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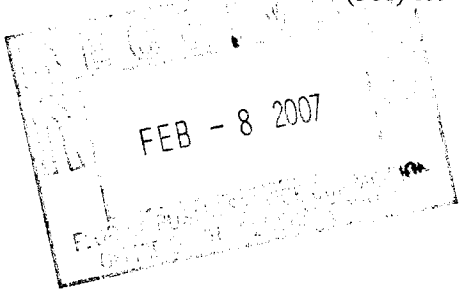

February 8, 2007

Via Hand Delivery

William McCool
Clerk of the Court
United States District Court
Northern District of Florida
111 N. Adams Street
Tallahassee, FL 32301-7730

060598-TL

Re: Competitive Carriers of the South, Inc. and NuVox Communications, Inc. v. Lisa Polak Edgar, Chairman of the Florida Public Service Commission, in her official capacity et al.

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
RCA ____
SCR ____
SGA ____
SEC ____
OTH Marguerite

Dear Mr. McCool:

Enclosed for filing please find a Civil Cover Sheet, Complaint, and Rule 7.1 Disclosure Statement. Also enclosed is an extra set of these documents for you to date stamp. Finally, enclosed is the filing fee of $350.00 to open a civil case.

Thank you for your attention to this matter. If there are any additional requirements to initiate this proceeding, please let me know.

Sincerely,

Vicki Gordon Kaufman
Florida Bar No. 286672

VGK/pg
Enclosures

cc: Adam Teitzman
James Meza III
Charles J. Beck

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Competitive Carriers of the South, Inc., and NuVox Communications, Inc.

(b) County of Residence of First Listed Plaintiff Leon
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Vicki Gordon Kaufman, 118 N. Gadsden Street, Tallahassee, FL 32301; (850) 681-3828

DEFENDANTS

Lisa Polak Edgar, in her official capacity as Chairman of the Fla. Public Service Commission, and Matthew M Carter II and Katrina McMurrian, in their official capacities as Commissioners

County of Residence of First Listed Defendant Leon
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

See attachment

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury

PERSONAL INJURY
- ☐ 362 Personal Injury - Med. Malpractice
- ☐ 365 Personal Injury - Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 444 Welfare
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 440 Other Civil Rights

PRISONER PETITIONS
- ☐ 510 Motions to Vacate Sentence

Habeas Corpus:
- ☐ 530 General
- ☐ 535 Death Penalty
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition

FORFEITURE/PENALTY
- ☐ 610 Agriculture
- ☐ 620 Other Food & Drug
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 630 Liquor Laws
- ☐ 640 R.R. & Truck
- ☐ 650 Airline Regs.
- ☐ 660 Occupational Safety/Health
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Mgmt. Relations
- ☐ 730 Labor/Mgmt.Reporting & Disclosure Act
- ☐ 740 Railway Labor Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 810 Selective Service
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 875 Customer Challenge 12 USC 3410
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 892 Economic Stabilization Act
- ☐ 893 Environmental Matters
- ☐ 894 Energy Allocation Act
- ☐ 895 Freedom of Information Act
- ☐ 900Appeal of Fee Determination Under Equal Access to Justice
- ☒ 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (**Do not cite jurisdictional statutes unless diversity**):
28 USC 1331, 1343(3)(a)

Brief description of cause:
Federal preemption

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE
2-8-07

SIGNATURE OF ATTORNEY OF RECORD
Vicki Gordon Kaufman

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Competitive Carriers of the South, Inc., and
NuVox Communications, Inc.

v.

Lisa Polak Edgar et al. and
BellSouth Telecommunications, Inc.

Attachment to Civil Cover Sheet

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Katrina McMurrian

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For: Office of Public Counsel

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Beck.Charles@leg.state.fl.us

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMPETITIVE CARRIERS OF THE SOUTH, INC. and NUVOX COMMUNICATIONS, INC., Plaintiffs, v. LISA POLAK EDGAR, Chairman of the Florida Public Service Commission, in her official capacity; MATTHEW M. CARTER II, and KATRINA J. TEW, in their official capacities as Commissioners of the Florida Public Service Commission; and BELLSOUTH TELECOMMUNICATIONS, INC., Defendants.	Case No. _____

COMPETTIVE CARRIERS OF THE SOUTH, INC.'S AND NUVOX COMMUNICATIONS, INC.'S RULE 7.1 DISCLOSURE STATEMENT

Pursuant to Rule 7.1, Federal Rules of Civil Procedure, Plaintiffs, the Competitive Carriers of the South, Inc. (CompSouth) and NuVox Communications, Inc. (NuVox) hereby file their Disclosure Statement.

CompSouth is a Florida not-for-profit corporation. It has no parent corporation and does not issue stock.

NuVox is 100% owned by Gabriel Communications Finance Company, a privately held corporation organized under the laws of Delaware, and which is a wholly owned subsidiary of NuVox, Inc., a privately held Delaware corporation. Entities related to publicly traded Wachovia Corporation own 10% or more of NuVox, Inc.

Dated: February 8, 2007

Respectfully submitted,

Vicki Gordon Kaufman
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Moyle Flanigan Katz Raymond
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Counsel to Competitive Carriers of the South, Inc. and NuVox Communications,Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Rule 7.1 Disclosure Statement has been provided by hand delivery to the following parties on this 8th day of February, 2007:

Adam Teitzman
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0850

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c/o Nancy Sims
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Tallahassee, FL 32301

Charles J. Beck
Deputy Public Counsel
Office of Public Counsel
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400

Vicki Gordon Kaufman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COMPETITIVE CARRIERS OF THE SOUTH, INC.

and

NUVOX COMMUNICATIONS, INC.,

Plaintiffs,

v.

LISA POLAK EDGAR, Chairman of the Florida Public Service Commission, in her official capacity; MATTHEW M. CARTER II, and KATRINA J. McMURRIAN, in their official capacities as Commissioners of the Florida Public Service Commission;

and

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendants.

Case No. _____

COMPLAINT

Plaintiffs, Competitive Carriers of the South, Inc. (CompSouth) and NuVox Communications, Inc. (NuVox), by and through undersigned counsel, do hereby file this Complaint and allege the following:

NATURE OF THE ACTION

1. This action is brought to enforce federal law, including the U.S. Constitution, specifically the Supremacy Clause and Impairment of Contract Clause, and various provisions of the Telecommunications Act of 1996, including, without limitation, 47 U.S.C. §§ 251(c)(3), 252(d), and state law, including, without limitation, the state constitutional provision prohibiting impairment of contract. This matter involves a decision of the Florida Public Service Commission (FPSC) that permits BellSouth Telecommunications, Inc. (BellSouth) to increase the rates that Plaintiffs pay to BellSouth pursuant to federally-mandated interconnection agreements (ICAs). ICAs are contracts that govern the Parties' business relationships in the telecommunications market. Prices contained in the ICAs for the purchase of unbundled network elements (UNEs) – the piece parts of the telecommunications network -- are set pursuant to federal law. Federal law requires the UNE prices which the FPSC approves pursuant to federal regulatory requirements, and which BellSouth charges to Plaintiffs, to be set at Total Elemental Long Run Incremental Cost (TELRIC).

2. Defendant FPSC violated these federal requirements by permitting Defendant BellSouth to charge Plaintiffs prices for UNEs in excess of TELRIC. Defendant FPSC violated federal requirements by permitting Defendant BellSouth to increase ICA prices without an amendment to the ICAs. Defendant FPSC violated

federal and state law by impairing the Parties' contracts and by permitting BellSouth to charge arbitrary, capricious and unreasonable rates for UNEs. The FPSC's action violates its authority under 47 U.S.C. §§ 251, 252; Article I, Section 10 of the U.S. Constitution; Chapter 364, Florida Statutes; and Article I, Section 10 of the Florida Constitution.

3. Plaintiffs seek a ruling from this Court finding that Final Order No. PSC-07-0036-FOF-TL[1] is invalid and of no force and effect because it violates federal and state law and is preempted by federal law, and requiring a refund of all monies paid, with interest, pursuant to the Final Order.

4. The FPSC issued the *Final Surcharge Order* as a result of a petition filed by BellSouth. In its petition, BellSouth sought to assess and collect a $.50 cent charge on UNEs based on a state statute. This statute, as applied by the FPSC in its decision, violates federal law which preempts the increased UNE charges BellSouth proposed and which the FPSC approved. Thus, the FPSC's *Final Surcharge Order* violates the Supremacy Clause of the United States Constitution[2], as well as the federal[3] and state[4] prohibitions against impairment of contract. The *Final Surcharge Order* is also arbitrary, capricious, and unreasonable. The state statute[5], pursuant to which the charge was approved, is unconstitutional as applied by Commissioner Defendants.

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[1] *Petition to Recover 2005 Tropical System Related Costs and Expenses, by BellSouth Telecommunications, Inc.*, Docket No. 060598-TL (Jan. 10, 2007) ("*Final Surcharge Order*") (Exhibit A).
[2] Art. VI., U.S. Const.
[3] Art. I, § 10, U.S. Const.
[4] Art. I. § 10, Fl. Const.
[5] Section 364.051(4), Florida Statutes.

PARTIES

5. Plaintiff, CompSouth is a not-for-profit corporation organized under the laws of Florida, comprised of competitive telecommunications providers. CompSouth members are Competitive Local Exchange Carriers (CLECs) who compete with incumbent carriers, like BellSouth, to provide telecommunications services to retail end users.

6. NuVox is a corporation organized under the laws of Delaware with its principal place of business at 2 Main Street, Greenville, South Carolina 29601. NuVox is a CLEC and provides telephone services in Florida in competition with BellSouth.

7. Defendant BellSouth is a Georgia corporation with its principal place of business in Georgia. BellSouth has offices in Florida located at 150 South Monroe Street, Tallahassee, FL 32301. BellSouth is a "Local Exchange Carrier" within the meaning of 47 U.S.C. § 153(26). BellSouth is an "Incumbent Local Exchange Carrier" under the Act. BellSouth provides local exchange, exchange access, and certain intrastate long-distance services within Florida.

8. Defendant Lisa Polak Edgar, Chairman of the FPSC, serves on the FPSC. Chairman Edgar's business address is 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

9. Defendant Matthew M. Carter II, Commissioner of the FPSC, serves on the FPSC. Commissioner Carter's business address is 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

10. Defendant Katrina J. McMurrian, Commissioner of the FPSC, serves on the FPSC. Commissioner McMurrian's business address is 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

11. Plaintiffs sue each Commissioner of the FPSC in his or her official capacity so that the full FPSC is bound by the final judgment in this case. Plaintiffs refer to the Commissioners collectively as the Commissioner Defendants.

12. Pursuant to §86.091, Florida Statutes, two copies of this Complaint have been served on the Attorney General of Florida via certified mail.

JURISDICTION AND VENUE

13. This is a civil action arising under federal and state law.

14. The Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C. § 1331 because it raises a federal question. The Court has subject matter jurisdiction over the action pursuant to the Supremacy Clause of the U.S. Constitution and 28 U.S.C. § 1343(a)(3).

15. Jurisdiction is also appropriate under 28 U.S.C. § 1332, because Plaintiff, NuVox, the Commissioner Defendants, and Defendant BellSouth are citizens of different states and the amount in controversy exceeds $75,000.

16. This action is also brought pursuant to 28 U.S.C. § 2201 et seq.

17. This Court has supplemental jurisdiction over the state law claims herein pursuant to 28 U.S.C. § 1367, because they arise out of the same set of operative facts and regard the same proceeding from which this Complaint arose.

18. Venue in this District is proper under 28 U.S.C. § 1391(b). All Commissioner Defendants perform their official duties in Tallahassee, Florida in accordance with the laws of Florida. Defendant BellSouth transacts a substantial amount of business in this District. A substantial part of the events or omissions giving rise to this dispute occurred in this District.

BACKGROUND

19. **Federal law**. The Telecommunications Act of 1996[6] restructured the local telecommunications market and ended the monopolies granted to local exchange carriers (LECs), like BellSouth, to provide local service.[7] One of the Act's main obligations requires incumbents, such as BellSouth, to share their networks with competitors, such as CompSouth members, via the leasing of the piece parts of the incumbent's network – unbundled network elements or UNEs.[8]

20. Federal law requires that rates that incumbents, like BellSouth, charge to competitors, like CompSouth members, for UNEs must be based on cost.[9] Such rates, as well as other terms and conditions, must be included in ICAs, which are either negotiated or the subject of arbitration proceedings before state regulatory commissions.[10]

21. The Federal Communications Commission (FCC), pursuant to federal law, has adopted the TELRIC costing methodology to set UNE prices. This is the method that state regulatory commissions *must* use to set cost-based UNE rates under the Act. The

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[6] Pub. L. No. 104-104, 110 Stat. 56, codified at 47 USC §§ 151 et seq. (the Act).
[7] *AT&T Corp. v. Iowa Utilities Board*, 525 US 366, 370 (1999).
[8] 47 USC § 251(c)(3).
[9] 47 USC § 252(d)(1)(A).
[10] 47 USC § 252(a), (b).

United States Supreme Court has upheld the FCC's authority to design and designate a pricing methodology.[11] The FCC's authority to require state commissions to set rates using the TELRIC methodology has been upheld by the United States Supreme Court.[12] In its state UNE pricing proceeding, Defendant Commissioners recognized that they were required to use the TELRIC pricing methodology to set UNE rates to be incorporated into ICAs.[13]

22. The FCC's TELRIC methodology[14] 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.[15]

23. The TELRIC methodology explicitly prohibits the use or inclusion of embedded costs in UNE rates.[16] 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." Federal law expressly prohibits the inclusion of historic book

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[11] *Iowa Utilities Bd.* at 384-385.
[12] *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002).
[13] *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.Fla. 2000), *affm'd*, 298 F.3d 1272 (11th Cir. 2002).
[14] *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); 47 C.F.R. § 51.505.
[15] 47 CFR § 51.505(b).
[16] 47 CFR § 51.505(d)(1); *WorldCom, Inc. v. Connecticut Department of Public Utility Control*, 375 F. Supp. 2d 86 (D. Conn. 2005).

costs and expenses related to repair, replacement or restoration of lines, plants or facilities damaged in the past in UNE rates.

24. **State law**. Section 364.051(4), Florida Statutes, permits incumbent telecommunications companies to elect the more flexible price cap regulation in lieu of traditional rate of return regulation. This state statute generally governs retail (not wholesale) rates. The statute permits incumbents to increase intrastate rates only in limited circumstances and only after an evidentiary showing of substantially changed circumstances.

25. Section 364.051(4)(b), Florida Statutes, provides that damage that has occurred to an incumbent's lines, plants or facilities as a result of a named tropical storm or hurricane automatically meets the "changed circumstances" criterion. In that circumstance, § 364.051(4)(b)5 permits the Defendant Commissioners to allow the incumbent to impose a charge not greater than 50 cents per month per customer line for no more than 12 months to recover storm-related costs. This charge is intended to allow incumbents to recover historical costs incurred in making repairs related to storm damage.

26. In apparent recognition of the jurisdictional differences in the Commissioner Defendants' authority over retail and wholesale rates, § 364.051(4)(b)6, Florida Statutes, states:

> 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, its retail nonbasic telecommunications service customers, and, *to the extent the commission*

determines appropriate, its wholesale loop unbundled network element customers.[17]

That is, the statute directs the Commissioner Defendants to determine if an increase on wholesale charges is appropriate.

PROCEEDINGS AT THE FPSC

27. On September 1, 2006, BellSouth filed a petition at the FPSC seeking to recover 2005 hurricane and tropical system related costs and expenses based on the state statute described above. BellSouth sought FPSC approval to increase the wholesale rates it charges to competitive local exchange carriers, such as CompSouth members and NuVox.

28. The FPSC granted intervention to CompSouth[18] and to NuVox.[19]

29. On November 20, 2006, pursuant to FPSC Order No. PSC-06-0941-PCO-TL, the Plaintiffs filed a pretrial memorandum addressing the federal preemption issue. A copy of Plaintiffs' memorandum is attached hereto as Exhibit B. Defendant BellSouth also filed a pretrial memorandum.

30. On December 6, 2006, a hearing was convened and the Parties' prefiled testimony was entered into the record without cross examination, as was all discovery conducted in the case. At no time in the FPSC proceeding, did BellSouth proffer a TELRIC cost study supporting the rate increase it sought. At the Parties' request and in lieu of an evidentiary hearing, the FPSC conducted oral argument.

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[17] Emphasis added.
[18] Order No. PSC-06-0792-PCO-TL (Sept. 22, 2006).
[19] Order No. PSC-06-0790-PCO-TL (Sept. 22, 2006).

31. On December 13, 2006, the FPSC Staff issued its Recommendation for the FPSC's consideration at its regularly scheduled Agenda Conference.[20] As to the federal TELRIC preemption issue, the Recommendation contained a Primary Recommendation and an Alternative Recommendation.

32. The Primary Recommendation stated, in part,:

> *Given that the charge at issue is a rate increase, primary staff believes that applying a line-item charge to wholesale loop unbundled network element customers violates the TELRIC pricing rules, and therefore is preempted by federal law.* Primary staff believes that the issue to be addressed by the Commission is not whether as a result of the 2005 storm season BellSouth's TELRIC rates are rendered unjust and unreasonable, but rather does the Commission have the jurisdiction to provide BellSouth with a remedy, specifically allowance of a line-item charge on wholesale UNE loops.
>
> The TELRIC methodology measures future costs to arrive at forward-looking rates that are both just and reasonable. Primary staff believes that the collection of a Commission approved line-item charge resulting from costs incurred in a previous year, clearly violates the tenets of the TELRIC methodology by allowing BellSouth to recover embedded costs.
>
> In finding that TELRIC is the appropriate methodology for pricing wholesale UNE loops, the FCC determined that years with additional costs, as well as years with additional savings would not be incorporated into the pricing of wholesale UNE loops. Although a specific year in which 6 named tropical storms impact BellSouth's territory may certainly be considered unforeseeable, the idea that there will be outlier years where unforeseen events may impact the cost of doing business certainly is not. The FCC determined that TELRIC is the appropriate pricing methodology and did not provide exceptions for catastrophic occurrences such as earthquakes, hurricanes, wildfires, etc. Furthermore, if BellSouth believes that increased storm activity in Florida has changed the cost of provisioning UNE loops on a going forward basis, BellSouth may petition the Commission to undertake a rate proceeding.

[20] Staff Recommendation (Exhibit C).

Moreover, even if you accept alternative staff's premise that certain events can result in costs that are so enormous they render the TELRIC rates unjust and unreasonable, it is not within a state's jurisdiction to remedy these results with a rate increase based on embedded costs. In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999), the United States Supreme Court held that the FCC has jurisdiction to design a pricing methodology to be followed by the states. Additionally, in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) the Supreme Court upheld the FCC's determination that TELRIC was an appropriate pricing methodology to implement §252(d) of the Act. *Therefore, primary staff believes that the FCC determined, and the Supreme Court upheld, that an ILEC may not recover its embedded costs in the pricing of wholesale UNEs. Primary staff believes allowing BellSouth to assess a line-item charge to wholesale UNE loops and, as a result, recover a portion of its costs for the year 2005, constitutes a clear violation of the TELRIC pricing methodology as set forth by the FCC.*

BellSouth and alternative staff may have a valid argument that in years where catastrophic events occur, which result in significant infrastructure damage, the TELRIC pricing methodology results in an inequitable cost distribution. However, a state commission is not the appropriate entity to address this concern. The FCC is the regulatory body that has been designated by Congress to set the pricing methodology of wholesale UNE loops.

The critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law. *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355 (1986). State law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. *English v. General Elec. Co.*, 496 U.S. 72 (1990). In *Verizon*, the Court characterized its decision in *Iowa* as "upholding the FCC's jurisdiction to 'design a pricing methodology' to bind state rate making commissions." *Verizon* at 494. Because, as discussed above, the proposed line-item charge is a rate increase based on embedded costs, primary staff believes it is not appropriate, pursuant to federal law, for the Commission to approve the proposed line-item charge for wholesale UNE loop customers.[21]

33. The alternative recommendation stated, in part,:

Alternative staff agrees that because the line charge effects a rate increase, the key question that must be answered is whether collection of

[21] *Id.* at 17-19, emphasis added.

> the line charge from wholesale UNE loop customers is permitted under federal law. Again, CompSouth contends that Federal law established the TELRIC pricing methodology to set cost-based UNE rates and that this methodology excludes the recovery of "embedded costs." Therefore, allegedly, any increase in rates by this Commission to recover "historic book costs and expenses related to repair, replacement, restoration of lines, plants or facilities," would be preempted by federal law. Nonetheless, alternative staff believes that recovery for these catastrophic events was not contemplated by TELRIC and is therefore not preempted by the federal pricing methodology.[22]

34. The Staff Recommendation does not address the issue Plaintiffs raised regarding the federal requirement for an ICA amendment to effect a change in UNE rates. On that issue, it states: "Staff believes the parties offer no reason for the effective and ending dates of any charges pertaining to wholesale UNE Loops to differ from those stipulated in the language for retail lines."[23]

35. On December 19, 2006, the FPSC voted to adopt the Alternative Staff Recommendation as to the TELRIC issue.

36. The *Final Surcharge Order* was rendered on January 10, 2007. While the FPSC found that the charge at issue was a rate increase, the *Final Surcharge Order* found TELRIC inapplicable to the increase because the costs were "not contemplated by TELRIC. . . ."[24] The *Final Surcharge Order* does not address the requirement for an amendment to the ICAs to effectuate a rate change, despite the fact that Plaintiffs raised this issue.[25] It simply reiterates the Staff Recommendation on this point.[26]

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[22] *Id.* at 19.
[23] *Id.* at 33.
[24] *Final Surcharge Order* at 14.
[25] *Id.* at 25.
[26] *Id.*

37. Defendant BellSouth has indicated that it intends to begin billing the charge to Plaintiffs beginning February 1, 2007.

COUNT I – FEDERAL TELECOMMUNICATIONS ACT

The FPSC's Decision is Contrary to Federal Law Because It Increases UNE Rates Above Federally Mandated TELRIC Rates

38. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 37 of this Complaint, as though fully set forth herein.

39. Plaintiffs are entitled, under 47 U.S.C. § 251(c)(3) and 47 U.S.C. § 252(d), as implemented by the FCC in 47 C.F.R. § 51.505 and related orders and court decisions, to purchase UNEs at TELRIC rates pursuant to the terms of their ICAs with Defendant BellSouth.

40. This proceeding was not treated as nor processed as a TELRIC cost proceeding.[27] BellSouth filed no TELRIC-compliant cost study and refused to provide any TELRIC-compliant cost information when such information was sought in discovery. Further, BellSouth's currently approved TELRIC rates include an allowance for forward-looking storm costs. BellSouth's double counting of such costs is also violative of federal costing requirements.

41. The *Final Surcharge Order,* authorizing BellSouth to charge more than TELRIC rates for UNEs that BellSouth is obligated to make available to Plaintiffs, violates 47 U.S.C. §§ 251(c)(3), 252(d), 47 C.F.R. § 51.505, and the FCC's implementing orders as well as court decisions.

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[27] *See, i.e.*, footnote 13, *supra.*

42. Commissioner Defendants' *Final Surcharge Order* providing that BellSouth is authorized to charge more than TELRIC rates for UNEs evidences an erroneous interpretation of a provision of law in violation of § 120.68(7)(d), Florida Statutes, and contravenes or violates a constitutional or statutory provision in violation of § 120.68(7)(e), Florida Statutes.

COUNT II – FEDERAL TELECOMMUNICATIONS ACT

The FPSC's Decision is Contrary to Federal Law Because It Effects An Increase in UNE Rates Without an Amendment to the Parties' Interconnection Agreements

43. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 37 of this Complaint, as though fully set forth herein.

44. Plaintiffs are entitled under 47 U.S.C. § 251(c)(3) and 47 USC § 252 to purchase UNEs pursuant to the prices, terms and conditions set out in their ICAs. The Act provides a process via which parties achieve an ICA which then governs their business relationship.[28] The Act provides for agreements arrived at through negotiation or mediation.[29] If an agreement is not reached via negotiation or mediation, the Act provides for compulsory arbitration.[30] Once an agreement is executed, it is submitted to the state regulatory commission for approval.[31]

45. Plaintiffs are entitled to purchase UNEs pursuant to their existing approved ICAs until such ICAs are replaced by the Parties (either voluntarily or through arbitration) and the FPSC approves the new ICAs. Commissioner Defendants' *Final*

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[28] *See*, 47 USC § 252.
[29] *Id.* § 252(a).
[30] *Id.* § 252(b).
[31] *Id.* § 252(e).

Surcharge Order illegally and unilaterally alters approved ICAs and sanctions a de facto rate increase for the purchase of UNEs outside of the negotiation and/or arbitration process the Act mandates. Defendant BellSouth's increased charges for UNE rates alters the ICAs (the contracts between the parties) by increasing the UNE rates Defendant BellSouth may charge for the UNEs it is obligated to provide to Plaintiffs pursuant to federal law. Absent an explicit provision to the contrary, the Parties are bound by the terms and conditions of the ICAs. Unless and until these contracts are amended with the consent of the Parties or through arbitration, the rates Plaintiffs are charged cannot be unilaterally increased.

46. Commissioner Defendants' *Final Surcharge Order,* providing that increased rates may be charged to Plaintiffs that are outside the requirements of the valid ICAs between Plaintiffs and BellSouth, and which are not TELRIC compliant, violates 47 U.S.C. §§ 251(c)(3), 252, and the FCC's implementing rules and orders. Defendant FPSC does not have authority under 47 U.S.C. §§ 251 and 252 to unilaterally amend existing, approved interconnection agreements.

47. Commissioner Defendants' *Final Surcharge Order* authorizing a rate amendment outside of the requirements of the ICAs evidences an erroneous interpretation of a provision of law in violation of § 120.68(7)(d), Florida Statutes, and contravenes or violates a constitutional or statutory provision in violation of § 120.68(7)(e), Florida Statutes.

COUNT III – IMPAIRMENT OF CONTRACT

Commissioner Defendants' Interpretation of the State Statute is Contrary to Federal and State Law Because it Impairs Plaintiffs' Contractual Rights

48. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 37 of this Complaint, as though fully set forth herein.

49. Article I, § 10 of the U.S. Constitution provides that: "No State shall ... pass any ... Law impairing the Obligation of Contracts ...." Article I, § 10 of the Florida Constitution prohibits laws "impairing the obligations of contracts. . . ."

50. Plaintiffs have contractual rights defined by their TELRIC-compliant ICAs with BellSouth. The ICAs govern the conduct of Plaintiffs' and Defendant BellSouth's business relationships, including the rates Plaintiffs pay to BellSouth for UNEs. Plaintiffs are entitled, pursuant to federal and state constitutional guarantees, to proceed under those contracts without the FPSC's unilateral revision of the terms of the agreements.

51. Commissioner Defendants' interpretation of § 364.051(4)(b)6, Florida Statutes, so as to require Plaintiffs to pay more than the contractual rates for UNEs interferes with and impairs the existing interconnection contracts between Plaintiffs and Defendant BellSouth. This impairment is substantial and increases Plaintiffs' costs.

52. Commissioner Defendants' *Final Surcharge Order* permits Defendant BellSouth to unilaterally alter its contracts with Plaintiffs and violates the federal and state constitutional prohibitions against impairment of contracts.

53. Commissioner Defendants' *Final Surcharge Order* evidences an erroneous interpretation of law in violation of § 120.68(7)(d), Florida Statutes, and

contravenes or violates constitutional provisions in violation of § 120.68(7)(e), Florida Statutes.

COUNT IV – FEDERAL TELECOMMUNICATIONS ACT

Commissioner Defendants' Decision is Contrary to Federal Law and State Law Because The Increase in UNE Rates Is Arbitrary, Capricious, and Unreasonable

54. Plaintiffs incorporate into this Count, by reference thereto, paragraphs 1 through 37 of this Complaint, as though fully set forth herein.

55. 47 USC § 252(d) of the Act requires that rates for elements and for interconnection provided under § 251(c) be just, reasonable and based on the cost of providing the UNE. As noted above, the FCC has established pricing rules to implement this § 252(d) requirement, known as TELRIC pricing rules. Plaintiffs are entitled, pursuant to these provisions as well as to FCC orders, to pay rates to incumbent Defendant BellSouth, based on the cost of the UNE purchased.

56. Commissioner Defendants' *Final Surcharge Order* permits Defendant BellSouth to collect charges which have no basis or relation to the cost of repairing the UNEs Plaintiffs purchase and thus violates 47 U.S.C. §§ 251(c) and 252(d), as well as the arbitrary and capricious standards of state and federal law. BellSouth is prohibited by 47 U.S.C. §§ 251 and 252 from imposing rates, terms or conditions on any CLEC, including Plaintiffs, which are unjust or unreasonable. Thus, BellSouth is not permitted to charge Plaintiffs UNE rates which have no relationship to cost and which are not the result of a TELRIC-compliant cost study.

57. Commissioner Defendants' *Final Surcharge Order* permits BellSouth to charge rates that are excessive, unjust, and unreasonable, and thus violates 47 U.S.C. §§ 251 and 252.

58. Commissioner Defendants' *Final Surcharge Order* that permits BellSouth to collect arbitrary and capricious charges which are unrelated to cost, is not based on competent, substantial evidence in violation of § 120.68(7)(b), Florida Statutes, evidences an erroneous interpretation of a provision of law in violation of § 120.68(7)(d), Florida Statutes, and contravenes or violates a constitutional or statutory provision in violation of § 120.68(7)(e), Florida Statutes.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court grant the following relief:

1. Declare that the *Final Surcharge Order,* which increases the rates Plaintiffs pay for UNEs, is contrary to federal law because it imposes UNE rates which exceed TELRIC, in violation of 47 USC §§ 251(c)(3), 252(d) and Article VI of the U.S. Constitution;

2. Declare that the *Final Surcharge Order,* which increases the rates Plaintiffs pay for UNEs, is contrary to federal law because it results in a de facto increase in UNE rates without utilizing the required ICA amendment procedures in violation of 47 USC §§ 251(c)(3) and 252(c);

3. Declare that the *Final Surcharge Order,* which increases the rates Plaintiffs pay for UNEs as set forth in their ICAs, is contrary to federal and state law

because it impairs Plaintiffs' contractual rights in violation of Article I, § 10 of the U.S. Constitution and Article I, § 10 of the Florida Constitution;

4. Declare that the *Final Surcharge Order,* which increases the rates Plaintiffs pay for UNEs as set forth in their ICAs, is contrary to federal and state law because it is arbitrary, capricious and unreasonable in violation of 47 USC §§ 251(c) and 252(d) ;

5. Declare that Defendant BellSouth must provide UNEs to Plaintiffs at the rates contained in their ICAs;

6. Enjoin all the Defendants, and all parties acting in concert therewith, from seeking to enforce and continue implementation of the *Final Surcharge Order* against Plaintiffs;

7. Require Defendant BellSouth to refund to Plaintiffs, with interest, any and all charges collected pursuant to the *Final Surcharge Order*;

8. Grant Plaintiffs such further relief as the Court may deem just and reasonable.

Dated: February 8, 2007

Respectfully submitted,

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Counsel for Competitive Carriers of the South, Inc. and NuVox Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint has been provided by (*) hand delivery or (+) certified mail to the following on this 8th day of February, 2007:

(*) Adam Teitzman
Florida Public Service Commission
Division of Legal Services
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Tallahassee FL 32399-0850

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Office of Attorney General
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Tallahassee, FL
32399-1050

Vicki Gordon Kaufman

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to recover 2005 tropical system related costs and expenses, by BellSouth Telecommunications, Inc.	DOCKET NO. 060598-TL ORDER NO. PSC-07-0036-FOF-TL ISSUED: January 10, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER ON BELLSOUTH
STORM COST RECOVERY

BY THE COMMISSION:

TABLE OF CONTENTS

EXHIBIT A

I. Abbreviations and Acronyms

Act	Telecommunications Act of 1996
BRI	Basic Rate Interface
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CLLI	Common Language Location Identifier – identifies a switch and the city, state and building where it is located.
CO	Central Office
COLR	Carrier of Last Resort
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DS3	Digital Subscriber Line 3
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
FX	Foreign Exchange
ICB	Individual Case Basis
ILEC	Incumbent Local Exchange Carrier

ISPN	Integrated Service Digital Network
IXC	Interexchange Carrier
LEC	Local Exchange Carrier
PRI	Primary Rate Interface
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order, FCC 03-36
TRRO	Triennial Review Remand Order, FCC 04-290
UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform

II. Case Background

On September 1, 2006, BellSouth Telecommunications Company, Inc. (BellSouth, or company), filed a Petition to Recover 2005 Tropical System Related Costs and Expenses sustained as a result of the six named tropical storm systems. On September 20, 2006, BellSouth filed an Amended Petition to Recover 2005 Tropical System Related Costs and Expenses (Petition) pursuant to Section 364.051(4), Florida Statutes, and Rule 28-106.202, Florida Administrative Code. BellSouth's Petition seeks cost recovery for the damage caused by the following 2005 Tropical Storm Systems:

- Tropical Storm Arlene made landfall just west of Pensacola, Florida, on the afternoon of June 11, 2005. Nearly 4,000 BellSouth access lines were impacted by physical damage causing intrastate incremental expenses of approximately $2.2 million.

- On July 5, 2005, Hurricane Cindy traveled northeast and crossed over the western panhandle region of Florida. Nearly 1,000 BellSouth access lines were impacted by physical damage producing intrastate, incremental expenses of approximately $675,000.

- Hurricane Dennis made landfall on the afternoon of July 10, 2005, west of Navarre Beach in Pensacola as a Category 3 storm with wind speeds of 120 mph. Approximately 225,000 lines were impacted and damaged by Hurricane Dennis causing intrastate, incremental expenses of approximately $2.2 million.

- Hurricane Katrina made landfall near the Dade-Broward County line between Hallandale Beach and North Miami Beach on August 25, 2005, as a Category 1 hurricane, and exited the southwest part of Florida on August 26 and continued in a north, northwesterly direction towards the Gulf Coast. While Hurricane Katrina did not make direct landfall in the Florida panhandle, the northwestern portion of the state experienced strong winds, major rainfall and a storm surge of up to 5 feet. Approximately 600,000 access lines were affected resulting in intrastate, incremental expenses of approximately $15.4 million.

- Hurricane Rita was a Category 1 storm primarily in Dade and Broward counties. BellSouth repaired and replaced 75 spans of cable due to the storm, resulting in intrastate, incremental expenses of approximately $37,000.

- Hurricane Wilma made landfall on the southwest coast of Florida, near Marco Island on October 24, 2005, as a Category 3 hurricane with wind speeds of 125 mph. It crossed the state and exited north of Palm Beach with wind speeds of 100 mph causing intrastate, incremental expenses of approximately $75 million.

Section 364.051(4)(b), Florida Statutes, (F.S.) provides that evidence of damage occurring to the lines, plant, or facilities of a local exchange telecommunications company that is subject to the carrier-of-last-resort obligations, which damage is the result of a tropical system occurring after June 1, 2005, and named by the National Hurricane Center, constitutes a compelling showing of changed circumstances. Section 364.051(4)(b), F.S. provides that:

1. A company may file a petition to recover its intrastate costs and expenses relating to repairing, restoring, or replacing the lines, plants, or facilities damaged by a named tropical system.

2. We shall verify the intrastate costs and expenses submitted by the company in support of its petition.

3. The company must show and the Commission shall determine whether the intrastate costs and expenses are reasonable under the circumstances for the named tropical system.

4. A company having a storm-reserve fund may recover tropical-system-related costs and expenses from its customers only in excess of any amount available in the storm-reserve fund.

5. The Commission may determine the amount of any increase that the company may charge its customers, but the charge per line item may not exceed $0.50 cents per month per customer line for a period of not more than 12 months.

6. 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, its retail nonbasic telecommunications service customers, and, to the extent the Commission determines appropriate, its wholesale loop unbundled network element customers. At the end of the collection period, the Commission shall verify that the collected amount does not exceed the amount authorized by the order. If collections exceed the ordered amount, the Commission shall order the company to refund the excess.

7. In order to qualify for filing a petition under this paragraph, a company with 1 million or more access lines, but fewer than 3 million access lines, must have tropical-system-related costs and expenses exceeding $1.5 million, and a company with 3 million or

more access lines must have tropical-system-related costs and expenses of $5 million or more. A company with fewer than 1 million access lines is not required to meet a minimum damage threshold in order to qualify to file a petition under this paragraph.

8. A company may file only one petition for storm recovery in any 12-month period for the previous storm season, but the application may cover damages from more than one named tropical system.

BellSouth serves 93 exchanges in Florida which include the major Florida cities of Miami, Fort Lauderdale, West Palm Beach, Jacksonville, Cocoa Beach, Daytona Beach, Gainesville, Orlando, Port St. Lucie, Pensacola, Panama City, and Melbourne. As of June 2006, the company states it had approximately 5 million retail lines and approximately 797,300 unbundled loops in service in Florida.

BellSouth claims that the intrastate costs and expenses incurred as a result of the impact of the six named tropical systems constitute a "compelling showing of changed circumstances" as set forth in Section 364.051(4), Florida Statutes. According to the company, the total storm related costs for repairing, restoring, or replacing its lines, plants, and facilities damaged by these 2005 Storms were approximately $202.4 million. Of this amount, BellSouth states its total incremental expenses for the 2005 Storms were $156 million and the intrastate portion was $95.5 million. It determined the incremental intrastate portion by using the total incremental expenses and applying a jurisdictional factor of 61.2144%.

According to the company, it has not previously filed a petition for storm recovery in any 12-month period for the 2005 storm season. BellSouth further states it did not have any insurance coverage which provided reimbursement for any of the intrastate costs and expenses incurred, and it does not have a storm reserve fund.

BellSouth proposes to recover its intrastate, incremental expenses via a charge not to exceed $0.50 per month per line for a period of not more than 12 months. It is proposing the line-item charge be recovered on a per line basis from retail basic and non-basic local exchange service lines, including residential and business lines, payphone lines, PBX trunk lines, Network Access Registers (NARs) (including NARs used in conjunction with BellSouth ESSX® Service and MultiServ Plus Service), B Channels of both Basic ISDN and ISDN PRI, and 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.)

The total amount BellSouth is seeking to recover in this petition is approximately $34.6 million, which is approximately one-third of the intrastate, incremental expenses incurred by the company and approximately 17 percent of the total costs that it incurred in repairing, replacing and restoring its lines, plant and facilities that were damaged as a result of the 2005 Storms.

By Orders PSC-06-0790-PCO-TL and PSC-06-0792-PCO-TL, issued September 22, 2006, we granted intervention to NuVox Communications, Inc., and Competitive Carriers of the South, Inc. By Order PSC-06-0791-PCO-TL, also issued on September 22, 2006, we acknowledged intervention by the Citizens of the State of Florida.

We conducted a number of public hearings to permit BellSouth customers to be heard on any and all issues in this case. The dates and places of the public hearings are listed below:

- 10/25/06 Pensacola – Pensacola Junior College
- 11/29/06 West Palm Beach – Palm Beach Convention Center
- 11/29/06 Ft. Lauderdale – Broward County Governmental Center
- 11/30/06 Miami – Miami City Hall

On December 6, 2006, we held an administrative hearing on the case. The purpose of the hearing was to permit parties to present testimony and exhibits relative to this proceeding. Prior to the hearing on the technical issues, the parties were able to reach stipulations on Issues 1, 2, 5 (in part), and 6. The stipulation language for these issues and any related discussion can be found below under the "Stipulation" heading, and also in the hearing transcripts, pp. 152-161.

