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Sent: Thursday, November 30, 2006 4:47 PM
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Subject: E-filing - Docket No. 060598-TL
Attachments: Prehearing Memorandum of Law 11-30-06.pdf

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Docket No. and title: In re: Petition by BellSouth Telecommunications, Inc., pursuant to Florida Statutes §364.051(4) to Recover 2005 Tropical System Related Costs and Expenses
Docket No. 060598-TL

Filed on behalf of: Competitive Carriers of the South, Inc.

Number of pages: 17

Document attached: Prehearing Memorandum of Law

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications, Inc., pursuant to Florida Statutes §364.051(4) to Recover 2005 Tropical System Related Costs and Expenses /	Docket No. 060598-TL Filed: November 30, 2006

COMPETITIVE CARRIERS OF THE SOUTH, INC.'S
PREHEARING MEMORANDUM OF LAW

The Competitive Carriers of the South, Inc. (CompSouth), pursuant to Order No. PSC-06-0941-PCO-TL, hereby files its Prehearing Memorandum of Law regarding whether a line item charge on BellSouth's wholesale UNE loops is appropriate pursuant to section 364.051(4)(b)(6), Florida Statutes, and federal law.[1] It is CompSouth's position that such a charge is inappropriate pursuant to state law and inconsistent with and preempted by federal law.

I. INTRODUCTION

Section 364.051(4)(b)(6), Florida Statutes, provides, in part: "The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local telecommunications service customers … *and, to the extent the commission determines appropriate, its wholesale loop unbundled network customers.*"[2] Thus, the statute provides the Commission with discretion to determine whether it is appropriate to increase UNE loop customer prices to recover BellSouth's embedded costs.[3] If the statute had *required* the Commission to increase

[1] This is Issue 3(b) in Order No. PSC-06-0941-PCO-TL.
[2] Emphasis added.
[3] BellSouth has requested that the Commission approve a storm surcharge on "all unbundled wholesale loop network element ("UNE") customers (including stand-alone loops, ISDN loops, DS1 and DS3 loops (stand-alone and as part of an enhanced extended loop), xDSL loops)." Blake amended direct testimony at 3.

unbundled loop prices to recover BellSouth's embedded costs related to damage from storms occurring in 2005, it would have been inconsistent with federal law and preempted. Similarly, if the Commission, in the exercise of its discretion, decides to permit BellSouth to increase the prices for unbundled loops, such action would be inconsistent with federal law and preempted because approval of this additional charge on wholesale loops would violate federal TELRIC[4] UNE rate pricing principles.[5]

II. BELLSOUTH'S PROPOSAL TO IMPOSE A SURCHARGE ON WHOLESALE UNE LOOPS IS INCONSISTENT WITH, IN CONFLICT WITH, AND PREEMPTED BY FEDERAL LAW.

A. FEDERAL LAW MANDATES TELRIC PRICING FOR UNES.

Rates that incumbents, like BellSouth, may charge to competitors, like CompSouth members, must be based on cost. 47 USC § 252(d)(1)(A). The Telecommunications Act of 1996 (Telecom Act), 47 USC § 252(d)(1), requires the Federal Communications Commission (FCC) to delineate the methodology state regulatory commissions must use to set cost-based UNE rates under the Telecom Act. In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 384-385 (1999), the United States Supreme Court upheld the FCC's authority to "design a pricing methodology" that the states must implement. Having settled the FCC's authority to require a particular pricing methodology in *Iowa Utilities Bd.*, in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002)[6], the United States Supreme Court reviewed whether the methodology the FCC chose – TELRIC -- should be sustained. In *Verizon*, the Court upheld the FCC's

[4] TELRIC is the abbreviation for total long run incremental cost.
[5] There is no dispute that the proposed surcharge does not comply with TELRIC principles. Ms. Blake claims that the proposed charge "has nothing to do with BellSouth's provisioning of an unbundled network element pursuant to federal law," (Blake Surrebuttal at 22), and she does not claim it is TELRIC compliant. Ms. Blake also admits that the surcharge is not based on specific costs (Blake Surrebuttal at 19), which is a TELRIC requirement.
[6] The long history of the controversy over TELRIC is discussed in *Verizon.*

selection of the TELRIC pricing methodology to implement the pricing provisions of 47 USC § 252(d). *Verizon* at 523. In its UNE pricing proceeding, this Commission recognized that it was required to use the TELRIC pricing methodology.[7]

