize to confirm that the customer has in fact switched. HT Pg. 312, L 18-20. The matching of the CRIS record with the Harmonize record is done electronically. HT Pg. 313, L 15-19. Like with the Harmonize feed, the MCDB system is programmed to filter out all CRIS records with a non-competitive DCR. HT Pg. 310, L 14-17. No leads will be generated for records that have a non-competitive DCR. HT Pg. 312, L 3-5.

MKIS uses a record from its Permanent Sunrise Table to match a record in CRIS. The MCDB, managed by Ms. Schoech, simply reverses this process. The MCDB, electronically, pulls records from a monthly snapshot of CRIS and then matches those records with a record from the Harmonize databases. If it is illegal for MKIS to harvest records from SOCS and CRIS

to generate a marketing list, then it is also illegal for the MCDB (automated system) to generate a similar list for business accounts using the same sources for information.

#### Local Toll

CARE delivers files up to thrice daily to Operation Sunrise and MKIS. See DAN-8 Bate Stamp 001018, Weekly Lead-generating Procedures; DAN-7 Bate Stamp 000755; DAN-9 Bate Stamp 001055. The LPIC changes that flow to the Permanent Sunrise Table do so by a path separate and apart from the Harmonize feed. HT Pg. 353, L 16-25.

CARE was developed to allow the competitors gaining and losing a customer to start and stop billing that customer in a timely and efficient manner. Ruscilli RT Pg. 6, L 24-25, Pg. 7, L 1-4. The fact that the competitive industry participated in the development of the CARE system does not in any way act as a shield against the FCC prior proscription against BellSouth's retail arm using as its source, its wholesale LPIC carrier change process, for generating leads to target customers for local toll reacquisition. The FCC wrote:

[I]n the situation of executing carriers and carrier change requests, section 222(b) works to prevent anticompetitive conduct on the part of the executing carrier by prohibiting marketing use of carrier proprietary information. The executing carrier otherwise would have no knowledge at that time of a consumer's decision to change carriers, were it not for the executing carrier's position as a provider of switched access services. Therefore, when an executing carrier receives a carrier change request, section 222(b) prohibits the executing carrier from using that information to market services to that consumer. (Emphasis added) FCC Order 98-334, ¶106, cited by FCC Order 03-42, ¶27, cited by PSC-03-0726-FOF-TP.

The establishment of CARE was appropriate. BellSouth's use of CARE as its source to generate targeted marketing leads is a violation of section 222(b) and this Commission's previous Orders.

#### Second Sweep

In March/April 2001 Operation Sunrise began generating targeted reacquisition leads. HT Pg. 371, L 11-15. All wholesale generated competitive DCRs were translated into "JL." HT Pg.

373, L 14-17, Pg. 371, L 15-23, HT Pg. 372, L 19-23. Only orders with a “JL” were moved from the Harmonize database to the Permanent Sunrise Table. Pg. 373, L 1-5, Pg. 374, L 13. “JL” remained on the order when it populated the Permanent Sunrise Table. HT Pg. 373, L 6-9. After a brief stop, lead generation began again, in earnest, in August 2001. HT Pg. 371, L 11-14.

For almost two years, MKIS has explicitly excluded retail generated non-competitive disconnect codes such as “NF,” “AS,” and “CO.” HT Pg. 343, L 21-25, Pg. 356, L 17-21, Pg. 362, L 23-24, Pg. 363, L 7-13. Supra’s Complaint was filed on April 18, 2003. The “second sweep” was only initiated -after our complaint had been filed - on or about July 21, 2003. HT Pg. 381, L21-22. It was intentionally programmed. HT Pg. 378, L 4-6. The only codes included in the second sweep are retail generated codes. “NF” means no further use. It would certainly be a waste of time to send a direct marketing piece to that address. The next DCR is “AS” which means abandoned station. Sending a mail piece to this address would also be a waste of time and resources. Mr. Wolfe also confirmed that at the time Operation Sunrise was programmed to generate local service reacquisition leads, it was designed to filter out all DCRs with a “CO” because they were “unreliable.” HT Pg. 437, L 12-17. Despite the inefficiency of sending letters to customers with these DCR’s, BellSouth’s marketing arm requested Mr. Wolfe to program Operation Sunrise to begin capturing these retail codes. Mr. Wolfe said with a smile: “I don’t know why marketing decided to do it that way.” HT Pg. 381, L 14-18. The marketing request is inexplicable.

In this same explanation, BellSouth mentions that the “second sweep” that was intentionally programmed also captured competitive DCRs of “CC” and “RT”. Both involve switches between competitors. The evidence in this proceeding, however, is that a Single “C” service order is used when “a CLEC sends an LSR for: “Resale to UNE-P: Same CLEC or

different CLEC.” Pate RT Pg. 33, L 24-25 & HT Pg 267, L 16-19. All Single “C” orders with a competitive DCR are funneled to the Temporary Sunrise Table and in turn to the Permanent Sunrise Table. HT Pg. 360, L 11-13. Accordingly, all Single “C” orders with a DCR of “RT” have been part of the process since at least August 2001. This is consistent with Mr. Wolfe’s deposition and admission at the hearing that he has actual knowledge that CLEC service orders with a DCR of “BR” and “RT” populate the Permanent Sunrise Table. HT Pg. 365, L 25 & Wolfe Deposition Pg. 109 L 22-23, Pg. 110, L 1-15; HT Pg. 361, L 2-15. Irrespective of the presence of an “RT” in the Permanent Sunrise Table, it is the source for the targeted leads that is restricted for the executing carriers. This violation has been well established.

#### Penalties

BellSouth should be ordered to immediately cease allowing MKIS and MCDB from using information from the present automated sources - which rely on the “fact” that a customer has switched. Specifically cease utilization of CARE for local toll, the Harmonize Feed and the Sunrise Tables for local service, and the MCDB marketing database for business leads. The Commission should also impose a monitoring regime; the costs to be borne by BellSouth. Also a fine should also be imposed for each lead generated, for local service, since August 1, 2001; and for local toll, since the inception of Operation Sunrise and the use of CARE.

In the alternative, if the Commission finds that the FCC did make BellSouth’s conduct legal after March 2003, then Supra respectfully request that this Commission impose a fine for each lead generated for local service from August 2001 until March 17, 2003; and an equivalent fine for local toll leads for the relevant time period.

Respectfully submitted this 30<sup>th</sup> day of September 2003.

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