We have jurisdiction over this matter pursuant to Section 364.051(4), Florida Statutes.

III. Stipulations

The Stipulated language for Issues 1, 2, 5 (in part), and 6 appears below. We approved the stipulations at the hearing which took place on December 6, 2006.

Issue 1: What amount of any storm damage reserve fund should be considered when determining the amount of tropical-system-related intrastate costs and expenses to be recovered?

Stipulated Language: By agreement of the parties, this issue does not need to be voted on by the Commission. The issue of any storm damage reserve fund can be raised in a future docket and addressed by the Commission at that time. In so doing, the parties expressly reserve the right to make any and all arguments regarding the existence or nonexistence of the storm reserve in a future storm recovery proceeding.

Issue 2: What is the appropriate amount of intrastate costs and expenses related to damage caused during the 2005 tropical storm season, if any, that should be recovered by BellSouth, pursuant to Section 364.051(4), Florida Statutes?

Stipulated Language: For the sole purpose of this case, the maximum amount of intrastate costs and expenses related to the damage caused during the 2005 tropical storm season that BellSouth incurred and is entitled to recover is $75.271 million.

Issue 5 (in part): If a line item charge is approved for retail customers in Issue 4, on what date should the charge become effective, and on what date should the charge end?

Stipulated Language: If a charge is approved in Issue 4 for BellSouth retail customers, the charge may be assessed at BellSouth's earliest convenience, but no earlier than 30 days from the date of the Commission vote. The charge should be effective for 12 consecutive months. BellSouth should provide staff the wording to be used on its bills regarding the storm charge prior to issuance.

Issue 6: Should this docket be closed?

Stipulated Language: If a charge is not approved, this docket should be closed. If a charge is approved, then the docket should remain open. At the end of the collection period, BellSouth shall file a report on the amount collected. If the collections exceed the amount authorized by the Commission in Issue 2, BellSouth shall refund the excess.

IV. Retail Access Lines

A. Parties' Arguments

BellSouth witness Blake testifies that in accordance with Section 364.051(4)(b)6, Florida Statutes, BellSouth proposes to assess a $0.50 line-item storm charge on the following retail access lines:

- Retail basic and nonbasic local exchange service lines, including residential and business lines
- Payphone lines
- PBX lines
- Network Access Registers (NARs)[1] (including NARs used in conjunction with BellSouth ESSX Service and MultiServ Plus Services)
- B Channels of both Basic ISDN and ISDN PRI

The witness explains that retail basic services consist of flat-rate single line residential and business services; multi-line business services, nonbasic services consist of package offerings (i.e., Complete Choice, Area Plus Service), payphone access lines, PBX trunk lines, NARs, and B channels of both Basic ISDN and ISDN PRI.

BellSouth witness Blake asserts that under BellSouth's methodology, an "access line" is equal to an activated voice channel. This definition, states the witness, is consistent with Rule 25-4.003, Florida Administrative Code, and the Federal Communications Commission's definition. Moreover, assessing activated channels, contends the witness, is consistent with how customers are billed with the service. For example, a Business BRI customer with three BRI lines and two B-Channels activated per ISDN line would be assessed a line-item charge on six activated lines (2 B-Channels X 3 ISDN lines).

Witness Blake states that because the line-item storm charge is not expected to begin until early 2007 and that the number of access lines fluctuates daily, it is not possible to determine the exact number of access lines which will be assessed during the 12-month period. However, to demonstrate that BellSouth is entitled to assess the maximum $0.50 line-item charge allowed by statute, BellSouth provided an estimate of the access line count for retail and wholesale lines. BellSouth identified the number of qualifying retail access lines, based on activated voice channels, as of June 2006 to be 4,970,624. In witness Blake's surrebuttal

[1] A NAR is a point of access to the network.

testimony, the witness explains that BellSouth discovered two errors: 1) that 33,339 lines should have been included as a category of retail lines, and 2) another category had been overstated by 28,900 in Official Lines. The witness explains that Official Lines are lines used by BellSouth for administrative purposes and should not have been included. The net effect of the revisions is an increase of 4,439 retail access lines, making the June 2006 retail access line count 4,975,063.

Witness Winston testifies that as part of our staff's audit on BellSouth's Petition, the number of customer access lines included in BellSouth witness Blake's amended testimony were compared with the Schedule 8 report required pursuant to Rule 25-4.0185, Florida Administrative Code. Witness Winston explains that Audit Finding 4 discusses that the access line count included in BellSouth's Amended Petition (4,970,624) and the access line count reported on Schedule 8 (4,815,490) were calculated based on two different methodologies. The audit opinion states that although BellSouth "provided reasons as to the difference, audit staff is unconvinced that these two filings should be different." The audit opinion is to use the Schedule 8 access line information as being consistent over time and "not devised to support a specific docket."

In response, BellSouth witness Blake contends that the appropriate data source to use for assessing a line-item storm charge is BellSouth's billing system, rather than Schedule 8 data. The witness explains that Schedule 8 is an engineering planning resource tool that reports access line data for each exchange in BellSouth's service area in Florida and is segmented into Retail Lines (total number of retail lines, number of residential lines, number of business lines), Resale Lines (total number of resale lines, number of residential resale lines, number or business resale lines), UNE-P (total number of unbundled network element platforms, number of residential UNE-P, number of business UNE-P), Pay Phones (total number of pay phone access lines) and Total Lines (total number of access lines from each of the reported category totals). Thus, asserts witness Blake, Schedule 8 includes retail and wholesale lines that are not at issue in the instant proceeding and counts business and wholesale lines differently. For example, Schedule 8:

- includes resold lines, not included in the storm Petition
- includes information on unbundled loop/port combinations (UNE-P) rather than wholesale unbundled loops
- counts each station line for retail business lines and PBX lines as well as other business lines rather than Network Access Registers (NARs)
- counts each ISDN line as a single line rather than counting activated voice channels provisioned on the ISDN line.

On the other hand, contends witness Blake, BellSouth's billing system provides a direct link to BellSouth's customers and the services they are receiving, better ensuring that the surcharge will be assessed in a manner consistent with the services being billed to the customer. The billing database contains the uniform service ordering codes (USOCs) that identify the services which may be assessed the storm recovery line-item charge. Additionally, notes witness Blake, using BellSouth's billing system data for assessing the storm charge is consistent with the assessment of the 911 and Miami-Dade County Ordinance line-item charges.

B. Analysis

Definition of access or customer line

Sections 364.051(4)(b) 5 and 6, Florida Statutes, allows us to determine a line-item storm charge "per customer line" and to order an equal line-item charge "per access line" to the billing statement of retail basic and nonbasic customers. Relative to the instant issue, the salient question is how to define "customer line" or "access line" for purposes of storm cost recovery. We note that neither of these terms is defined in the statute. However, we observe that "access line" is defined in Rule 25-4.003, Florida Administrative Code (FAC), as:

> The circuit or channel between the demarcation point at the customer's premises and the service end or class 5 central office.

Both BellSouth and CompSouth rely on this rule as support for their respective definitions of "access line."[2] BellSouth asserts that the Rule defines "access line" in terms of channels, thus supporting a definition in terms of activated voice channels.[3] BellSouth witness Blake believes that BellSouth's definition is also consistent with the FCC's definition, the 911 charge, the Miami-Dade manhole ordinance assessment of an ISDN line, as well as with our decision in BellSouth's Change of Law[4] proceeding. In contrast, CompSouth witness Wood believes the Rule clearly defines the term as the facility regardless of the actual or potential capacity; the circuit is the facility.[5]

We observe that the FCC defines "access line" as:

> A communication facility extending from a customer's premises to a serving central office comprising a subscriber line, and if necessary, a trunk facility, e.g. a WATS access line, TWX access line.

Because this is a case of first impression, we look to the Legislature for guidance. The Legislature specifically tied assessing the storm charge to the customer billing statement. To assess a line-item storm charge to the customer's billing statement on a per customer or access line can be reasonably construed to mean that the charge is tied to how the customer is billed. BellSouth provided a customer bill for ISDN service that directly shows the customer is billed

[2] Although CompSouth did not take a position on this issue, witness Wood's definition of access line with respect to wholesale loops is just as applicable to retail lines.

[3] An activated channel represents an actual channel or line that is being used to provide services over the facility. For example, an ISDN PRI facility has a maximum of 23 channels. Under BellSouth's definition, if the customer has 18 channels activated, then this equates to 18 access or customer lines.

[4] Order No. PSC-06-0172-FOF-TP, issued March 2, 2006, Docket No. 041269-TP, In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

[5] Under CompSouth's definition, an ISDN PRI facility equates to one access or customer line.

for the activated channels or lines being used. Under CompSouth's view, a single-line residential customer would be counted as one access line; a business customer obtaining a high-capacity service from BellSouth would be counted as one line, even though the business customer may actually be using 10 separate channels. This seems inequitable; the single-line residential customer would be assessed the same charge as a business customer with 10 activated lines. "Access line," for purposes of assessing a line-item storm charge, shall be defined based on activated channels rather than facility.

Application of access line to retail business high-capacity customers

According to BellSouth, a retail customer subscribing to a T1 line with 18 active channels would be assessed a line-item charge of $0.50 on each of the 18 active channels, or $9.00 per month. However, a retail customer subscribing to a high-capacity service such as Channelized MegaLink or LightGate would be assessed for the local channel plus each specific service or access line being provided over the service. This seems to be a reach under the statute and contrary to BellSouth's methodology of counting activated voice channels. Only an activated channel can be connected to the Public Switched Telephone Network (PSTN). Without an activated channel, there is no connection. Therefore, only the activated channels shall be counted and assessed a storm charge.

There is insufficient evidence in the record to determine an exact adjustment needed. However, since BellSouth will be billing the retail access lines each month for assessing the storm charge, only billing the activated channels for retail high-capacity services is sufficient.

Source of data for retail access lines

BellSouth witness Blake explains that the access line counts included in BellSouth's petition were extracted from BellSouth's Customer Record Information System (CRIS); Schedule 8 line count data is on a per exchange basis and specifically used for future planning in the network. Schedule 8 data includes lines for which the line-item storm charge will not be assessed, for example, resold lines. For residential lines, the difference between Schedule 8 and BellSouth's Amended Petition is 212 lines.

On the business line side, Schedule 8 counts station lines for the more complex nonbasic services such as ESSX and Centrex; BellSouth counted NARs for these services in its Amended Petition. For ISDN, Schedule 8 counts each ISDN line as one line. Under its proposal, BellSouth counts each active voice channel.[6]

For purposes of assessing a line-item charge, BellSouth's use of its billing system data is appropriate. As noted by BellSouth, Schedule 8 data includes line counts that BellSouth is not proposing to assess. Furthermore, the billing system data ensures that the billing statement of those customers that subscribe to the identified access lines will be assessed the line-item storm charge.

[6] A PRI-ISDN line can have up to 23 active voice channels.

Lifeline residential lines

According to BellSouth witness Blake, the Company will not assess the line-item storm charge to the bills of customers participating in the Universal Service Lifeline program. However, the witness identified 83,745 Lifeline lines that had been inadvertently reported in the residential retail line count. The witness agrees that the residential line count should be reduced to reflect the exclusion of these customers.

Other access lines

Although this Issue and Issue 3(b) address retail and wholesale access lines to be assessed a storm recovery charge, we are concerned that not all access lines or customers are being captured. Resale lines, special access lines, and CLECs with commercial agreements are not paying the storm recovery charge. It may be appropriate for these customers to bear their fair share of BellSouth's storm recovery costs. However, the record in this case is insufficient to address this possible inequity. There are several possible methods for either charging or allocating costs to these other access lines which we intend to pursue in future storm recovery dockets. Due to the large amount of storm recovery costs identified in Issue 2, we do not believe that the inclusion of these other types of access lines would have any affect on the monthly charge.

C. Conclusion

For purposes of assessing a line-item storm recovery charge, customer or access line shall be defined as the number of activated channels. As of June 2006, BellSouth had approximately 4.9 million retail access lines. The line-item recovery charge shall be assessed per access line for retail basic and nonbasic local exchange service lines, including residential and business lines, payphone lines, PBX trunk lines, Network Access Registers (NARs) (including NARs used in conjunction with BellSouth ESSX® Service and MultiServ Plus Service), and B Channels of both Basic ISDN and ISDN PRI. Residential lines shall exclude Lifeline customers; business lines shall exclude Official lines. For retail customers obtaining high-capacity or channelized services, BellSouth shall assess the charge only on the actual activated channels. Additionally, BellSouth's general billing database shall be used in determining the access lines to be assessed.

V. Wholesale UNE Loops

A. Parties' Arguments (Legal Authority)

Section 364.051(4)(b)6, Florida Statutes, states in pertinent 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 exchange telecommunications service customers, its retail nonbasic telecommunications service customers, and, to the extent the commission determines appropriate, its wholesale loop unbundled network element customers. (emphasis added)

As might be expected, BellSouth and CompSouth's positions on this issue were anticipated.

Appropriate or Unlawful?

BellSouth asserts that wholesale loop UNE customers should be included in the assessment of the line-item charge because it is consistent with and expressly authorized by Section 364.051(4)(b)6, Florida Statutes. BellSouth argues further that, as a matter of fact, the line-item charge does not re-price or alter UNE rates, but rather is a separate line-item charge of limited duration established under state law for the recovery of intrastate costs and expenses associated with repairing BellSouth's network following the 2005 Storms.

CompSouth contends that Section 364.051(4)(b)6, Florida Statutes, provides us with discretion to determine whether it is appropriate to increase UNE loop customer prices to recover BellSouth's embedded costs. CompSouth argues that if this 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 UNE rate pricing principles.

BellSouth counters that the storm recovery line-item charge available under Florida law has nothing to do with BellSouth's provisioning of UNEs pursuant to the Act. BellSouth asserts that UNE rates will not increase or be modified as a result of the proposed line-item charge and that CLECs will pay the same UNE rate for wholesale loops that they paid prior to the implementation of a line-item charge; and UNE rates set forth in the CLECs' interconnection agreements will not be altered or modified through a line-item charge.

Comparison to Other Surcharges

BellSouth draws a comparison between a line-item charge being assessed pursuant to Section 364.051(4)(b)6, Florida Statutes, and Regulatory Assessment Fees (RAFs) and 911 surcharges which are assessed pursuant to Florida law. BellSouth contends that if we were to adopt CompSouth's argument, RAFs and the 911 surcharge would be preempted by federal law because they indirectly increase the costs of providing service in Florida. BellSouth argues further that this is clearly not the case as the Legislature has deemed it appropriate that CLECs are required to pay certain fees under Florida law, and the mere existence of these fees does not violate or conflict with federal law.

To the contrary, CompSouth argues that BellSouth's comparison of its proposed surcharge with RAFs and the 911 surcharge is patently false. CompSouth distinguishes these fees by pointing out that neither the RAFs nor the 911 surcharge is paid to BellSouth to defray BellSouth's historic book costs, as would be the case for the line-item charge proposed in this proceeding. CompSouth asserts that CLECs pay the RAFS and 911 surcharge to governmental entities to cover the cost of government services and neither of the charges is assessed on a per loop basis.

CompSouth argues further that the state laws authorizing the RAF and 911 surcharge have no conflicting or overlapping federal regime for assessment, unlike this situation in which the federal regime, TELRIC, establishes what is to be paid by whom and to whom for what.

State Authority versus Federal Preemption

BellSouth contends that any determination that the proposed line-item charge conflicts with federal law, and thus, cannot apply to CLECs renders Section 364.051(4)(b)6, Florida Statutes meaningless. BellSouth argues this is so because then in no event could we find that it would be appropriate to apply the proposed line-item charge on BellSouth's wholesale loop UNE customers, notwithstanding the statutes clear language to the contrary.[7] BellSouth argues further that the Legislature is presumed to have known of the existence of Section 252 of the Act, because it is a well-settled rule of statutory construction that "the Legislature is presumed to know the existing law when a statute is enacted." See *Wood v. Fraser*, 677 So.2d 15 (Fla. 2d DCA 1996) citing *Collins v. Inv. Co. v. Metro Dade County*, 164 So.2d 806, 809 (Fla. 1964). Thus, BellSouth argues that the Legislature's clear intent was for this Commission to have the discretion to determine that BellSouth's wholesale UNE loop customers are within the universe of customers that would be subject to this proposed line-item charge.

CompSouth argues that the proposed line-item charge runs counter to federal law for several reasons. CompSouth asserts that the proposed line-item charge would impose a charge on top of and in addition to approved TELRIC-based rates outside of a cost proceeding. CompSouth contends that the proposed line-item charge would permit BellSouth to recover historic book costs in addition to those included in the calculation of forward-looking costs when we set UNE rates. CompSouth concludes that if the Florida Legislature can allow BellSouth to assess historic books 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 thus dismantling the Federal TELRIC regime.

CompSouth maintains that because BellSouth's proposed line-item charge is inconsistent with federal pricing regulations, it is impermissible and preempted by federal law. CompSouth asserts that 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 Act's provisions. CompSouth contends that because the proposed line-item charge on UNEs does not comport with the specific criteria expressly listed in section 251, which requires UNE rates to be based on TELRIC costing principles, it is preempted by federal law.

CompSouth argues further that the binding impact of TELRIC on the states, as set forth in *Verizon*, leaves no room for consideration of matters expressly eliminated from or outside of the required TELRIC methodology. CompSouth argues that if we approve the proposed line-item charge, it will have the effect of increasing approved TELRIC rates and would run afoul of the rationale behind TELRIC pricing and Congress' occupation of the pricing field.

[7] Under Florida law, clear and unambiguous statutory language must be given its plain and obvious meaning. *Holly v. Auld*, 450 So.2d 217 (Fla. 1984); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla. 1982).

Equitable Treatment of Consumer Groups

BellSouth argues that it is not appropriate policy for one group of customers to be assessed the proposed line-item storm recovery charge while another group of customers identified in the statute are exempt. BellSouth maintains that not assessing the proposed line-item charge on wholesale unbundled loop customers could, in future proceedings, where BellSouth was not entitled to collect the maximum amount allowed, result in BellSouth's retail customers making up the shortfall in all instances, which BellSouth contends is not what the legislature contemplated.

B. Analysis (Legal Authority)

Rate Increase

Section 364.051(4)(a), Florida Statutes, states in pertinent part;

> Notwithstanding subsection (2), any local exchange telecommunications company that believes circumstances have changed substantially to justify any *increase in the rates* for basic local telecommunications services may petition the commission for a *rate increase*, but the commission shall grant the petition only after an opportunity for a hearing and a compelling showing of changed circumstances.

Pursuant to this statute, if BellSouth believes its circumstances have changed substantially, it may petition this Commission for a rate increase. Section 364.051(4)(b), Florida Statutes, proceeds to clarify that a tropical system occurring after June 1, 2005, and named by the National Hurricane Center, constitutes a compelling showing of changed circumstances. Consequently, storm cost recovery through the $0.50 charge is a rate increase as contemplated by section 364.051(4)(a), Florida Statutes.

TELRIC Inapplicable

Because the line charge effects a rate increase, the key question that must be answered is whether collection of the line charge from wholesale UNE loop customers is permitted under federal law. Again, CompSouth contends that Federal law established the TELRIC pricing methodology to set cost-based UNE rates and that this methodology excludes the recovery of "embedded costs." Therefore, allegedly, any increase in rates by this Commission to recover "historic book costs and expenses related to repair, replacement, restoration of lines, plants or facilities," would be preempted by federal law. Nonetheless, recovery for these catastrophic events was not contemplated by TELRIC and is therefore not preempted by the federal pricing methodology. In short, although the change is a rate increase within the meaning of Section 364.0511(4)(a), Florida Statutes, it is not a price increase within the meaning of the TELRIC.