The TELRIC methodology,[8] which is set out in 47 C.F.R. § 51.505 requires UNE costs to be forward looking. The FCC defines forward-looking costs as:

> The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.[9]

In addition, TELRIC explicitly prohibits the use of embedded costs.[10] 47 C.F.R. § 51.505(d)(1) prohibits the inclusion of "costs that the incumbent LEC incurred in the past and are recorded in the incumbent LEC's books of accounts." Historic book costs and expenses related to repair, replacement or restoration of lines, plants or facilities damaged in the past are exactly the type of embedded costs federal law prohibits from inclusion in UNE rates. The imposition of a storm surcharge on UNE loops, as BellSouth proposes, would directly conflict with these federal pricing requirements.

As a preliminary matter, despite the nomenclature of surcharge or line-item charge, this charge is a per-loop charge, which is a price increase in TELRIC rates. BellSouth has argued that this is simply a surcharge, not a rate increase. Its position is belied by section 364.051(4)(a) of the statute at issue, which clearly states that, if a local

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[7] *In Re: Investigation into unbundled network elements*, Docket No. 990649-TP, Order No. PSC-01-1181-FOF-TP (May 25, 2001) at 23-24; Order No. PSC-02-1311-FOF-TP (Sept. 27, 2002). *See also*, *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (N.D.Fl. 2000), *affm'd*, 298 F.3d 1272 (11th Cir. 2002).
[8] *See*, First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCCR 15,499, 15,844, ¶ 672 (1996).
[9] 47 CFR § 51.505(b).
[10] 47 CFR § 51.505(d)(1); *WorldCom, Inc. v. Connecticut Department of Public Utility Control*, 375 F. Supp. 2d 86 (D. Conn. 2005).

telecommunications company believes circumstances have changed substantially, so as to justify an "increase in rates," it may petition for a "rate increase" and demonstrate a compelling showing of changed circumstances. Subsection (4)(b) simply removes the need for the company to make a compelling showing in the case of tropical storms.

BellSouth's argument that its proposed surcharge is no different than the Commission's Regulatory Assessment (RAF) fee or 911 charge is also patently false. Neither the RAF fee nor 911 charge is paid to BellSouth to defray BellSouth's historic book costs, as would be the case of the proposed surcharge. In the case of the RAF, all regulated utilities pay this charge *to the Commission* to help defray regulatory costs. Similarly, 911 charges are paid to county authorities to help fund 911 services. CLECs do not pay these charges *to their competitors* – a non-governmental entity. CLECs pay these charges to governmental entities to cover the cost of government services. And neither of these charges is assessed on a per loop basis. In fact, CompSouth is aware of no situation in which a charge on a per loop basis is paid to an incumbent on top of the TELRIC rate.

Furthermore, the state laws authorizing the RAF and 911 charge have no conflicting or overlapping federal regime for assessment, unlike this situation in which the federal regime, TELRIC, establishes precisely, and with exclusivity, what is to be paid by whom and to whom for what. BellSouth is clearly wrong when it claims the proposed surcharge is "unrelated" to the pricing of UNE loops – the charge is assessed on loops to recover historic book costs and increases competitors' prices for such loops.

The surcharge runs counter to federal law for several reasons. The rationale of TELRIC pricing is to require incumbents to lease parts of their networks to new entrants "[i]n order to foster competition between monopolistic carriers providing local telephone service and companies seeking to enter local markets. . ." *Verizon* at 1648. The proposed surcharge would impose a charge on top of and in addition to approved TELRIC-based rates outside of a cost proceeding where all costs are reviewed. The proposed surcharge would permit BellSouth to recover historic book costs in addition to those included in the calculation of forward-looking costs when the Commission set UNE rates.