TELRIC is inapplicable to this rate increase for one basic reason: TELRIC framework assumes that future costs are "normal" over the long run, while the costs being addressed here are not "normal" but rather catastrophic. In other words, the TELRIC framework, in excluding

embedded costs, assumes hypothetically that the COLR's system, as on ongoing concern, will not be devastated by widespread catastrophic damage in the long run.

> First, TELRIC measures costs in the long run, a time frame lengthy enough to allow all of an incumbent's costs to become variable and, thus, to allow all embedded costs to drop out. Second, TELRIC is based not on an incumbent local exchange carrier's (ILEC) actual network but instead on a hypothetical network that uses the least cost technology and most efficient design currently available, given the existing location of the ILECs' wire centers. Despite these technical features, however, TELRIC is not a specific, mathematical formula but rather a framework of methodological principles that states retain flexibility to use in conjunction with local technological, environmental, regulatory, and economic conditions in order to arrive at forward-looking rates that are both just and reasonable.[8]

TELRIC thus assumes (1) a hypothetical and perfect system that (2) operates over a time frame lengthy enough (3) to allow just and reasonable forward-looking rates. Some disasters, whether the work of nature or man, can impose restoration costs so enormous that they cannot be handled in the TELRIC framework without rendering the "hypothetical network" arbitrary and capricious and forward-looking rates both unjust and unreasonable.

For example, if an ILEC's system incurred restoration costs so great that one could reasonably project them to occur once every century, those costs could not be reflected in a time frame of 30 years or less without untoward consequences. Moreover, disasters of such enormity are essentially unforeseeable, except in some vague way not useful for rate setting. Thus the assumptions and purpose of TELRIC preclude that framework from being used to address widespread catastrophic damage in forward looking rates. Widespread catastrophic damage to an ILEC's system must be handled on an ad-hoc basis, and in this context, state legislative authority remains primary.

The attempt to use TELRIC to frustrate the legislative scheme in Section 364.051(4)(b), Florida Statutes, also must be rejected because it produces an absurd result. For example, if the rate increase were subject to the TELRIC methodology, then CLECs would be treated inequitably as compared to retail customers. Specifically, they would bear a greater portion of the cost recovery in a UNE rate proceeding than BellSouth's retail customers who are subject to the $0.50 cap.[9] Likewise, if TELRIC rejected the rehabilitation costs because they were atypical and unlikely to reoccur, then BellSouth and its retail customers would be treated inequitably by shouldering all the burden of restoring the ILEC infrastructure upon which the CLECs depend.

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[8] Verizon Pa., Inc. v. Pa. PUC, 380 F. Supp. 2d 627, 632 (Eastern Dist. PA 2005)

[9] This assumes that TELRIC allowed the forward-looking hypothetical costs to include historic costs due to aberrant catastrophe.

In sum, the catastrophic events at issue here are unpredictable and have diverse economic effect. Were TELRIC to account for the costs caused by such events, the resulting TELRIC rates would be unjust not only because of their amount in relation to historical averages, but also because of the disparity in the amount of recovery between retail and wholesale customers. Moreover, the resulting rates would be anti-competitive because they would be so high.

Therefore, these costs are not included in the TELRIC methodology and we may approve recovery of these costs in compliance with both Federal and Florida law. Moreover, by allowing short term storm and partial cost recovery, we can maintain the integrity of the existing TELRIC rates as forward looking cost of the most efficient telecommunications technology.

Recovery Appropriate

Under Section 364.051(4)(b), Florida Statutes, we must affirmatively conclude that BellSouth's recovery from wholesale UNE loop customers is appropriate. As already suggested, the basic reason for allowing the line charges to be placed on the UNE loop customers is to avoid unequal treatment of the retail customers and wholesale customers. In addition, the Florida legislature contemplated that both retail and wholesale customers contribute partially to the restoration of the COLR's network, a network essential to the infrastructure of the state.

We note that BellSouth has elected to not impose the line charge on its wholesale customers taking service under commercial agreements. Moreover, BellSouth's proposal does not place the line charge on resold service or special access. This decision to not impose the charge on some non-retail customers does raise concerns that wholesale customers may be treated unequally with anticompetitive results. Based on the record, however, these concerns do not justify treating the retail customer inequitably. Therefore, we find it appropriate to authorize BellSouth to impose a line charge on the wholesale UNE loop customer.

C. Parties' Arguments (Technical)

Witness Blake testifies that in accordance with Chapter 364.051(4), Florida Statutes, BellSouth proposes that the line item storm charge be assessed on all unbundled wholesale loop network element (UNE) customers. This includes, states the witness, stand-alone loops, ISDN loops, DS1 and DS3 loops (stand-alone and as part of an enhanced extended loop EEL and xDSL loops.)

According to witness Blake's direct testimony, BellSouth proposed to apply the surcharge to the capacity, or all potential channels, of loops. As of June 2006, BellSouth had 406,000 unbundled loop equivalents in service. Witness Blake filed amended testimony to correct two errors in the number of unbundled loops. One of the errors was caused by a spreadsheet multiplication error and the other was attributed to the omission of the DS1 and DS3 loop portion of EELs. These corrections increased the number of assessable loops from 406,000 to 797,300.

CompSouth witness Wood asserts that the difference in the number of loop equivalents must be a result of a change in how BellSouth defines the term "unbundled loop," as DS0

equivalent. He further explains, because BellSouth is capped at $0.50 per access line by the statute, BellSouth's application of DS0 equivalent increases the total BellSouth compensation by CLECs. Witness Wood alleges that because BellSouth is not imposing the surcharge on a DS0 equivalent basis on its own retail customers that purchase DS0 and DS1 services, but only on wholesale customers, the proposal has anticompetitive implications.

CompSouth witness Wood disputes the scope of the services to which the storm surcharge would be applied and the way in which BellSouth counts "access lines" pursuant to Chapter 364.051(4)(b)5, Florida Statutes. The witness argues that BellSouth's proposal actually 1) imposes a surcharge on some access lines much greater than the permitted $0.50 per line per month permitted by the statute, 2) applies the surcharge in a way that is not competitively neutral by assessing wholesale UNE loop lines and retail lines on a different basis, and 3) may be proposing to impose the surcharge on access lines purchased pursuant to a commercial agreement, something not permitted by the statute. The witness believes that certain aspects of the statute are particularly important in this proceeding:

1. The statute does not provide the opportunity to impose a surcharge on any other types of wholesale access lines purchased pursuant to a tariff (such as special access), or those access lines provided pursuant to a wholesale commercial agreement.

2. Constraints built into the statute create a definite set of incentives for BellSouth. The statute limits the surcharge to $0.50 per access line each month for one year. Such a constraint causes BellSouth to have little incentive or reason to justify costs in excess of the limit, and to be motivated to seek to apply the surcharge to as many access lines as possible (and highly motivated to define and count access lines to yield the highest number possible.)

3. Witness Wood argues that a line-item storm charge should not be applied to wholesale unbundled loops because:

    a. BellSouth proposes to apply the surcharge on a "per-DS0" rather than on a per access line basis.

    b. BellSouth has not demonstrated that its proposed application of the surcharge will be competitively neutral. BellSouth intends to apply the surcharge on DS0, ISDN, DS1, xDSL, and DS3 wholesale loop capacity but does not indicate an intention to apply the surcharge on the same basis to its own retail customers.

Witness Wood contends that the phrase "DS0 equivalent" does not appear in the pertinent section of the statute; only the phase "access line" appears in Section 364.051(4)(b)6, Florida Statutes, and it is used in the same way when referring to retail nonbasic telecommunications service customers, or wholesale loop unbundled network element customers. According to witness Wood, BellSouth is attempting to broaden the statute's language. BellSouth, contends the witness, defined "access line" not as a single customer but as multiple customer lines based on the bandwidth of the loop in question. This interpretation increased the size of the surcharge applied to wholesale lines and is at odds with the plain reading of the statute.

Witness Wood also asserts that BellSouth's proposal is at odds with the way in which costs are incurred. Costs to restore facilities damaged by storms are not incurred on a per DS0 basis. Further, the restoration of a DS1 loop is unlikely to cost anything different than restoring a DS0 loop, for example. BellSouth has not demonstrated that it costs 24 times as much to restore a DS1 loop than a DS0 loop, or 672 times as much to restore a DS3 loop as a DS0 loop. BellSouth responds that the statute does not require that costs for repairing specific loops or lines form the basis for the proposed recovery amount.

With respect to witness Winston's audit finding number 5 that the number of unbundled loop access lines could not be verified to Schedule 8 data, witness Blake states that Schedule 8 data includes the total number of unbundled network element platforms (UNE-P lines) sold under a commercial agreement with BellSouth. Additionally, asserts witness Blake, the number of UNE-Ps on Schedule 8 does not include stand-alone unbundled loops or unbundled loops provided as part of EEL combinations. For these reasons, witness Blake states that Schedule 8 data cannot be used to determine the number of wholesale loops to be assessed the storm surcharge and explains why audit staff was unable to verify the unbundled loop calculation.

Witness Blake explains that BellSouth determined the number of unbundled loops that would be assessed the line-item charge from information from BellSouth's wholesale data warehouse, which is fed by the systems used to bill the CLEC for the loops. Using the USOCs assigned to each type of unbundled loop, BellSouth extracted information from its wholesale data warehouse and determined the number of loops in-service as of June 2006. We agree with witness Blake that Schedule 8 data is not appropriate for use in determining the number of assessable wholesale loops.

In response to witness Wood's contention that CLECs have no practical market mechanism to impose a storm surcharge on their customers, witness Blake asserts that CLECs have the ability to pass on their costs or choose not to. Witness Blake explains that the statute allows BellSouth to assess the line-item charge per access line for wholesale unbundled loop customers. The witness asserts that in the wholesale world, one unbundled loop could be used to provide services that are equivalent to more than a single access line. For example, a DS0 loop is equivalent to one voice grade loop; a DS1 loop is equivalent to 24 voice grade equivalent loops; and a DS3 loop is equivalent to 672 voice grade equivalent loops. BellSouth witness Blake claims that witness Wood is mistaken that BellSouth is using the term "per-DS0" to mean something different than "per access line."

As further support for BellSouth's position, witness Blake notes that we previously found in the Change of Law proceeding, that a DS1 unbundled loop equates to 24 DS0s or 24 voice grade equivalent loops. Therefore, surmises the witness, we have already determined that the capacity of a wholesale unbundled loop determines the equivalent number of access lines.

With respect to witness Wood's contention that BellSouth's proposed application of the storm surcharge is not competitively neutral and that BellSouth is applying the surcharge to wholesale and retail customers differently, BellSouth witness Blake asserts that this is not true. If a retail customer and wholesale loop customer both have a single line or single loop, both will be charged $0.50. If a retail customer has more than one line, BellSouth will assess the

surcharge to its retail customers for each activated voice channel/access line. Because BellSouth is unable to determine the number of activated channels a CLEC is using in a high capacity loop, BellSouth relied on the FCC's definition of access line, this Commission's decision in the Change of Law proceeding, and the definition of access line set forth in Rule 25-4.003, FAC. As such, BellSouth witness Blake contends, it was appropriate to count the full capacity of such loops. However, in an effort to address the CLECs' concerns, BellSouth is not opposed to applying an alternative methodology in which BellSouth would apply its utilization percentage for high-capacity retail services to wholesale high capacity unbundled loops. BellSouth's current utilization factor is 47%, meaning that, on average, 47% of the available bandwidth (or channels) associated with high-capacity retail services is currently being used by BellSouth's retail customers. BellSouth witness Blake explains that BellSouth obtained data from its billing systems that identified, by Florida wire center, the maximum system channel capacity retail services. BellSouth then obtained data identifying the quantity of retail services (utilized capacity) being provided to retail customers over these high capacity retail arrangements. The utilization factor of 47% was calculated by dividing the total utilized capacity for the high capacity retail arrangements in each qualifying Florida wire center by the total maximum capacity for these same retail services in the same Florida wire centers.

Accordingly, BellSouth's alternative proposal is to apply the 47% utilization factor to the maximum capacity of DS1 and DS3 unbundled loops to determine the number of line-item surcharges to be assessed, regardless of actual usage. Each DS1 unbundled loop would be assessed 11 line-item charges (DS1 capacity is 24, 24 x 47% = 11); each DS3 unbundled loop would be assessed 315 line-item charges (DS1 capacity is 672, 672 x 47% = 315) Witness Blake believes that this alternative approach addresses all of CompSouth witness Wood's concerns, contending that it ensures that retail and wholesale customers purchasing high capacity loops are assessed a line-item surcharge in the same manner. Using a 47% utilization factor, the number of wholesale unbundled loops as of June 2006 is 477,648. For retail customers obtaining high capacity services from BellSouth, such as MegaLink Channel Service, the surcharge will be assessed based on the presence of the initial mileage USOC for the local channel element and for each service or access line that is being provided over the MegaLink Channel Service. Thus, the witness believes, BellSouth's proposal for assessing retail and wholesale customers is consistent with Commission precedent and ensures that the charge is applied on a consistent and competitively neutral basis.

In contrast to witness Wood's allegation that BellSouth is redefining access lines to increase the costs of CLECs, BellSouth witness Blake asserts that application of the 47% utilization factor, coupled with a consistent line-item charge to retail high capacity customers, illustrates that BellSouth is treating all customers in a consistent manner and on a competitively neutral basis.

D. Analysis (Technical)

BellSouth defines "access line" as voice equivalents or activated channels. BellSouth witness Blake asserts that BellSouth relied on Rule 25-4.003, Florida Administrative Code, and the FCC's definition of a business line when determining its access line counts. Witness Blake asserts that activated channels (capacity) is also consistent with the way the Miami-Dade

manhole ordinance is assessed on an ISDN (per channel basis). BellSouth's proposal is to apply the line item storm charge on each retail customer for each activated channel/access line, regardless of whether the customer has entered into a retail term commercial agreement. For interconnection agreements, BellSouth believes the line item charge can be imposed without amending said agreements. BellSouth also proposes to assess its DSL customers because such customers also subscribe to a BellSouth voice service. In this instant proceeding, BellSouth asserts that it does not have any DSL customers who do not also subscribe to a voice service.

However, BellSouth is not proposing to apply the line item charge on resale, special access, or wholesale commercial agreement customers because Section 364.051(4)(b)6, Florida Statutes, provides that the charge could apply to wholesale unbundled network element customers. As further explanation of its exclusion of loops purchased under commercial agreements, in this instant proceeding, BellSouth asserted that these loops are not within our jurisdiction. BellSouth did note that it would not be opposed to applying the storm recovery surcharge on resale, special access, or commercial agreement customers if so ordered.

Witness Wood asserts that an unbundled loop can provide, just as retail loop can provide, more than one voice grade channel. However, the underlying facility identifies the customer line or the access line or the unbundled loop. In other words, there is a one-to-one relationship.

BellSouth's Change of Law proceeding involved the identification of impairment and the application of 47 CFR 51.5. Witness Wood asserts that impairment has little relevance with identifying a number of unbundled loops or access lines. It has to do with counting lines for impairment purposes in a given central office. Witness Wood believes that an access line is the underlying facility. According to witness Wood, the FCC defined an access line in its Triennial Review Order as a facility, not as a voicegrade equivalent. Anything other than the underlying facility is at odds with the FCC's use of the term. This Commission's definition of an access line is also the facility; the circuit is the facility. Whether using the FCC's definition, standard industry usage; the circuit, loop, access line is the facility. The cost to BellSouth for the restoration is not a function of the number of active channels or the amount of capacity.

BellSouth's Proposals

BellSouth's proposal for its retail high capacity loops is to count the number of activated channels as well as in some cases, adding an additional surcharge for the loop itself (e.g. MegaLink and LightGate). However, BellSouth is not able to determine how many channels of a CLEC's high capacity loop are activated.

In BellSouth's original proposal for wholesale unbundled loops, the loops were to be assessed at their capacity, i.e., a DS0 has a maximum capacity of one channel while DS1 loop has a maximum of 24 channels and a DS3 loop has a maximum of 672 channels, resulting 1, 24, and 672 surcharges per month, respectively.

BellSouth's alternative proposal is to assess the storm recovery surcharge on 47 percent of the capacity of the CLECs' unbundled loops. For example, BellSouth would assess a CLEC DS1 loop 11 surcharges (24 multiplied by 47 percent). A CLEC DS3 loop would be assessed

315 surcharges. BellSouth developed the 47 percent utilization factor by dividing the number of activated retail channels by the retail loops' capacity as of June, 2006, resulting in the average retail activated channel percentage of 47 percent.

The 47 percent utilization factor is an average, which means that the retail utilization rate may range from 1 percent to 100%. According to the redacted version of BellSouth's Late Filed Deposition Exhibit, Item No. 8, retail customer channel utilization ranges from 6 percent to 100% in each of the CLLI (switch) codes listed.

When CompSouth witness Wood was asked during his deposition whether the CLEC industry was homogenous enough so that the 47% would be fair, he responded that he did not "have any reason to believe that customer utilization of channels on a T1, for example, provided by one CLEC versus another would be different or whether there would be any reason to expect that that kind of utilization for CLEC customers would be different than for BellSouth retail customers."

We have two primary concerns about this factor: 1) BellSouth does not intend to update the factor, and 2) the implication that CLECs whose actual utilization is not 47% will pay less or more than comparable retail customers. One way to improve the accuracy and appropriateness of the 47 percent factor, addressing our first concern, is for BellSouth to recalculate it monthly using the most recent retail billing period data. Addressing the second concern, CompSouth witness Wood was asked if CLECs would be willing to self-report the number of active channels (because BellSouth does not have that information), witness Wood stated that he did not know.

When CompSouth witness Wood was asked in his deposition if the 47 percent factor would be acceptable to CompSouth, he replied that he could provide his opinion, but that he couldn't "give you what's acceptable and unacceptable to CompSouth." Witness Wood characterized the 47 percent proposal as "an improvement over the original BellSouth proposal."

CompSouth witness Wood's alternative

Although CompSouth witness Wood does not agree with BellSouth's proposal to apply the surcharge to unbundled loops, he stated in his deposition that if the surcharge is to be applied, "you have to apply it on a per line basis, per loop basis, whatever you want to call it. But it's not something that's capacity specific." Using witness Wood's approach, then a DS1 and a DS3 should each be assessed one surcharge ($0.50 per month). This approach would apply the surcharge to both retail and wholesale customers based on the physical attributes of the loop; a line is a line. Although witness Wood did not speak to retail lines, it appears as if using his recommendation, a residential customer with two phone lines would be assessed a monthly surcharge of $0.50 for each line for a total of $1.00. A retail or wholesale DS3 customer would be assessed $0.50; however, the capacity of a DS3 is 672 voice channels.

Applying the surcharge to the loop or line without regard to capacity might appear to treat retail and wholesale customers fairly; however, this approach is likely to result in inequities for the following reasons:

- A single line residential or business customer pays the same surcharge as a large business or CLEC customer for a single loop or line even though the loop can provide as many as 672 voice channels.
- A residential or business customer with two lines pays $1.00 compared to the $0.50 a large business or CLEC customer would pay for a 672 channel capacity loop.

Subscriber Line Charge – ISDN PRI Assessment

A utilization factor, similar to BellSouth's proposed 47 percent, is used under federal rules when applying the Subscriber Line Charge (SLC) to ISDN PRI service. According to BellSouth's FCC Interstate Tariff No. 1, page 4-7, effective October 3, 2006, BellSouth retail ISDN PRI customers are charged five times the Multiline Business SLC rate of $6.77. ISDN PRI customers have access to 23 (B) channels, thus for SLC purposes, these customers are assessed the SLC at a utilization rate of 21.7 percent. When asked whether BellSouth had considered using the SLC surcharge rate, BellSouth witness Blake stated that "using the definition of an access line and reading the statute as to how we can apply the storm recovery charge, along with the FCC's definition, this Commission's definition, what is being used of our network to provide service to our retail basic and nonbasic customers, we felt it was most appropriate to assess it using those definitions."

If the ISDN PRI SLC utilization factor of 21.7 percent were to be adopted for calculation of the storm recovery surcharge, then a DS1 would have 5.2 or five surcharges applied to it, for a total assessment of $2.50 per month. For a DS3, 145.8 or 146 surcharges would be applied to it, for a total assessment of $73 per month.

An advantage to using the SLC 21.7 percent utilization factor for high capacity lines or loops is that SLC charges are a familiar and relatively longstanding charge, making an assessment based on the ISDN PRI SLC utilization factor easily understandable to customers and consistent with another assessment. The primary disadvantage to using the SLC 21.7 percent utilization factor is that it is not based on actual market data unlike BellSouth's 47 percent utilization factor.

E. Conclusion

There is no completely equitable method to assess this surcharge because BellSouth does not know how many channels are activated on CLEC high-capacity loops. Without knowing whether CLECs are able to or would self-report the number of activated channels, the appropriate method for assessing the storm recovery surcharge on retail and wholesale high capacity lines/loops is one that shall not advantage large business and wholesale customers at the expense of residential and small business customers; it shall be based on actual channel utilization as much as possible, and to the extent possible it shall not provide an advantage to either retail high capacity customers or wholesale unbundled loop customers.

Of the proposals (alternatives) described above, all result in potential inequities. Our analysis has focused on minimizing potential inequities. In determining which is the best proposal, we reject the following proposals:

- BellSouth's original proposal shall be rejected because it applies the assessment without any regard for the channel activation or utilization of the wholesale unbundled loops.
- CompSouth witness Wood's alternative shall be rejected because it provides an advantage to the customer or CLEC that purchases high capacity loops over residential and small business customers.
- The SLC 21.7 percent utilization factor shall be rejected because it is not based on actual market data.

BellSouth's 47 percent utilization factor is the only proposal based on actual market data. This fact outweighs disadvantages that cannot be fixed without actual CLEC utilization data. However, using a constant 47 percent factor is troublesome because the factor will not be able to reflect future changes in the retail high capacity market.

We find that BellSouth shall use the 47% factor in calculating the number of storm recovery line item surcharges applied to each high capacity loop. BellSouth shall recalculate the factor monthly, using its most recently available retail billing data, and use the recalculated factor when applying storm recovery line item surcharges to high capacity loops.

A single storm recovery line item surcharge shall be applied to each of the following loops:

- 4-wire 19.2, 56 or 64 Kbps Digital Grade Loop
- 2-wire Analog Voice Grade Loop – Service Level 2
- 4-wire Analog Voice Grade Loop
- 2-wire ISDN Digital Grade Loop
- 2-wire High Bit Rate Digital Subscriber Line (HDSL) Compatible Loop
- 2-wire Asymmetrical Digital Subscriber Line (ADSL) Compatible Loop
- 2-wire Analog Voice Grade Loop – Service Level 1
- 2-wire and 4-wire Unbundled Copper Loop
- 2-wire Unbundled Copper Loop – Non-designed

The 47% factor, updated monthly, shall be applied to the following high capacity loops so that, using the 47% factor, 11 storm recovery line item surcharges shall be assessed to each DS1 loop and 315 storm recovery line item surcharges shall be assessed to each DS3 loop. The updated factor shall be rounded in a consistent manner with the methodology used in computing the 11 and 315 surcharges, that is for a DS1, 47 percent x 24 channels = 11.28 surcharges, rounded down to 11. For a DS3, 47 percent x 672 channels = 315.84 surcharges, rounded down to 315. Following are the high capacity loops:

- 4-wire Unbundled DS1/ISDN Digital Grade Loop
- 4-wire Unbundled DS1/ISDN Digital Grade Loop in EEL Combination
- DS3 Unbundled Digital Loop
- DS3 Unbundled Digital Loop in EEL Combination

The total number of line item surcharges (or loop equivalents) to be assessed as of June 2006 is 477,648.

VI. Line Item Charge Per Access Line

A. Parties' Arguments

BellSouth asserts that Florida Statutes allow for recovery of storm related expenses, including incremental interest and expenses, through a line item surcharge of up to 50 cents. Witness Blake testified that the 50 cents charge should be assessed on BellSouth's retail basic telecommunications service customers and retail nonbasic customers.[10] Additionally, BellSouth believes that wholesale loop unbundled network element customers should be included in the assessment of line-item charges.[11]

Comp-South believes there should be no line item charge assessed on wholesale UNE-P customers. Specifically, witness Wood believes that BellSouth is attempting to (1) impose a surcharge on some access lines that is much greater than the permitted $0.50 per line charge permitted by Florida Statutes, (2) apply the surcharge in a way that is not competitively neutral by assessing wholesale lines but not retail line based on the same kind of local loop, (3) apply a surcharge to wholesale unbundled network element (UNE) loops that is not permitted by the Federal Telecommunications Act and FCC pricing rules, and (4) impose the surcharge on assess lines purchased pursuant to a commercial agreement.

B. Analysis

Section 364.051(4)(b), Florida Statutes provides that "The Commission may determine the amount of any increase that the company may charge its customers, but the charge per line item may not exceed 50 cents per month per customer line for a period of not more than 12 months." It also states that "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, its retail nonbasic telecommunications service customers, and, to the extent the Commission determines appropriate, its wholesale loop unbundled network element customers."

C. Conclusion

This issue is a calculation based on the decisions in Issues 2, 3A and 3B. The appropriate monthly line item charge per access line is the amount approved in Issue 2 divided by the appropriate number of access lines, approved in Issues 3A and 3B, divided by 12, as long as this

[10] BellSouth defines its retail customers as customers that subscribe to flat-rate residential service (i.e. 1FR) or flat-rate single line business services (i.e. 1 FB). Customers that subscribe to multi-line business services, payphone access lines, PBX trunk lines, Network Access Registers (NARs) and B channels of both Basic-Rate ISDN and ISDN PRI are considered retail nonbasic telecommunications service customers.

[11] See Issue 3B for more in-depth analysis of the utilization rate.

amount does not exceed the statutory limitation of $0.50 per month per customer line as defined in Section 364.051(4), Florida Statutes. Therefore, the appropriate line item charge per access line is $0.50 per month for 12 months.

VII. Assessment of Line Item Charge on Wholesale Customers

A. Parties' Arguments

BellSouth asserts the charge should become effective as soon as possible after our approval, taking into consideration time for BellSouth to modify its billing processes necessary to implement the our order. Accordingly, it is BellSouth's proposal that the assessment of the line-item charge begin approximately 60 days following a final order. Once BellSouth begins billing the line-item charge, it should be allowed to apply the charge for 12 consecutive months, as permitted by the statute.

CompSouth argues that if we approve any storm charge, it should not be applicable to wholesale UNE customers. If any charge is applied to wholesale customers, which it should not be, such a charge cannot be applied unless and until any applicable interconnection agreements are amended. Finally, any charge must end 12 months after its effective date.

B. Analysis

At the administrative hearing held on December 6, 2006, we approved stipulated language in Issue 5 as it relates to retail customers.

The parties offer no reason for the effective and ending dates of any charges pertaining to wholesale UNE Loops to differ from those stipulated in the language for retail lines. The same language shall be used to establish the controlling dates for wholesale UNE Loops.

C. Conclusion

Regarding the effective and ending dates of any charges pertaining to wholesale UNE Loops, the charge may be assessed at BellSouth's earliest convenience, but no earlier than 30 days from December 19, 2006. The charge shall be effective for 12 consecutive months. BellSouth shall provide our staff the wording to be used on its bill regarding the storm charge prior to issuance.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that this docket shall remain open for a period of time to allow us to verify the collected amount does not exceed the amount authorized.

By ORDER of the Florida Public Service Commission this 10th day of January, 2007.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

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.

EXHIBIT B

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).

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[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.
>
> *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

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[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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-M-E-M-O-R-A-N-D-U-M-

DATE: December 13, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Wright, Broussard, Lee, Maduro, Mann, Ollila, Watts)
Office of the General Counsel (Teitzman, Tan, Wiggins)

RE: Docket No. 060598-TL – Petition to recover 2005 tropical system related costs and expenses, by BellSouth Telecommunications, Inc.

AGENDA: 12/19/06 – Regular Agenda – Posthearing Decision – Participation is Limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Deason

CRITICAL DATES: January 18, 2007 – 120-Day Statutory Deadline For Commission Action

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\060598.RCM.DOC

DOCUMENT NUMBER-DATE
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EXHIBIT C

Abbreviations and Acronyms

Act	Telecommunications Act of 1996
BRI	Basic Rate Interface
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
CLLI	Common Language Location Identifier – identifies a switch and the city, state and building where it is located.
CO	Central Office
COLR	Carrier of Last Resort
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DS3	Digital Subscriber Line 3
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
FX	Foreign Exchange
ICB	Individual Case Basis
ILEC	Incumbent Local Exchange Carrier
ISPN	Integrated Service Digital Network
IXC	Interexchange Carrier
LEC	Local Exchange Carrier
PRI	Primary Rate Interface
TELRIC	Total Element Long-Run Incremental Cost
TRO	Triennial Review Order, FCC 03-36
TRRO	Triennial Review Remand Order, FCC 04-290
UNE	Unbundled Network Element
UNE-L	Unbundled Network Element-Loop
UNE-P	Unbundled Network Element-Platform

Case Background

On September 1, 2006, BellSouth Telecommunications Company, Inc. (BellSouth, or company), filed a Petition to Recover 2005 Tropical System Related Costs and Expenses sustained as a result of the six named tropical storm systems. On September 20, 2006, BellSouth filed an Amended Petition to Recover 2005 Tropical System Related Costs and Expenses (Petition) pursuant to Section 364.051(4), Florida Statutes, and Rule 28-106.202, Florida Administrative Code. BellSouth's Petition seeks cost recovery for the damage caused by the following 2005 Tropical Storm Systems:

- Tropical Storm Arlene made landfall just west of Pensacola, Florida, on the afternoon of June 11, 2005. Nearly 4,000 BellSouth access lines were impacted by physical damage causing intrastate incremental expenses of approximately $2.2 million.

- On July 5, 2005, Hurricane Cindy traveled northeast and crossed over the western panhandle region of Florida. Nearly 1,000 BellSouth access lines were impacted by physical damage producing intrastate, incremental expenses of approximately $675,000.

- Hurricane Dennis made landfall on the afternoon of July 10, 2005, west of Navarre Beach in Pensacola as a Category 3 storm with wind speeds of 120 mph. Approximately 225,000 lines were impacted and damaged by Hurricane Dennis causing intrastate, incremental expenses of approximately $2.2 million.

- Hurricane Katrina made landfall near the Dade-Broward County line between Hallandale Beach and North Miami Beach on August 25, 2005, as a Category 1 hurricane, and exited the southwest part of Florida on August 26 and continued in a north, northwesterly direction towards the Gulf Coast. While Hurricane Katrina did not make direct landfall in the Florida panhandle, the northwestern portion of the state experienced strong winds, major rainfall and a storm surge of up to 5 feet. Approximately 600,000 access lines were affected resulting in intrastate, incremental expenses of approximately $15.4 million.

- Hurricane Rita was a Category 1 storm primarily in Dade and Broward counties. BellSouth repaired and replaced 75 spans of cable due to the storm, resulting in intrastate, incremental expenses of approximately $37,000.

- Hurricane Wilma made landfall on the southwest coast of Florida, near Marco Island on October 24, 2005, as a Category 3 hurricane with wind speeds of 125 mph. It crossed the state and exited north of Palm Beach with wind speeds of 100 mph causing intrastate, incremental expenses of approximately $75 million.

Section 364.051(4)(b), Florida Statutes, (F.S.) provides that evidence of damage occurring to the lines, plant, or facilities of a local exchange telecommunications company that is subject to the carrier-of-last-resort obligations, which damage is the result of a tropical system occurring after June 1, 2005, and named by the National Hurricane Center, constitutes a compelling showing of changed circumstances. Section 364.051(4)(b), F.S. provides that:

1. A company may file a petition to recover its intrastate costs and expenses relating to repairing, restoring, or replacing the lines, plants, or facilities damaged by a named tropical system.

2. The Commission shall verify the intrastate costs and expenses submitted by the company in support of its petition.

3. The company must show and the Commission shall determine whether the intrastate costs and expenses are reasonable under the circumstances for the named tropical system.

4. A company having a storm-reserve fund may recover tropical-system-related costs and expenses from its customers only in excess of any amount available in the storm-reserve fund.

5. The Commission may determine the amount of any increase that the company may charge its customers, but the charge per line item may not exceed $0.50 cents per month per customer line for a period of not more than 12 months.

6. 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, its retail nonbasic telecommunications service customers, and, to the extent the Commission determines appropriate, its wholesale loop unbundled network element customers. At the end of the collection period, the Commission shall verify that the collected amount does not exceed the amount authorized by the order. If collections exceed the ordered amount, the Commission shall order the company to refund the excess.

7. In order to qualify for filing a petition under this paragraph, a company with 1 million or more access lines, but fewer than 3 million access lines, must have tropical-system-related costs and expenses exceeding $1.5 million, and a company with 3 million or more access lines must have tropical-system-related costs and expenses of $5 million or more. A company with fewer than 1 million access lines is not required to meet a minimum damage threshold in order to qualify to file a petition under this paragraph.

8. A company may file only one petition for storm recovery in any 12-month period for the previous storm season, but the application may cover damages from more than one named tropical system.

BellSouth serves 93 exchanges in Florida which include the major Florida cities of Miami, Fort Lauderdale, West Palm Beach, Jacksonville, Cocoa Beach, Daytona Beach, Gainesville, Orlando, Port St. Lucie, Pensacola, Panama City, and Melbourne. As of June 2006, the company states it had approximately 5 million retail lines and approximately 797,300 unbundled loops in service in Florida.

BellSouth claims that the intrastate costs and expenses incurred as a result of the impact of the six named tropical systems constitute a "compelling showing of changed circumstances"

as set forth in Section 364.051(4), Florida Statutes. According to the company, the total storm related costs for repairing, restoring, or replacing its lines, plants, and facilities damaged by these 2005 Storms were approximately $202.4 million. Of this amount, BellSouth states its total incremental expenses for the 2005 Storms were $156 million and the intrastate portion was $95.5 million. It determined the incremental intrastate portion by using the total incremental expenses and applying a jurisdictional factor of 61.2144%.

According to the company, it has not previously filed a petition for storm recovery in any 12-month period for the 2005 storm season. BellSouth further states it did not have any insurance coverage which provided reimbursement for any of the intrastate costs and expenses incurred, and it does not have a storm reserve fund.

BellSouth proposes to recover its intrastate, incremental expenses via a charge not to exceed $0.50 per month per line for a period of not more than 12 months. It is proposing the line-item charge be recovered on a per line basis from retail basic and non-basic local exchange service lines, including residential and business lines, payphone lines, PBX trunk lines, Network Access Registers (NARs) (including NARs used in conjunction with BellSouth ESSX® Service and MultiServ Plus Service), B Channels of both Basic ISDN and ISDN PRI, and 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.)

The total amount BellSouth is seeking to recover in this petition is approximately $34.6 million, which is approximately one-third of the intrastate, incremental expenses incurred by the company and approximately 17 percent of the total costs that it incurred in repairing, replacing and restoring its lines, plant and facilities that were damaged as a result of the 2005 Storms.

By Orders PSC-06-0790-PCO-TL and PSC-06-0792-PCO-TL, issued September 22, 2006, the Commission granted intervention to NuVox Communications, Inc., and Competitive Carriers of the South, Inc. By Order PSC-06-0791-PCO-TL, also issued on September 22, 2006, the Commission acknowledged intervention by the Citizens of the State of Florida.

The Commission conducted a number of public hearings to permit BellSouth customers to be heard on any and all issues in this case. The dates and places of the public hearings are listed below:

- 10/25/06 Pensacola – Pensacola Junior College
- 11/29/06 West Palm Beach – Palm Beach Convention Center
- 11/29/06 Ft. Lauderdale – Broward County Governmental Center
- 11/30/06 Miami – Miami City Hall

On December 6, 2006, the Commission held an administrative hearing on the case. The purpose of the hearing was to permit parties to present testimony and exhibits relative to this proceeding. Prior to the hearing on the technical issues, the parties were able to reach stipulations on Issues 1, 2, 5 (in part), and 6. The stipulation language for these issues and any related discussion can be found in this recommendation below under the "Stipulation" heading, and also in the hearing transcripts, pp. 152-161.

The Commission has jurisdiction over this matter pursuant to Section 364.051(4), Florida Statutes.

STIPULATIONS

The Stipulated language for Issues 1, 2, 5 (in part), and 6 appears below. Staff notes that these stipulations were approved by the Commission as a preliminary matter at the hearing which took place on December 6, 2006. (TR 152-161).

Issue 1: What amount of any storm damage reserve fund should be considered when determining the amount of tropical-system-related intrastate costs and expenses to be recovered?

Stipulated Language: By agreement of the parties, this issue does not need to be voted on by the Commission. The issue of any storm damage reserve fund can be raised in a future docket and addressed by the Commission at that time. In so doing, the parties expressly reserve the right to make any and all arguments regarding the existence or nonexistence of the storm reserve in a future storm recovery proceeding.

Issue 2: What is the appropriate amount of intrastate costs and expenses related to damage caused during the 2005 tropical storm season, if any, that should be recovered by BellSouth, pursuant to Section 364.051(4), Florida Statutes?

Stipulated Language: For the sole purpose of this case, the maximum amount of intrastate costs and expenses related to the damage caused during the 2005 tropical storm season that BellSouth incurred and is entitled to recover is $75.271 million.

Issue 5 (in part): If a line item charge is approved for retail customers in Issue 4, on what date should the charge become effective, and on what date should the charge end?

Stipulated Language: If a charge is approved in Issue 4 for BellSouth retail customers, the charge may be assessed at BellSouth's earliest convenience, but no earlier than 30 days from the date of the Commission vote. The charge should be effective for 12 consecutive months. BellSouth should provide staff the wording to be used on its bills regarding the storm charge prior to issuance.

Issue 6: Should this docket be closed?

Stipulated Language: If a charge is not approved, this docket should be closed. If a charge is approved, then the docket should remain open. At the end of the collection period, BellSouth shall file a report on the amount collected. If the collections exceed the amount authorized by the Commission in Issue 2, BellSouth shall refund the excess.

Discussion of Issues

Issue 3A: What is the appropriate type and number of retail access lines, basic and nonbasic, to which any storm damage recovery may be assessed?

Recommendation: Staff recommends that for purposes of assessing a line-item storm recovery charge, customer or access line should be defined as the number of activated channels. As of June 2006, BellSouth had approximately 4.9 million retail access lines. The line-item recovery charge should be assessed per access line for retail basic and nonbasic local exchange service lines, including residential and business lines, payphone lines, PBX trunk lines, Network Access Registers (NARs) (including NARs used in conjunction with BellSouth ESSX® Service and MultiServ Plus Service), and B Channels of both Basic ISDN and ISDN PRI. Residential lines should exclude Lifeline customers; business lines should exclude Official lines. For retail customers obtaining high-capacity or channelized services, BellSouth should assess the charge only on the actual activated channels. Additionally, staff recommends that BellSouth's general billing database should be used in determining the access lines to be assessed. **(P. Lee, Ollila)**

Position of the Parties

BellSouth: As of June 2006, BellSouth had approximately five million retail access lines. In accordance with Florida Statutes Section 364.051(4), the line-item charge can be assessed "per access line to the billing statement of the company's retail basic local telecommunications service customers" and "its retail nonbasic telecommunications service customers." BellSouth proposes that the line-item charge be recovered on a per line basis from retail basic and nonbasic local exchange service lines, including residential and business lines, payphone lines, PBX trunk lines, Network Access Registers (NARs) lines (including NARs used in conjunction with BellSouth ESSX® Service and MultiServ Plus Service), and B Channels of both Basic ISDN and ISDN PRI. BellSouth proposes to use its general billing database to determine the appropriate line counts because this database contains the uniform service ordering codes that BellSouth will use in order to apply the line-item charge to the service that each access line carries. Further, because the total number of applicable lines fluctuates on a daily basis, BellSouth proposes to apply the $0.50 charge to the classes of service identified above.