Also, as Mr. Wood explained in his testimony, BellSouth is attempting to true-up forward-looking costs to a higher level based on costs incurred in a specific year[11], which violates the FCC's prohibition against the inclusion of embedded costs in UNE rates.[12] Imposition of the surcharge would result in a retroactive adjustment and make the calculation of forward-looking costs meaningless. Just as BellSouth does not lower UNE rates in a year when a certain cost may decline (for example, 2006 hurricane costs), it may not raise them when a cost increases. If the Florida Legislature can do what BellSouth says it can and assess historic book costs as a UNE rate additive, then any state could pass a law permitting recovery of costs incurred or refund of costs saved and impose surcharges on credits. The federal TELRIC regime would thus be undone, state by state, piece by piece.

B. BELLSOUTH'S PROPOSAL TO ADD AN ADDITIONAL CHARGE TO APPROVED UNE TELRIC RATES VIOLATES FEDERALLY-MANDATED TELRIC PRICING RULES.

Via the proposed charge, BellSouth is attempting to reprice UNEs to include historic book costs beyond what it included in its forward-looking cost calculation when

[11] 47 C.F.R.§ 51.505(d)(1). BellSouth specifically included costs related to storm damage in its TELRIC cost studies upon which its TELRIC rates are based . See, BellSouth's Capital Cost Calculator, attachment to BellSouth response to CompSouth Interrogatory No. 12(b).
[12] Wood testimony at 14.

this Commission set BellSouth's UNE rates using the required TELRIC methodology. Such pricing would conflict with and be inconsistent with federal pricing regulations, as approved by the United States Supreme Court in *Verizon,* and thus would be impermissible and preempted by federal law.

As the United States Supreme Court explained in *Louisiana Public Service Commission v. Federal Communications Commission,* 476 US 355, 368-369 (1986):

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Roth Packing Co., 430 U.S. 519 (1977)*, when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland,* 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn. v. De la Cuesta,* 458 U.S. 141 (1982); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984).[13]

Thus, when state law conflicts or interferes with federal law, as in this instance, state law must give way. *Teper v. Miller*, 82 F.3d 989, 993 (11th Cir. 1996).

[13] Alternative cites omitted. As the FCC held: "[A] state may not impose any requirement that is contrary to the terms of sections 251 through 261 . . .." *In the Matter of the Public Utility Commission of Texas, et al.*, CCBP01 96-13, 96-14, 96-16, 96-19 (Oct. 1997). In this case, the FCC preempted state law which would have required competitors to provide a certain percentage of service using facilities not belonging to the incumbent. One of the FCC's reasons for preemption was that the build-out requirements imposed a financial burden that would prohibit entities from providing service.

Federal law preempts state law in three situations, each of which is present in this case. The three categories of preemption discussed below are not rigidly distinct and they may overlap. As the United States Supreme Court has said: "field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." *English v. General Electric Co.,* 496 US 72, 79, n.5 (1990).

The United States Supreme Court described the three preemption situations in *English* at 78-79:

1. Preemption exists when Congress explicitly defines the extent to which its enactment preempts state law. *English* at 78-79. This is "express" preemption. *Teper* at 993.

The question of state preemption is addressed in three sections of the Telecom Act. In each, it is made clear that the limited role of state commissions in implementing the Telecom Act is not preempted *so long as* any state regulation is not inconsistent with federal law. For example, 47 U.S.C. § 251(d) relates to implementation of the Telecom Act's interconnection requirements. Subsection (3) provides that state access regulations are not preempted *so long as* any such regulations are consistent with the requirements of the section and do not prevent implementation of the section or interfere with the purposes of the section. If a state promulgated an access requirement inconsistent with section 251, it would be preempted pursuant to section 251(d).

47 U.S.C. § 261 contains two preemption provisions. Subsection (b) states that nothing in the Telecom Act will prevent a state from enforcing regulations prescribed prior to the Telecom Act or prescribing regulations after the Telecom Act "if such

regulations are not inconsistent with the provisions of this part." Similarly, subsection (c) does not preclude a state from enacting requirements after the Telecom Act "as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part."

Through these provisions, Congress has prescribed that a state may not take any action, either in enforcing past regulations or in enacting new regulations, which are inconsistent with any of the Telecom Act's provisions. BellSouth's attempt to impose additional charges on UNEs would be preempted because they do not comport with the specific criteria expressly listed in section 251, which requires UNE rates to be based on TELRIC costing principles.

2. State law is preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively. *English* at 79. This is "field" preemption. *Teper* at 993.

Congress' intent may be inferred from a "'scheme of federal regulation...so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it....'" *English* at 79, *quoting, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Through its enactment of the 1996 Telecom Act, Congress intended to occupy the field of local telecommunications regulation as to all areas the Telecom Act addresses[14], including UNE pricing:

> In the Act, Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission (FCC). While the state utility commissions

[14] "Congress's intent to preempt can be impled from the structure and purpose of a statute even if it is not unambiguously stated in the text." *Teper* at 993, *citing, Jones v. Rath Packing Co.*, 430 U.S. 519, 523-25 (1977).

> were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act"; it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.

Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission, 359 F.3d 493, 494 (7th Cir. 2004), citation omitted. As the United States Supreme Court stated in *Iowa Utilities Bd.* at 730, n.6, the federal government has unquestionably "taken the regulation of local telecommunications competition away from the States." The *Indiana Bell* court, at 497, held: "It is uncontroverted that in the Act, Congress transferred broad authority from state regulators to federal regulators. . . ."

In the area of UNE pricing methodology, Congress clearly intended to occupy the field when it directed the FCC to design the appropriate pricing methodology. In *Verizon,* the United States Supreme Court affirmed "the FCC's jurisdiction to 'design a pricing methodology' to *bind* state ratemaking commissions. . . ." *Verizon* at 494, emphasis added, citations omitted. The binding impact of TELRIC on the states leaves no room for the consideration of matters expressly eliminated from (such as embedded costs) or outside of the required TELRIC methodology. The Commission's imposition of a charge, regardless of what it is called, that has the effect of increasing approved TELRIC rates would run afoul of the rationale behind TELRIC pricing and Congress' occupation of the pricing field. It would require the state to encroach on and regulate in an area which Congress has intended to exclusively occupy.

3. **State law is preempted if it conflicts with federal law.** *English* at 79. This is "conflict" preemption. *Teper* at 993.

Conflict preemption occurs when "state and federal law actually conflict, so that it is impossible for a party simultaneously to comply with both, or state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Teper* at 993, *citing, Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also, Fidelity Federal Savings & Loan Assn,* 458 U.S. at 153, *quoting, Hines*, 312 U.S. at 67; *Jones v. Rath Packing Co.,* 430 US 519, 525-526 (1977). State law constitutes an "obstacle" if it interferes with the way in which the federal law was designed to reach that goal. *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 103 (1992).

BellSouth's proposed storm surcharge would conflict with federal TELRIC pricing rules because it would impermissibly increase the price for UNEs to rates higher than TELRIC.

4. Case law and regulatory decisions demonstrate that the purposed surcharge on UNEs is inconsistent with and preempted by federal law.

The principles of preemption outlined above have often been applied when state law or regulation conflicts with the Telecom Act. The cases discussed below demonstrate that when a state law or action conflicts or interferes with the federal Telecom Act, it cannot stand.

In a case emanating from this Commission, *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 1286 (N.D. Fl. 2000), *affm'd,* 298 F.3d 1269 (11th Cir. 2002), the court invalidated the pricing methodology (TSLRIC[15]) this Commission employed to set UNE prices because it was "inconsistent with governing FCC regulations." *Id.* at 1290. The court held: "[T]he Florida Commission's decision on

[15] TSLRIC stands for total service long-run incremental cost.

pricing is invalid because it is contrary to the Telecommunications Act of 1996 as interpreted by the FCC." *Id.* at 1294. In its discussion of the TELRIC pricing methodology, the court found that prices for unbundled network elements

> must be based on cost that reasonably would be incurred to provide the service or network element at issue prospectively, not cost that may have been incurred historically but would not reasonably be incurred to provide the service or network element prospectively. As the parties have said, prices must be based on "forward-looking," not historical, cost.