CompSouth: No position.

OPC: No position.

Staff Analysis: Section 364.051(4)(b), Florida Statutes, provides a telecommunications company the right to request approval to recover certain storm-related costs from the Commission. Specifically, Sections 364.051(4)(b) 5 and 6, Florida Statutes, state that:

> 5. The commission may determine the amount of any increase that the company may charge its customers, but the charge per line item may not exceed 50 cents per month *per customer line* for a period of not more than 12 months.
>
> 6. 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, its retail nonbasic telecommunications service customers, and, to the extent the commission determines appropriate, its wholesale loop unbundled network element customers. At the end of the collection period, the commission shall verify that the collected amount does not exceed the amount authorized by the order. If collections exceed the ordered amount, the commission shall order the company to refund the excess. (emphasis added)

The instant issue addresses how to define the term "access line" for assessing the storm recovery charge and how to apply the definition in determining the number of retail access lines.

PARTIES' ARGUMENTS

BellSouth witness Blake testifies that in accordance with Section 364.051(4)(b)6, Florida Statutes, BellSouth proposes to assess a $0.50 line-item storm charge on the following retail access lines:

- Retail basic and nonbasic local exchange service lines, including residential and business lines
- Payphone lines
- PBX lines
- Network Access Registers (NARs)[1] (including NARs used in conjunction with BellSouth ESSX Service and MultiServ Plus Services)
- B Channels of both Basic ISDN and ISDN PRI (TR 74)

The witness explains that retail basic services consist of flat-rate single line residential and business services; multi-line business services, nonbasic services consist of package offerings (i.e., Complete Choice, Area Plus Service), payphone access lines, PBX trunk lines, NARs, and B channels of both Basic ISDN and ISDN PRI. (TR 91-92)

BellSouth witness Blake asserts that under BellSouth's methodology, an "access line" is equal to an activated voice channel. (TR 97, 104) This definition, states the witness, is consistent with Rule 25-4.003, Florida Administrative Code, and the Federal Communications Commission's definition. (Exh. 4 Blake Depo. pp. 21, 66, 76; Exh. 2 Rog. 24) Moreover, assessing activated channels, contends the witness, is consistent with how customers are billed with the service. (TR 96; Exh. 4 Blake Depo. p. 24) For example, a Business BRI customer with three BRI lines and two B-Channels activated per ISDN line would be assessed a line-item charge on six activated lines (2 B-Channels X 3 ISDN lines). (Exh. 4 LFX 2)

Witness Blake states that because the line-item storm charge is not expected to begin until early 2007 and that the number of access lines fluctuates daily, it is not possible to determine the exact number of access lines which will be assessed during the 12-month period. However, to demonstrate that BellSouth is entitled to assess the maximum $0.50 line-item charge allowed by statute, BellSouth provided an estimate of the access line count for retail and

[1] A NAR is a point of access to the network. (Exh. 4 Blake Depo. p. 18)

wholesale lines. (TR 92) BellSouth identified the number of qualifying retail access lines, based on activated voice channels, as of June 2006 to be 4,970,624. (TR 74; Exh. 2 POD 2) In witness Blake's surrebuttal testimony, the witness explains that BellSouth discovered two errors: 1) that 33,339 lines should have been included as a category of retail lines, and 2) another category had been overstated by 28,900 in Official Lines. The witness explains that Official Lines are lines used by BellSouth for administrative purposes and should not have been included. The net effect of the revisions is an increase of 4,439 retail access lines, making the June 2006 retail access line count 4,975,063. (TR 93; Exh. 2 POD 2; Exh. 7 POD 2)

Staff witness Winston testifies that as part of the staff audit on BellSouth's Petition, the number of customer access lines included in BellSouth witness Blake's amended testimony were compared with the Schedule 8 report required pursuant to Rule 25-4.0185, Florida Administrative Code. (TR 123; Exh. 19 p. 121) Witness Winston explains that Audit Finding 4 discusses that the access line count included in BellSouth's Amended Petition (4,970,624) and the access line count reported on Schedule 8 (4,815,490) were calculated based on two different methodologies. The audit opinion states that although BellSouth "provided reasons as to the difference, audit staff is unconvinced that these two filings should be different." The audit opinion is to use the Schedule 8 access line information as being consistent over time and "not devised to support a specific docket." (Exh. 19 pp. 9-11)

In response, BellSouth witness Blake contends that the appropriate data source to use for assessing a line-item storm charge is BellSouth's billing system, rather than Schedule 8 data. (TR 94-96) The witness explains that Schedule 8 is an engineering planning resource tool that reports access line data for each exchange in BellSouth's service area in Florida and is segmented into Retail Lines (total number of retail lines, number of residential lines, number of business lines), Resale Lines (total number of resale lines, number of residential resale lines, number or business resale lines), UNE-P (total number of unbundled network element platforms, number of residential UNE-P, number of business UNE-P), Pay Phones (total number of pay phone access lines) and Total Lines (total number of access lines from each of the reported category totals). (TR 95) Thus, asserts witness Blake, Schedule 8 includes retail and wholesale lines that are not at issue in the instant proceeding and counts business and wholesale lines differently. For example, Schedule 8:

- includes resold lines, not included in the storm Petition
- includes information on unbundled loop/port combinations (UNE-P) rather than wholesale unbundled loops
- counts each station line for retail business lines and PBX lines as well as other business lines rather than Network Access Registers (NARs)
- counts each ISDN line as a single line rather than counting activated voice channels provisioned on the ISDN line. (TR 96-97)

On the other hand, contends witness Blake, BellSouth's billing system provides a direct link to BellSouth's customers and the services they are receiving, better ensuring that the surcharge will be assessed in a manner consistent with the services being billed to the customer. (TR 96, 98-99; Exh. 21) The billing database contains the uniform service ordering codes (USOCs) that identify the services which may be assessed the storm recovery line-item charge.

(TR 97) Additionally, notes witness Blake, using BellSouth's billing system data for assessing the storm charge is consistent with the assessment of the 911 and Miami-Dade County Ordinance line-item charges. (TR 98-99)

ANALYSIS

Definition of access or customer line

Sections 364.051(4)(b) 5 and 6, Florida Statutes, allows the Commission to determine a line-item storm charge "per customer line" and to order an equal line-item charge "per access line" to the billing statement of retail basic and nonbasic customers. Relative to the instant issue, staff believes the salient question is how to define "customer line" or "access line" for purposes of storm cost recovery. Staff notes that neither of these terms is defined in the statute. However, staff observes that "access line" is defined in Rule 25-4.003, Florida Administrative Code (FAC), as:

> The circuit or channel between the demarcation point at the customer's premises and the service end or class 5 central office.

Both BellSouth and CompSouth rely on the Commission's Rule as support for their respective definitions of "access line."[2] BellSouth asserts that the Rule defines "access line" in terms of channels, thus supporting a definition in terms of activated voice channels.[3] (Exh. 2 Rog. 14-15, 17, 26) BellSouth witness Blake believes that BellSouth's definition is also consistent with the FCC's definition, the 911 charge, the Miami-Dade manhole ordinance assessment of an ISDN line, as well as with the Commission's decision in BellSouth's Change of Law[4] proceeding. (TR 104; Exh. 2 Rog. 24; Exh. 4 Blake Depo. pp. 21, 66, 76) In contrast, CompSouth witness Wood believes the Rule clearly defines the term as the facility regardless of the actual or potential capacity; the circuit is the facility.[5] (Exh. 2 Rog. 9; Exh. 4 Blake Depo. pp. 9, 15)

Staff observes that the FCC defines "access line" as:

> A communication facility extending from a customer's premises to a serving central office comprising a subscriber line, and if necessary, a trunk facility, e.g. a WATS access line, TWX access line. (Appendix to 47 CFR Part 36; TR 104; Exh. 2 Rog. 25)

[2] Although CompSouth did not take a position on this issue, witness Wood's definition of access line with respect to wholesale loops is just as applicable to retail lines.

[3] An activated channel represents an actual channel or line that is being used to provide services over the facility. For example, an ISDN PRI facility has a maximum of 23 channels. Under BellSouth's definition, if the customer has 18 channels activated, then this equates to 18 access or customer lines.

[4] Order No. PSC-06-0172-FOF-TP, issued March 2, 2006, Docket No. 041269-TP, In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

[5] Under CompSouth's definition, an ISDN PRI facility equates to one access or customer line.

Staff believes that this is a case of first impression and, as such, the Commission should look to the Legislature for guidance. Staff believes that the Legislature specifically tied assessing the storm charge to the customer billing statement. To assess a line-item storm charge to the customer's billing statement on a per customer or access line can be reasonably construed to mean that the charge is tied to how the customer is billed. BellSouth provided a customer bill for ISDN service that directly shows the customer is billed for the activated channels or lines being used. Under CompSouth's view, a single-line residential customer would be counted as one access line; a business customer obtaining a high-capacity service from BellSouth would be counted as one line, even though the business customer may actually be using 10 separate channels. To staff, this seems inequitable; the single-line residential customer would be assessed the same charge as a business customer with 10 activated lines. Staff believes that "access line," for purposes of assessing a line-item storm charge, should be defined based on activated channels rather than facility.

Application of access line to retail business high-capacity customers

According to BellSouth, a retail customer subscribing to a T1 line with 18 active channels would be assessed a line-item charge of $0.50 on each of the 18 active channels, or $9.00 per month. (Exh. 4) However, a retail customer subscribing to a high-capacity service such as Channelized MegaLink or LightGate would be assessed for the local channel plus each specific service or access line being provided over the service. (TR 107; Exh. 2 Rog. 51; Exh. 4 LFX2, LFX5, Blake Depo. pp. 78-80; Exh. 5; Exh. 16 KKB3) This seems to staff to be a reach under the statute and contrary to BellSouth's methodology of counting activated voice channels. Only an activated channel can be connected to the Public Switched Telephone Network (PSTN). Without an activated channel, there is no connection. Therefore, consistent with the prior recommendation, staff believes that only the activated channels should be counted and assessed a storm charge.

There is insufficient evidence in the record for staff to determine an exact adjustment needed. However, since BellSouth will be billing the retail access lines each month for assessing the storm charge, staff believes the Commission instructing the company to only bill the activated channels for retail high-capacity services is sufficient.

Source of data for retail access lines

BellSouth witness Blake explains that the access line counts included in BellSouth's petition were extracted from BellSouth's Customer Record Information System (CRIS); Schedule 8 line count data is on a per exchange basis and specifically used for future planning in the network. (Exh. 4 Blake Depo. pp. 97-98) Schedule 8 data includes lines for which the line-item storm charge will not be assessed, for example, resold lines. For residential lines, the difference between Schedule 8 and BellSouth's Amended Petition is 212 lines.

On the business line side, Schedule 8 counts station lines for the more complex nonbasic services such as ESSX and Centrex; BellSouth counted NARs for these services in its Amended

Petition. (Exh. 4 Blake Depo. pp. 98-100) For ISDN, Schedule 8 counts each ISDN line as one line. Under its proposal, BellSouth counts each active voice channel.[6]

Staff believes that for purposes of assessing a line-item charge, BellSouth's use of its billing system data is appropriate. As noted by BellSouth, Schedule 8 data includes line counts that BellSouth is not proposing to assess. Furthermore, the billing system data ensures that the billing statement of those customers that subscribe to the identified access lines will be assessed the line-item storm charge.

Lifeline residential lines

According to BellSouth witness Blake, the Company will not assess the line-item storm charge to the bills of customers participating in the Universal Service Lifeline program. (Blake Depo. Exh. 4) However, the witness identified 83,745 Lifeline lines that had been inadvertently reported in the residential retail line count. (Exh. 4 Blake Depo. pp. 8-9, 57, LFX1) The witness agrees that the residential line count should be reduced to reflect the exclusion of these customers.

Other access lines

Although this Issue and Issue 3(b) address retail and wholesale access lines to be assessed a storm recovery charge, staff is concerned that not all access lines or customers are being captured. Resale lines, special access lines, and CLECs with commercial agreements are not paying the storm recovery charge. Staff believes that it may be appropriate for these customers to bear their fair share of BellSouth's storm recovery costs. However, the record in this case is insufficient for staff to make a recommendation to address this possible inequity. There are several possible methods for either charging or allocating costs to these other access lines which staff intends to pursue in future storm recovery dockets. Due to the large amount of storm recovery costs identified in Issue 2, staff does not believe that the inclusion of these other types of access lines would have any affect on the monthly charge which staff is recommending in Issue 4.

CONCLUSION

Staff recommends that for purposes of assessing a line-item storm recovery charge, customer or access line should be defined as the number of activated channels. As of June 2006, BellSouth had approximately 4.9 million retail access lines. The line-item recovery charge should be assessed per access line for retail basic and nonbasic local exchange service lines, including residential and business lines, payphone lines, PBX trunk lines, Network Access Registers (NARs) (including NARs used in conjunction with BellSouth ESSX® Service and MultiServ Plus Service), and B Channels of both Basic ISDN and ISDN PRI. Residential lines should exclude Lifeline customers; business lines should exclude Official lines. For retail customers obtaining high-capacity or channelized services, BellSouth should assess the charge only on the actual activated channels. Additionally, staff recommends that BellSouth's general billing database should be used in determining the access lines to be assessed.

[6] A PRI-ISDN line can have up to 23 active voice channels.

Issue 3b: Is a line item charge on BellSouth's wholesale UNE loops appropriate pursuant to section 364.051(4)(b)6, Florida Statutes and Federal Law? If yes, on which types of lines should the charge be assessed and how should the lines be counted? What is the total number of UNE loops to be assessed, if any?

Primary Recommendation: No, primary staff believes that applying a line-item charge to wholesale loop unbundled network element customers violates the TELRIC pricing rules, and therefore, is preempted by Federal Law. **(Teitzman)**

Alternative Recommendation: Alternative staff recommends that the Commission authorize BellSouth to impose a line-item charge on the wholesale UNE loop customer.

If the Commission determines that a line item charge on BellSouth's wholesale UNE loops is appropriate pursuant to Section 364.051(4)(b)6, Florida Statutes, then staff recommends that BellSouth use the 47% utilization factor in calculating the number of storm recovery line item surcharges applied to each high capacity loop. Staff also recommends that BellSouth recalculate the factor monthly, using its most recently available retail billing data, and use the recalculated factor when applying storm recovery line item surcharges to high capacity loops.

Staff recommends a single storm recovery line item surcharge be applied to each of the following loops:

- 4-wire 19.2, 56 or 64 Kbps Digital Grade Loop
- 2-wire Analog Voice Grade Loop – Service Level 2
- 4-wire Analog Voice Grade Loop
- 2-wire ISDN Digital Grade Loop
- 2-wire High Bit Rate Digital Subscriber Line (HDSL) Compatible Loop
- 2-wire Asymmetrical Digital Subscriber Line (ADSL) Compatible Loop
- 2-wire Analog Voice Grade Loop – Service Level 1
- 2-wire and 4-wire Unbundled Copper Loop
- 2-wire Unbundled Copper Loop – Non-designed

Staff recommends that the 47% factor, updated monthly, be applied to the following high capacity loops so that, using the 47% factor, 11 storm recovery line item surcharges will be assessed to each DS1 loop and 315 storm recovery line item surcharges will be assessed to each DS3 loop. The updated factor should be rounded in a consistent manner with the methodology used in computing the 11 and 315 surcharges, that is for a DS1, 47 percent x 24 channels = 11.28 surcharges, rounded down to 11. For a DS3, 47 percent x 672 channels = 315.84 surcharges, rounded down to 315. Following are the high capacity loops:

- 4-wire Unbundled DS1/ISDN Digital Grade Loop
- 4-wire Unbundled DS1/ISDN Digital Grade Loop in EEL Combination
- DS3 Unbundled Digital Loop
- DS3 Unbundled Digital Loop in EEL Combination

The total number of line item surcharges (or loop equivalents) to be assessed as of June 2006 is 477,648. **(Wiggins, Ollila, P. Lee)**

Position of the Parties:

BellSouth: Yes, the line-item charge on BellSouth's wholesale UNE Loops is appropriate pursuant to Section 364.051(4)(b)6, Florida Statutes, and federal law. Section 364.051(4)(b)6, Florida Statutes, allows the Commission to apply the line-item charge to BellSouth's wholesale loop unbundled network element customers. This charge does not constitute a change in the TELRIC price of the loop; rather, it is a temporary line-item charge authorized under Florida law for the recovery of intrastate expenses that BellSouth is seeking to apply to its retail and wholesale loop customers. The charge is unrelated to BellSouth's federal Section 251 obligations and thus does not impact any TELRIC pricing requirements. Further, because the charge is unrelated to Section 251, no amendment of an interconnection agreement is required.

BellSouth proposes that the line-item charge be recovered on a per access line basis from all unbundled wholesale loop network element customers (including stand-alone loops, ISDN loops, DS1 and DS3 loops (stand-alone and as part of an enhanced extended loop), xDSL loops). BellSouth proposes to apply the charge on a nondiscriminatory basis for all affected CLECs by charging CLECs $0.50 a line for all lines leased by the CLEC, regardless of the loop type purchased. Such a proposal is consistent with the Commission's decision in Order No. PSC-06-0172-FOF-TP, where the Commission determined that a DS1 should be counted as 24 business lines because it corresponds to 24 64 kbps-equivalents. BellSouth also proposes to use its general billing database to determine the appropriate line counts, because this database contains the uniform service ordering codes that BellSouth will use in order to apply the line-item charge to the applicable wholesale loops. Using this data source and as of June 2006, BellSouth had approximately 797,300 unbundled loops in service.

CompSouth: No. A line item charge on UNEs is inappropriate under Florida and federal law. Pursuant to federal law, BellSouth's attempt to apply the proposed charge to UNE customers is inconsistent with and preempted by federal law. The United States Supreme Court in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), approved the FCC's adoption of the TELRIC pricing methodology, which state commissions must apply in regard to UNE pricing. Imposing a charge on top of already approved TELRIC prices is in conflict with federal law. The Commission should reject BellSouth's proposal to apply its requested storm surcharge to unbundled wholesale loop network element customers. BellSouth's proposed charge on UNEs is inconsistent and in conflict with federal law. BellSouth seeks, through this surcharge, to reprice UNEs at above TELRIC prices. This is directly inconsistent with and violative of the Telecommunications Act of 1996 and FCC regulations which require UNEs to be priced at TELRIC rates.

Further, section 364.051(4)(b)(6), Florida Statutes, explicitly states that a surcharge may only be applied to wholesale access lines if the Commission finds it appropriate. Such a charge is not appropriate because it would conflict with federal law. It is also inappropriate for the following reasons.

First, it is inappropriate under the Florida statute to assess a charge on CLECs because CLECs have incurred and must absorb significant expenses of their own related to storm damage. Second, unlike BellSouth, CLECs have no practical market mechanism by which to

impose such a surcharge on their own customers. Third, the way in which BellSouth has counted access lines is inconsistent with the statute which directs the charge to be applied on a per access line or per customer basis, not a "per DSO equivalent" basis as BellSouth seeks. Fourth, BellSouth's proposed charge is not competitively neutral – it does not propose to apply the charge in the same way to wholesale and retail customers. BellSouth proposes to charge wholesale customers more through its surcharge than retail customers for equivalent service.