Id. at 1292. Because the Commission used a different methodology than that *required by the FCC,* the resulting prices were invalid. Similarly, a surcharge in addition to approved TELRIC rates, by its very nature, would result in a rate above TELRIC and would directly conflict with federal pricing requirements.

In *WorldCom, Inc. v. Connecticut Department of Public Utility Control*, 375 F.Supp. 2d 86 (D. Conn. 2005), the court found that pricing was specifically within the scope of the Telecom Act: "Pricing methodology is explicitly within the scope of the 1996 Act . . . ." The court invalidated prices the Connecticut Commission set because those prices were based on historical costs and thus failed to comply with the Telecom Act's pricing methodology. In invalidating the rates, the court said: "Given the explicit direction of Congress in the 1996 Act that all rates for UNEs should be based on the TELRIC methodology, and the explicit prohibition by Congress against the inclusion of historical costs or price subsidies in the UNE rates, the Court finds that the rates established under the CAST [tariff] violate both subpart (B) and (C) of § 251(D)(3)." The same would be true of an additional charge on TELRIC rates.[16]

In *AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co.*, 349 F.3d 402 (7th Cir. 2003), the Seventh Circuit affirmed a decision of the United States District Court for the Northern District of Illinois invalidating a state pricing plan that was in conflict with TELRIC rules. The court found that an Illinois law that established pricing rules which looked at only two factors in isolation was inconsistent with federal pricing rules and therefore preempted. The court held that: "That approach conflicts with the 1996 Act and the telric [sic] methodology and is therefore preempted." *Id.* at 411.

In *Verizon New England, Inc. v. New Hampshire Public Utilities Commission*, 2005 WL 1984452 (D.N.H. 2005), the court vacated an order of the New Hampshire Commission (NHC) because the rates the NHC set failed to comply with the TELRIC methodology. At issue was the cost of capital used to set rates. The NHC based the cost of capital on historical data which violated the TELRIC requirement that costs be forward looking. The court set aside the rates.

In *Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*, 359 F. 3d 493 (7th Cir. 2004), Indiana Bell (SBC) challenged a remedy plan the Indiana Commission (IURC) ordered as a condition required for SBC's entry into the long distance market. The court framed the preemption question this way:

> What the IURC has done is preempted *if Congress has occupied the field so thoroughly "as to make reasonable the inference that Congress left no room for the States to supplement it."* *Cipollone,* 505 U.S. at 516, 112 S.Ct. 2608. It is also preempted where what the state has done is

[16] The fact that the increased charge is for a limited period of time does not cure its infirmity. As Ms. Blake admitted in her deposition, the FCC has made no exception for an increase in TELRIC rates that applies for a limited time.

> an obstacle to the execution of Congress's purpose or frustrates that purpose by interfering with the methods Congress selected to achieve a federal goal even when the state goal is identical to the federal goal:
>
> In determining whether state law stands as an obstacle to the full implementation of federal law, it is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach the goal.
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> *Gade,* 505 U.S. at 103, 112 S.Ct. 2374 (citations omitted); *see also Crosby v. National Foreign Trade Council,* 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).

Indiana Bell at 497, emphasis added. The Seventh Circuit found that the IURC could not impose a remedy plan upon SBC even though the IURC attempted to couch the plan in terms of an order related to local service. The court held:

> The problem is that the procedure for entry into the local-service market is spelled out in some detail in sections 251 and 252. The IURC order bumps up against those procedures and thus interferes with the method the Act sets out for the application process for long-distance service in section 271 and, more dramatically, with the process for interconnection agreements for local service under sections 251 and 252.

Id. The imposition of a charge that has the effect of increasing TELRIC rates "bumps up against" the FCC's required TELRIC pricing rules.

In *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission,* 2006 WL 3103677, a state commission's ruling was preempted because it conflicted with FCC regulations. In that case, SBC contested an order of the Missouri Commission which required it to combine switching with § 251 facilities so as to create the UNE Platform (UNE-P). SBC argued that such a requirement was directly contrary to the FCC's holding in the *TRRO*[17] that prohibited the leasing of switching needed for UNE-P. The Missouri order permitted CLECs to use the same combination of facilities which made up UNE-P in conflict with the FCC's ruling. The court found the Missouri Commission's order preempted: "[T]he Court concludes that the Arbitration Order conflicts with and is preempted by federal law to the extent it requires SBC to provide unbundled access to switching and the UNE Platform."

In addition, various state commissions have concluded that prices that are inconsistent with TELRIC pricing principles cannot stand. For example, the Georgia Public Service Commission[18] (GPSC) found that BellSouth could not add a surcharge (residual recovery requirement or RRR) to its TELRIC costs for loops and switching intended to recover embedded costs.[19] The GPSC found that this charge would simply add an amount to TELRIC costs that would result in the recovery of historical, embedded costs. The GPSC[20] rejected this surcharge because "[t]he pricing standards contained in the Act require that rates be based on cost, but not on historical or embedded costs."[21]

The Virginia State Corporation Commission (VSCC) addressed the TELRIC issue when dealing with a complaint from Cavalier Telephone, LLC (Cavalier).[22] Cavalier

[17] Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005).
[18] *In re: Review of Cost Studies, Methodologies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications Services, Order Establishing Cost-Based Rates*, Docket No. 7061-U (GA PSC October 21, 1997).
[19] BellSouth proposed the RRR to recover the difference between forward looking and embedded costs, exactly what it proposes here.
[20] In a related proceeding, *In re: Generic Proceeding to Establish Long-Term Pricing Policies for Unbundled Network Elements*, Order, Docket No. 10692-U (GA PSC Feb. 1, 2000), the GPSC rejected BellSouth's request to add an additional charge on certain loop-port combinations, which BellSouth claimed represented "reasonable profit," as contrary to FCC UNE pricing rules.
[21] *Id.* at 21.
[22] *Petition of Cavalier Telephone, LLC for Injunction Against Verizon Virginia Inc. for Violations of Interconnection Agreement and for Expedited Relief to Order Verizon Virginia to Provision Unbundled Network Elements in Accordance with the Telecommunications Act of 1996*, Final Order, Case No. PUC-2002-00088 (VSCC Jan. 28, 2004) (*Cavalier Final Order*).

filed a complaint regarding Verizon Virginia Inc.'s (Verizon) refusal to provision DS1 UNE loops unless Cavalier executed an amendment that included a $1,000 surcharge for DS1 network modifications and other time and materials charges.[23] In its report, the VSCC Staff stated that the VSCC's previously-established TELRIC rates "address all of the activities required of Verizon to provision DS-1 UNE loop orders"[24] and that "Verizon's DS-1 UNE loop provisioning policy conflicts with the Total Element Long Run Incremental Cost ("TELRIC") pricing assumptions adopted by the Commission."[25] The VSCC ruled that these costs were addressed in the TELRIC rates for high-capacity UNE loops and were applicable until the TELRIC rates were changed or the interconnection agreement was amended or replaced.[26]

Each of the cases discussed above illustrates that state action, whether through legislative or agency action, that results in deviation from TELRIC pricing is inappropriate. The same would be true if the Commission approved BellSouth's proposal to surcharge UNEs.

IV. CONCLUSION

Imposition of a surcharge, in addition to Commission-approved TELRIC rates, regardless of its name or duration, is inappropriate under state law and violative of federal TELRIC pricing principles. Such a charge would have the effect of increasing TELRIC rates and would therefore be in conflict with and inconsistent with federal pricing principles. The Commission should exercise its discretion under state law to reject BellSouth's proposal.

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[23] *Id.* at 5.
[24] *Id.* at 7.
[25] *Id.* at 2.
[26] Id. at 8.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Prehearing Memorandum of Law was furnished by electronic and U.S. Mail this 30th day of November, 2006 to:

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