OPC: No position.

LEGAL ISSUE

Parties' Arguments

Section 364.051(4)(b)6, Florida Statutes, states in pertinent 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 exchange telecommunications service customers, its retail nonbasic telecommunications service customers, and, to the extent the commission determines appropriate, its wholesale loop unbundled network element customers.

BellSouth asserts that wholesale loop UNE customers should be included in the assessment of the line-item charge because it is consistent with and expressly authorized by Section 364.051(4)(b)6, Florida Statutes. BellSouth argues further that, as a matter of fact, the line-item charge does not re-price or alter UNE rates but rather is a separate line-item charge of limited duration established under state law for the recovery of intrastate costs and expenses associated with repairing BellSouth's network following the 2005 Storms. (BellSouth memo at 2)

CompSouth contends that Section 364.051(4)(b)6, Florida Statutes, provides the Commission with discretion to determine whether it is appropriate to increase UNE loop customer prices to recover BellSouth's embedded costs. CompSouth argues that 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 UNE rate pricing principles. (CompSouth memo at 1-2)

BellSouth counters that the storm recovery line-item charge available under Florida law has nothing to do with BellSouth's provisioning of UNEs pursuant to the Act. BellSouth asserts that UNE rates will not increase or be modified as a result of the proposed line-item charge and that CLECs will pay the same UNE rate for wholesale loops that they paid prior to the implementation of a line-item charge; and UNE rates set forth in the CLECs' interconnection agreements will not be altered or modified through a line-item charge. (BellSouth memo at 3)

BellSouth draws a comparison between a line-item charge being assessed pursuant to Section 364.051(4)(b)6, Florida Statutes, and Regulatory Assessment Fees (RAFs) and 911 surcharges which are assessed pursuant to Florida law. BellSouth contends that if the

Commission were to adopt CompSouth's argument, RAFs and the 911 surcharge would be preempted by federal law because they indirectly increase the costs of providing service in Florida. BellSouth argues further that this is clearly not the case as the Legislature has deemed it appropriate that CLECs are required to pay certain fees under Florida law and the mere existence of these fees does not violate or conflict with federal law. (BellSouth memo at 4)

To the contrary, CompSouth argues that BellSouth's comparison of its proposed surcharge with RAFs and the 911 surcharge is patently false. CompSouth distinguishes these fees by pointing out that neither the RAFs nor the 911 surcharge is paid to BellSouth to defray BellSouth's historic book costs, as would be the case for the line-item charge proposed in this proceeding. CompSouth asserts that CLECs pay the RAFS and 911 surcharge to governmental entities to cover the cost of government services and neither of the charges is assessed on a per loop basis. (CompSouth memo at 4)

CompSouth argues further that the state laws authorizing the RAF and 911 surcharge have no conflicting or overlapping federal regime for assessment, unlike this situation in which the federal regime, TELRIC, establishes what is to be paid by whom and to whom for what. (CompSouth memo at 4)

BellSouth contends that any determination that the proposed line-item charge conflicts with federal law and thus cannot apply to CLECs renders Section 364.051(4)(b)6, Florida Statutes meaningless. BellSouth argues this is so because it results in a finding that in no event, could the Commission find that it would be appropriate to apply the proposed line-item charge on BellSouth's wholesale loop UNE customers, notwithstanding the statutes clear language to the contrary.[7] BellSouth argues further that the Legislature is presumed to have known of the existence of Section 252 of the Act, because it is a well-settled rule of statutory construction that "the Legislature is presumed to know the existing law when a statute is enacted." See *Wood v. Fraser*, 677 So.2d 15 (Fla. 2d DCA 1996) citing *Collins v. Inv. Co. v. Metro Dade County*, 164 So.2d 806, 809 (Fla. 1964). Thus, BellSouth argues that the Legislature's clear intent was for the Commission to have the discretion to determine that BellSouth's wholesale UNE loop customers are within the universe of customers that would be subject to this proposed line-item charge. (BellSouth memo at 4-5)

CompSouth argues that the proposed line-item charge runs counter to federal law for several reasons. CompSouth asserts that the proposed line-item charge would impose a charge on top of and in addition to approved TELRIC-based rates outside of a cost proceeding. CompSouth contends that the proposed line-item charge 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. CompSouth concludes that if the Florida Legislature can allow BellSouth to assess historic books 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 thus dismantling the Federal TELRIC regime. (CompSouth memo at 4-5)

[7] Under Florida law, clear and unambiguous statutory language must be given its plain and obvious meaning. *Holly v. Auld*, 450 So.2d 217 (Fla. 1984); *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla. 1982).

CompSouth maintains that because BellSouth's proposed line-item charge is inconsistent with federal pricing regulations, it is impermissible and preempted by federal law. CompSouth asserts that 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 Act's provisions. CompSouth contends that because the proposed line-item charge on UNEs does not comport with the specific criteria expressly listed in section 251, which requires UNE rates to be based on TELRIC costing principles, it is preempted by federal law. (CompSouth memo at 8)

CompSouth argues further that the binding impact of TELRIC on the states, as set forth in *Verizon*, leaves no room for consideration of matters expressly eliminated from or outside of the required TELRIC methodology. CompSouth argues that if the Commission approves the proposed line-item charge, it will have the effect of increasing approved TELRIC rates and would run afoul of the rationale behind TELRIC pricing and Congress' occupation of the pricing field. (CompSouth memo at 9)

BellSouth argues that it is not appropriate policy for one group of customers to be assessed the proposed line-item storm recovery charge while another group of customers identified in the statute are exempt. BellSouth maintains that not assessing the proposed line-item charge on wholesale unbundled loop customers could, in future proceedings, where BellSouth was not entitled to collect the maximum amount allowed, result in BellSouth's retail customers making up the shortfall in all instances, which BellSouth contends is not what the legislature contemplated. (BellSouth memo at 5-6)

Primary Legal Analysis

Section 364.051(4)(a), Florida Statutes, states in pertinent part;

> Notwithstanding subsection (2), any local exchange telecommunications company that believes circumstances have changed substantially to justify any *increase in the rates* for basic local telecommunications services may petition the commission for a *rate increase*, but the commission shall grant the petition only after an opportunity for a hearing and a compelling showing of changed circumstances.

Pursuant to this statute, if BellSouth believes its circumstances have changed substantially, it may petition the Commission for a rate increase. Section 364.051(4)(b), Florida Statutes, proceeds to clarify that a tropical system occurring after June 1, 2005, and named by the National Hurricane Center, constitutes a compelling showing of changed circumstances. Consequently, primary staff believes storm cost recovery through the $0.50 charge is a rate increase as contemplated by section 364.051(4)(a), Florida Statutes.

Given that the charge at issue is a rate increase, primary staff believes that applying a line-item charge to wholesale loop unbundled network element customers violates the TELRIC pricing rules, and therefore is preempted by federal law. Primary staff believes that the issue to be addressed by the Commission is not whether as a result of the 2005 storm season BellSouth's TELRIC rates are rendered unjust and unreasonable, but rather does the Commission have the

jurisdiction to provide BellSouth with a remedy, specifically allowance of a line-item charge on wholesale UNE loops.

The TELRIC methodology measures future costs to arrive at forward-looking rates that are both just and reasonable. Primary staff believes that the collection of a Commission approved line-item charge resulting from costs incurred in a previous year, clearly violates the tenets of the TELRIC methodology by allowing BellSouth to recover embedded costs.

In finding that TELRIC is the appropriate methodology for pricing wholesale UNE loops, the FCC determined that years with additional costs, as well as years with additional savings would not be incorporated into the pricing of wholesale UNE loops. Although a specific year in which 6 named tropical storms impact BellSouth's territory may certainly be considered unforeseeable, the idea that there will be outlier years where unforeseen events may impact the cost of doing business certainly is not. The FCC determined that TELRIC is the appropriate pricing methodology and did not provide exceptions for catastrophic occurrences such as earthquakes, hurricanes, wildfires, etc. Furthermore, if BellSouth believes that increased storm activity in Florida has changed the cost of provisioning UNE loops on a going forward basis, BellSouth may petition the Commission to undertake a rate proceeding.

Moreover, even if you accept alternative staff's premise that certain events can result in costs that are so enormous they render the TELRIC rates unjust and unreasonable, it is not within a state's jurisdiction to remedy these results with a rate increase based on embedded costs. In *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999), the United States Supreme Court held that the FCC has jurisdiction to design a pricing methodology to be followed by the states. Additionally, in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) the Supreme Court upheld the FCC's determination that TELRIC was an appropriate pricing methodology to implement §252(d) of the Act. Therefore, primary staff believes that the FCC determined, and the Supreme Court upheld, that an ILEC may not recover its embedded costs in the pricing of wholesale UNEs. Primary staff believes allowing BellSouth to assess a line-item charge to wholesale UNE loops and, as a result, recover a portion of its costs for the year 2005, constitutes a clear violation of the TELRIC pricing methodology as set forth by the FCC.

BellSouth and alternative staff may have a valid argument that in years where catastrophic events occur, which result in significant infrastructure damage, the TELRIC pricing methodology results in an inequitable cost distribution. However, a state commission is not the appropriate entity to address this concern. The FCC is the regulatory body that has been designated by Congress to set the pricing methodology of wholesale UNE loops.

The critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law. *Louisiana Public Service Com'n v. F.C.C.*, 476 U.S. 355 (1986). State law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. *English v. General Elec. Co.*, 496 U.S. 72 (1990). In *Verizon*, the Court characterized its decision in *Iowa* as "upholding the FCC's jurisdiction to 'design a pricing methodology' to bind state rate making commissions." *Verizon* at 494. Because, as discussed above, the proposed line-item charge is a rate increase based on embedded

costs, primary staff believes it is not appropriate, pursuant to federal law, for the Commission to approve the proposed line-item charge for wholesale UNE loop customers.

BellSouth argues that if the Commission finds that the proposed line-item charge conflicts with federal law and thus cannot apply to CLECs, Section 364.051(4)(b)6, Florida Statutes, would be rendered meaningless. Primary staff believes that BellSouth's argument is flawed. Based on the structure of the statute, primary staff believes that the Legislature contemplated that the Commission would have to consider factors beyond that which are considered when approving a line-item charge for retail customers. The statute could have simply combined retail basic local telecommunications service customers and retail nonbasic local telecommunications service customers with wholesale UNE loop customers. However, by including the caveat, "to the extent the commission determines appropriate" primary staff believes the Legislature explicitly recognized that the Commission would have to consider additional factors in its consideration of the wholesale UNE loop customers and that such factors may result in a finding that it is not appropriate to assess a line-item charge to wholesale UNE loop customers. Otherwise, primary staff believes the statute's caveat would be rendered meaningless.

Additionally, primary staff believes that BellSouth's public policy argument is flawed. Although not a factor in this proceeding due to the amount of costs, primary staff notes that nothing in the statute precludes BellSouth from petitioning for costs solely associated with the provisioning of retail services.

Alternative Legal Analysis

Alternative staff agrees with the primary recommendation the charge at issue is a rate increase. Nevertheless, alternative staff disagrees that the authority reserved to the State of Florida under the Amendment X to the U.S. Constitution is preempted by Federal Law because the proposed line charge violates the TELRIC pricing rules. Alternative staff rejects the absolutist position that under the TELRIC framework an ILEC's post-catastrophe restoration costs can never be recovered in any amount regardless of the circumstances. The absolutist view would deny the ILEC any recovery for real costs in rehabilitating its network even if the ILEC's system had been leveled by disaster because those costs were not forward-looking and hypothetical. This result is a disconnect from reality and not what the TELRIC framework intended.

Alternative staff agrees that because the line charge effects a rate increase, the key question that must be answered is whether collection of the line charge from wholesale UNE loop customers is permitted under federal law. Again, CompSouth contends that Federal law established the TELRIC pricing methodology to set cost-based UNE rates and that this methodology excludes the recovery of "embedded costs." Therefore, allegedly, any increase in rates by this Commission to recover "historic book costs and expenses related to repair, replacement, restoration of lines, plants or facilities," would be preempted by federal law. Nonetheless, alternative staff believes that recovery for these catastrophic events was not contemplated by TELRIC and is therefore not preempted by the federal pricing methodology.

The alternative staff believes that TELRIC is inapplicable to this rate increase for one basic reason: TELRIC framework assumes that future costs are "normal" over the long run, while the costs being addressed here are not "normal" but rather catastrophic. In other words, alternative staff believes that the TELRIC framework, in excluding embedded costs, assumes hypothetically that the COLR's system, as on ongoing concern, ***will not be devastated by widespread catastrophic damage in the long run.***

> First, TELRIC measures costs in the long run, a time frame lengthy enough to allow all of an incumbent's costs to become variable and, thus, to allow all embedded costs to drop out. Second, TELRIC is based not on an incumbent local exchange carrier's (ILEC) actual network but instead on a hypothetical network that uses the least cost technology and most efficient design currently available, given the existing location of the ILECs' wire centers. Despite these technical features, however, TELRIC is not a specific, mathematical formula but rather a framework of methodological principles that states retain flexibility to use in conjunction with local technological, environmental, regulatory, and economic conditions in order to arrive at forward-looking rates that are both just and reasonable.[8]

TELRIC thus assumes (1) a hypothetical and perfect system that (2) operates over a time frame lengthy enough (3) to allow just and reasonable forward-looking rates. Some disasters, whether the work of nature or man, can impose restoration costs so enormous that they cannot be handled in the TELRIC framework without rendering the "hypothetical network" arbitrary and capricious and forward-looking rates both unjust and unreasonable.

For example, if an ILEC's system incurred restoration costs so great that one could reasonably project them to occur once every century, how could those costs be reflected in a time frame of 30 years or less without untoward consequences? Moreover, disasters of such enormity are essentially unforeseeable, except in some vague way not useful for rate setting. Thus the assumptions and purpose of TELRIC preclude that framework from being used to address widespread catastrophic damage in forward looking rates. Widespread catastrophic damage to an ILEC's system must be handled on an ad-hoc basis, and in this context, state authority remains primary.

The attempt to use TELRIC to frustrate the legislative scheme in Section 364.051(4)(b), Florida Statutes, should also be rejected because it produces an absurd result. For example, if the rate increase were subject to the TELRIC methodology, then CLECs would be treated inequitably as compared to retail customers. Specifically, they would bear a greater portion of the cost recovery in a UNE rate proceeding than BellSouth's retail customers who are subject to the $0.50 cap.[9] Likewise, if TELRIC rejected the rehabilitation costs because they were atypical

[8] Verizon Pa., Inc. v. Pa. PUC, 380 F. Supp. 2d 627, 632 (Eastern Dist. PA 2005)

[9] This assumes that TELRIC allowed the forward-looking hypothetical costs to include historic costs due to aberrant catastrophe.

and unlikely to reoccur, then BellSouth and its retail customers would be treated inequitably by shouldering all the burden of restoring the ILEC infrastructure upon which the CLECs depend.

In sum, the catastrophic events at issue here are unpredictable and have diverse economic effect. Were TELRIC to account for such economically diverse and unpredictable events, the resulting TELRIC rates would be unjust not only because of their amount in relation to historical averages, but also because of the disparity in the amount of recovery between retail and wholesale customers. Moreover, the resulting rates would be anti-competitive because they would be so high.

Therefore, alternative staff believes that because these costs are not included in the TELRIC methodology, the Commission has authority to allow recovery of these costs in compliance with both Federal and Florida law. Moreover, alternative staff believes that by allowing short term storm and partial cost recovery, the Commission can maintain the integrity of the existing TELRIC rates as forward looking cost of the most efficient telecommunications technology.

Under Section 364.051(4)(b), Florida Statutes, the Commission must affirmatively conclude that BellSouth's recovery from wholesale UNE loop customers is appropriate. As already suggested, the basic reason for allowing the line charges to be placed on the UNE loop customers is to avoid unequal treatment of the retail customers and wholesale customers. In addition, alternative staff believes that the Florida legislature contemplated that both retail and wholesale customers contribute *partially* to the restoration of the COLR's network, a network essential to the infrastructure of the state.

Alternative staff notes that BellSouth has elected to not impose the line charge on its wholesale customers taking service under commercial agreements. Moreover, BellSouth's proposal does not place the line charge on resold service or special access. This decision to not impose the charge on some non-retail customers does raise concerns that wholesale customers may be treated unequally with anticompetitive results. Based on the record, however, these concerns do not justify treating the retail customer inequitably. Therefore, alternative staff recommends that the Commission authorize BellSouth to impose a line charge on the wholesale UNE loop customer.

Primary Legal Conclusion

No, primary staff believes that applying a line-item charge to wholesale loop unbundled network element customers violates the TELRIC pricing rules, and therefore, is preempted by Federal Law. If the Commission approves the primary legal recommendation, then the technical analysis is moot.

Alternate Legal Conclusion

Alternative staff recommends that the Commission authorize BellSouth to impose a line charge on the wholesale UNE loop customer.

If the Commission determines that a line item charge on BellSouth's wholesale UNE loops is appropriate pursuant to Section 364.051(4)(b)6, Florida Statutes, then the technical portion of this issue needs to be addressed.

TECHNICAL ISSUE

If the Commission approves the primary legal analysis, then the technical analysis is moot. BellSouth proposed that retail high capacity loops be counted based on the number of activated channels/access lines a customer had. (TR 104) However, for wholesale unbundled loops, because BellSouth does not know how many channels a CLEC has activated, BellSouth witness Blake first proposed to assess the surcharge on the total capacity of the loops. (TR 105) For example, a DS1 is capable of providing 24 channels, so in this proposal, the surcharge would be assessed 24 times whether or not all channels were activated. Similarly, a DS3 is capable of providing 672 channels, so the surcharge would be assessed 672 times whether or not all channels were activated. BellSouth reported 406,000 loop equivalents as of June 2006. (Exh. 10 Rog. 1 p. 1) After filing the direct testimony, BellSouth discovered what it termed errors in its calculation of unbundled loop equivalents and accordingly, witness Blake filed amended direct testimony which served to increase the number of loop equivalents to approximately 797,300. (TR 74 and Exh. 10 Rog. 1 p. 1)

In BellSouth witness Blake's surrebuttal testimony, she offered an alternative proposal to address the CLECs' concerns. (TR 105) In BellSouth's alternative proposal, a utilization factor of 47% was developed by taking the number of activated channels for retail customers and dividing that number by total channel capacity. The utilization factor of 47% is applied to wholesale unbundled loop equivalents to determine the number of line-item surcharges. (TR 106) The alternative proposal results in a DS1 being assessed 11 times (instead of 24) and a DS3 being assessed 315 times (instead of 672). (TR 106) This results in 477,648 loop equivalents. (TR 107) The types of lines and their application of the surcharges under BellSouth's alternative method are shown in witness Blake's exhibit to her surrebuttal testimony. (Exh. 14 KKB 3, p. 1)

Parties' Arguments

Witness Blake testifies that in accordance with Chapter 364.051(4), Florida Statutes, BellSouth proposes that the line item storm charge be assessed on all unbundled wholesale loop network element (UNE) customers. This includes, states the witness, stand-alone loops, ISDN loops, DS1 and DS3 loops (stand-alone and as part of an enhanced extended loop EEL and xDSL loops.) (TR 74)

According to witness Blake's direct testimony, BellSouth proposed to apply the surcharge to the capacity, or all potential channels, of loops. As of June 2006, BellSouth had 406,000 unbundled loop equivalents in service. Witness Blake filed amended testimony to correct two errors in the number of unbundled loops. One of the errors was caused by a spreadsheet multiplication error and the other was attributed to the omission of the DS1 and DS3 loop portion of EELs. These corrections increased the number of assessable loops from 406,000 to 797,300. (Exh. 10 Rog. 1 p. 1)

CompSouth witness Wood asserts that the difference in the number of loop equivalents must be a result of a change in how BellSouth defines the term "unbundled loop," as DS0 equivalent. (TR 136) He further explains, because BellSouth is capped at $0.50 per access line by the statute, BellSouth's application of DS0 equivalent increases the total BellSouth compensation by CLECs. Witness Wood alleges that because BellSouth is not imposing the surcharge on a DS0 equivalent basis on its own retail customers that purchase DS0 and DS1 services, but only on wholesale customers, the proposal has anticompetitive implications. (TR 137)

CompSouth witness Wood disputes the scope of the services to which the storm surcharge would be applied and the way in which BellSouth counts "access lines" pursuant to Chapter 364.051(4)(b)5, Florida Statutes. (TR 146) The witness argues that BellSouth's proposal actually 1) imposes a surcharge on some access lines much greater than the permitted $0.50 per line per month permitted by the statute, 2) applies the surcharge in a way that is not competitively neutral by assessing wholesale UNE loop lines and retail lines on a different basis, and 3) may be proposing to impose the surcharge on access lines purchased pursuant to a commercial agreement, something not permitted by the statute. (TR 127-128) The witness believes that certain aspects of the statute are particularly important in this proceeding:

1. The statute does not provide the opportunity to impose a surcharge on any other types of wholesale access lines purchased pursuant to a tariff (such as special access), or those access lines provided pursuant to a wholesale commercial agreement. (TR 129)

2. Constraints built into the statute create a definite set of incentives for BellSouth. The statute limits the surcharge to $0.50 per access line each month for one year. Such a constraint causes BellSouth to have little incentive or reason to justify costs in excess of the limit, and to be motivated to seek to apply the surcharge to as many access lines as possible (and highly motivated to define and count access lines to yield the highest number possible.) (TR 130)

Witness Wood argues that a line-item storm charge should not be applied to wholesale unbundled loops because:

1. BellSouth proposes to apply the surcharge on a "per-DS0" rather than on a per access line basis.

2. BellSouth has not demonstrated that its proposed application of the surcharge will be competitively neutral. BellSouth intends to apply the surcharge on DS0, ISDN, DS1, xDSL, and DS3 wholesale loop capacity but does not indicate an intention to apply the surcharge on the same basis to its own retail customers. (TR 132-133)

Witness Wood contends that the phrase "DS0 equivalent" does not appear in the pertinent section of the statute; only the phase "access line" appears in Section 364.051(4)(b)6, Florida Statutes, and it is used in the same way when referring to retail nonbasic telecommunications service customers, or wholesale loop unbundled network element customers. According to witness Wood, BellSouth is attempting to broaden the statute's language. BellSouth, contends the witness, defined "access line" not as a single customer but as multiple customer lines based

on the bandwidth of the loop in question. (TR 134-135) This interpretation increased the size of the surcharge applied to wholesale lines and is at odds with the plain reading of the statute.

Witness Wood also asserts that BellSouth's proposal is at odds with the way in which costs are incurred. Costs to restore facilities damaged by storms are not incurred on a per DS0 basis. Further, the restoration of a DS1 loop is unlikely to cost anything different than restoring a DS0 loop, for example. BellSouth has not demonstrated that it costs 24 times as much to restore a DS1 loop than a DS0 loop, or 672 times as much to restore a DS3 loop as a DS0 loop. (TR 135-136) BellSouth responds that the statute does not require that costs for repairing specific loops or lines form the basis for the proposed recovery amount. (Exh. 2 Rog. 48 p. 1)

With respect to staff witness Winston's audit finding number 5 that the number of unbundled loop access lines could not be verified to Schedule 8 data, witness Blake states that Schedule 8 data includes the total number of unbundled network element platforms (UNE-P lines) sold under a commercial agreement with BellSouth. Additionally, asserts witness Blake, the number of UNE-Ps on Schedule 8 does not include stand-alone unbundled loops or unbundled loops provided as part of EEL combinations. For these reasons, witness Blake states that Schedule 8 data cannot be used to determine the number of wholesale loops to be assessed the storm surcharge and explains why audit staff was unable to verify the unbundled loop calculation. (TR 100-101)

Witness Blake explains that BellSouth determined the number of unbundled loops that would be assessed the line-item charge from information from BellSouth's wholesale data warehouse, which is fed by the systems used to bill the CLEC for the loops. Using the USOCs assigned to each type of unbundled loop, BellSouth extracted information from its wholesale data warehouse and determined the number of loops in-service as of June 2006. (TR 101) Staff agrees with witness Blake that Schedule 8 data is not appropriate for use in determining the number of assessable wholesale loops.

In response to witness Wood's contention that CLECs have no practical market mechanism to impose a storm surcharge on their customers, witness Blake asserts that CLECs have the ability to pass on their costs or choose not to. Witness Blake explains that the statute allows BellSouth to assess the line-item charge per access line for wholesale unbundled loop customers. The witness asserts that in the wholesale world, one unbundled loop could be used to provide services that are equivalent to more than a single access line. For example, a DS0 loop is equivalent to one voice grade loop; a DS1 loop is equivalent to 24 voice grade equivalent loops; and a DS3 loop is equivalent to 672 voice grade equivalent loops. BellSouth witness Blake claims that witness Wood is mistaken that BellSouth is using the term "per-DS0" to mean something different than "per access line." (TR 102-103)

As further support for BellSouth's position, witness Blake notes that the Commission had previously found in the Change of Law proceeding, that a DS1 unbundled loop equates to 24 DS0s or 24 voice grade equivalent loops. Therefore, surmises the witness, the Commission has already determined that the capacity of a wholesale unbundled loop determines the equivalent number of access lines. (TR 103)

With respect to witness Wood's contention that BellSouth's proposed application of the storm surcharge is not competitively neutral and that BellSouth is applying the surcharge to wholesale and retail customers differently, BellSouth witness Blake asserts that this is not true. If a retail customer and wholesale loop customer both have a single line or single loop, both will be charged $0.50. If a retail customer has more than one line, BellSouth will assess the surcharge to its retail customers for each activated voice channel/access line. Because BellSouth is unable to determine the number of activated channels a CLEC is using in a high capacity loop, BellSouth relied on the FCC's definition of access line, this Commission's decision in the Change of Law proceeding, and the definition of access line set forth in Rule 25-4.003, FAC. As such, BellSouth witness Blake contends, it was appropriate to count the full capacity of such loops. (TR 104) However, in an effort to address the CLECs' concerns, BellSouth is not opposed to applying an alternative methodology in which BellSouth would apply its utilization percentage for high-capacity retail services to wholesale high capacity unbundled loops. BellSouth's current utilization factor is 47%, meaning that, on average, 47% of the available bandwidth (or channels) associated with high-capacity retail services is currently being used by BellSouth's retail customers. BellSouth witness Blake explains that BellSouth obtained data from its billing systems that identified, by Florida wire center, the maximum system channel capacity retail services. BellSouth then obtained data identifying the quantity of retail services (utilized capacity) being provided to retail customers over these high capacity retail arrangements. The utilization factor of 47% was calculated by dividing the total utilized capacity for the high capacity retail arrangements in each qualifying Florida wire center by the total maximum capacity for these same retail services in the same Florida wire centers. (TR 105-106)

Accordingly, BellSouth's alternative proposal is to apply the 47% utilization factor to the maximum capacity of DS1 and DS3 unbundled loops to determine the number of line-item surcharges to be assessed, regardless of actual usage. (TR 105-106) Each DS1 unbundled loop would be assessed 11 line-item charges (DS1 capacity is 24, 24 x 47% = 11); each DS3 unbundled loop would be assessed 315 line-item charges (DS1 capacity is 672, 672 x 47% = 315) Witness Blake believes that this alternative approach addresses all of CompSouth witness Wood's concerns, contending that it ensures that retail and wholesale customers purchasing high capacity loops are assessed a line-item surcharge in the same manner. (TR 106) Using a 47% utilization factor, the number of wholesale unbundled loops as of June 2006 is 477,648. (Exh. 16; KKB-2) For retail customers obtaining high capacity services from BellSouth, such as MegaLink Channel Service, the surcharge will be assessed based on the presence of the initial mileage USOC for the local channel element and for each service or access line that is being provided over the MegaLink Channel Service.[10] (TR 107) Thus, the witness believes, BellSouth's proposal for assessing retail and wholesale customers is consistent with Commission precedent and ensures that the charge is applied on a consistent and competitively neutral basis. (TR 108)

In contrast to witness Wood's allegation that BellSouth is redefining access lines to increase the costs of CLECs, BellSouth witness Blake asserts that application of the 47% utilization factor, coupled with a consistent line-item charge to retail high capacity customers,

[10] BellSouth's proposal for Megalink Channel Service was addressed in Issue 3(a).

illustrates that BellSouth is treating all customers in a consistent manner and on a competitively neutral basis. (TR 110)

Staff Analysis

BellSouth defines "access line" as voice equivalents or activated channels. BellSouth witness Blake asserts that BellSouth relied on the Commission's Rule 25-4.003, Florida Administrative Code, and the FCC's definition of a business line when determining its access line counts. Witness Blake asserts that activated channels (capacity) is also consistent with the way the Miami-Dade manhole ordinance is assessed on an ISDN (per channel basis). (Exh. 4 Blake Depo. p. 21) BellSouth's proposal is to apply the line item storm charge on each retail customer for each activated channel/access line, regardless of whether the customer has entered into a retail term commercial agreement (Exh. 10 Rog. 14 supp. p.1 and Rog. 15 p. 1) For interconnection agreements, BellSouth believes the line item charge can be imposed without amending said agreements. (Exh. 10 Rog. 17 p.1) BellSouth also proposes to assess its DSL customers because such customers also subscribe to a BellSouth voice service. In this instant proceeding, BellSouth asserts that it does not have any DSL customers who do not also subscribe to a voice service. (Exh. 10 Rog. 19 p. 1)

However, BellSouth is not proposing to apply the line item charge on resale, special access, or wholesale commercial agreement customers because Section 364.051(4)(b)6, Florida Statutes, provides that the charge could apply to wholesale unbundled network element customers. (Exh. 10 Rog. 16 p.1) As further explanation of its exclusion of loops purchased under commercial agreements, in this instant proceeding, BellSouth asserted that these loops are not within the jurisdiction of the Commission. (Exh. 2 Rog. 27 p. 1) BellSouth did note that it would not be opposed to applying the storm recovery surcharge on resale, special access, or commercial agreement customers if so ordered by the Commission. (Exh. 10 Rog. 16 p. 1).

Witness Wood asserts that an unbundled loop can provide, just as retail loop can provide, more than one voice grade channel. However, the underlying facility identifies the customer line or the access line or the unbundled loop. In other words, there is a one-to-one relationship. (Exh. 4 Wood Depo. p. 9)

BellSouth's Change of Law proceeding involved the identification of impairment and the application of 47 CFR 51.5. Witness Wood asserts that impairment has little relevance with identifying a number of unbundled loops or access lines. It has to do with counting lines for impairment purposes in a given central office. (Exh. 4 Wood Depo. p. 9-10) Witness Wood believes that an access line is the underlying facility. According to witness Wood, the FCC defined an access line in its Triennial Review Order as a facility, not as a voicegrade equivalent. (Exh. 4 Wood Depo. p. 10) Anything other than the underlying facility is at odds with the FCC's use of the term. (Exh. 4 Wood Depo. p. 14) The Commission's definition of an access line is also the facility; the circuit is the facility. (Exh. 4 Wood Depo. p. 15) Whether using the FCC's definition, standard industry usage; the circuit, loop, access line is the facility. (Exh. 4 Wood Depo. p. 17) The cost to BellSouth for the restoration is not a function of the number of active channels or the amount of capacity. (Exh. 4 Wood Depo. p. 21)

BellSouth's Proposals

BellSouth's proposal for its retail high capacity loops is to count the number of activated channels as well as in some cases, adding an additional surcharge for the loop itself (e.g. MegaLink and LightGate). (Exh. 1 Rog. 14 supplemental, Exh. 5 LFX) However, BellSouth is not able to determine how many channels of a CLEC's high capacity loop are activated. (Exh. 2 Rog. 40 p. 1)

In BellSouth's original proposal for wholesale unbundled loops, the loops were to be assessed at their capacity, i.e., a DS0 has a maximum capacity of one channel while DS1 loop has a maximum of 24 channels and a DS3 loop has a maximum of 672 channels, resulting 1, 24, and 672 surcharges per month, respectively. (TR 105)

BellSouth's alternative proposal is to assess the storm recovery surcharge on 47 percent of the capacity of the CLECs' unbundled loops. For example, BellSouth would assess a CLEC DS1 loop 11 surcharges (24 multiplied by 47 percent). A CLEC DS3 loop would be assessed 315 surcharges. (TR 106) BellSouth developed the 47 percent utilization factor by dividing the number of activated retail channels by the retail loops' capacity as of June, 2006, resulting in the average retail activated channel percentage of 47 percent. (TR 106)

The 47 percent utilization factor is an average, which means that the retail utilization rate may range from 1 percent to 100%. According to the redacted version of BellSouth's Late Filed Deposition Exhibit, Item No. 8, (Exh. 9, Blake LFX 8 p. 1; redacted) retail customer channel utilization ranges from 6 percent to 100% in each of the CLLI (switch) codes listed.

When CompSouth witness Wood was asked during his deposition whether the CLEC industry was homogenous enough so that the 47% would be fair, he responded that he did not "have any reason to believe that customer utilization of channels on a T1, for example, provided by one CLEC versus another would be different or whether there would be any reason to expect that that kind of utilization for CLEC customers would be different than for BellSouth retail customers." (Exh. 4 Wood Depo. pp. 21-22)

Staff has two primary concerns about this factor: 1) BellSouth does not intend to update the factor (Exh. 4 Blake Depo p. 107), and 2) the implication that CLECs whose actual utilization is not 47% will pay less or more than comparable retail customers. One way to improve the accuracy and appropriateness of the 47 percent factor, addressing staff's first concern, is for BellSouth to recalculate it monthly using the most recent retail billing period data. Addressing the second concern, CompSouth witness Wood was asked if CLECs would be willing to self-report the number of active channels (because BellSouth does not have that information), witness Wood stated that he did not know. (Exh. 4 Wood Depo. p. 19)

When CompSouth witness Wood was asked in his deposition if the 47 percent factor would be acceptable to CompSouth, he replied that he could provide his opinion, but that he couldn't "give you what's acceptable and unacceptable to CompSouth." (Exh. 4 Wood Depo. p. 18) Witness Wood characterized the 47 percent proposal as "an improvement over the original BellSouth proposal." (Exh. 4 Wood Depo. p. 18)

<u>CompSouth witness Wood's alternative</u>

Although CompSouth witness Wood does not agree with BellSouth's proposal to apply the surcharge to unbundled loops, he stated in his deposition that if the surcharge is to be applied, "you have to apply it on a per line basis, per loop basis, whatever you want to call it. But it's not something that's capacity specific." (Exh. 4 Wood Depo. pp. 17-18) Using witness Wood's approach, then a DS1 and a DS3 should each be assessed one surcharge ($0.50 per month). This approach would apply the surcharge to both retail and wholesale customers based on the physical attributes of the loop; a line is a line. Although witness Wood did not speak to retail lines, it appears as if using his recommendation, a residential customer with two phone lines would be assessed a monthly surcharge of $0.50 for each line for a total of $1.00. A retail or wholesale DS3 customer would be assessed $0.50; however, the capacity of a DS3 is 672 voice channels.

Applying the surcharge to the loop or line without regard to capacity might appear to treat retail and wholesale customers fairly; however, staff believes this approach is likely to result in inequities for the following reasons:

- A single line residential or business customer pays the same surcharge as a large business or CLEC customer for a single loop or line even though the loop can provide as many as 672 voice channels.
- A residential or business customer with two lines pays $1.00 compared to the $0.50 a large business or CLEC customer would pay for a 672 channel capacity loop.

Subscriber Line Charge – ISDN PRI Assessment

A utilization factor, similar to BellSouth's proposed 47 percent, is used under federal rules when applying the Subscriber Line Charge (SLC) to ISDN PRI service. According to BellSouth's FCC Interstate Tariff No. 1, page 4-7, effective October 3, 2006, BellSouth retail ISDN PRI customers are charged five times the Multiline Business SLC rate of $6.77. ISDN PRI customers have access to 23 (B) channels, thus for SLC purposes, these customers are assessed the SLC at a utilization rate of 21.7 percent. When asked whether BellSouth had considered using the SLC surcharge rate, BellSouth witness Blake stated that "using the definition of an access line and reading the statute as to how we can apply the storm recovery charge, along with the FCC's definition, the Commission's definition, what is being used of our network to provide service to our retail basic and nonbasic customers, we felt it was most appropriate to assess it using those definitions." (Exh. 4 Blake Depo. p. 76)

If the ISDN PRI SLC utilization factor of 21.7 percent were to be adopted for calculation of the storm recovery surcharge, then a DS1 would have 5.2 or five surcharges applied to it, for a total assessment of $2.50 per month. For a DS3, 145.8 or 146 surcharges would be applied to it, for a total assessment of $73 per month.

An advantage to using the SLC 21.7 percent utilization factor for high capacity lines or loops is that SLC charges are a familiar and relatively longstanding charge, making an assessment based on the ISDN PRI SLC utilization factor easily understandable to customers and consistent with another assessment. The primary disadvantage to using the SLC 21.7 percent utilization factor is that it is not based on actual market data unlike BellSouth's 47 percent utilization factor.

Line Types and Count of Lines: Conclusion

There is no completely equitable method to assess this surcharge because BellSouth does not know how many channels are activated on CLEC high-capacity loops. Without knowing whether CLECs are able to or would self-report the number of activated channels, staff believes that the appropriate method for assessing the storm recovery surcharge on retail and wholesale high capacity lines/loops is one that should not advantage large business and wholesale customers at the expense of residential and small business customers; it should be based on actual channel utilization as much as possible, and to the extent possible it should not provide an advantage to either retail high capacity customers or wholesale unbundled loop customers.

Of the proposals (alternatives) described above, all result in potential inequities. Staff's analysis has focused on minimizing potential inequities. In determining which is the best proposal, staff recommends that the following proposals/alternatives be rejected:

- BellSouth's original proposal should be rejected because it applies the assessment without any regard for the channel activation or utilization of the wholesale unbundled loops.
- CompSouth witness Wood's alternative should be rejected because it provides an advantage to the customer or CLEC that purchases high capacity loops over residential and small business customers.
- The SLC 21.7 percent utilization factor should be rejected because it is not based on actual market data.

BellSouth's 47 percent utilization factor is the only proposal based on actual market data. Staff recommends that this fact outweighs disadvantages that cannot be fixed without actual CLEC utilization data. However, using a constant 47 percent factor is troublesome to staff because the factor will not be able to reflect future changes in the retail high capacity market.

Staff recommends that BellSouth use the 47% factor in calculating the number of storm recovery line item surcharges applied to each high capacity loop. Staff also recommends that BellSouth recalculate the factor monthly, using its most recently available retail billing data, and use the recalculated factor when applying storm recovery line item surcharges to high capacity loops.

Staff recommends a single storm recovery line item surcharge be applied to each of the following loops:

- 4-wire 19.2, 56 or 64 Kbps Digital Grade Loop
- 2-wire Analog Voice Grade Loop – Service Level 2
- 4-wire Analog Voice Grade Loop
- 2-wire ISDN Digital Grade Loop
- 2-wire High Bit Rate Digital Subscriber Line (HDSL) Compatible Loop
- 2-wire Asymmetrical Digital Subscriber Line (ADSL) Compatible Loop
- 2-wire Analog Voice Grade Loop – Service Level 1
- 2-wire and 4-wire Unbundled Copper Loop
- 2-wire Unbundled Copper Loop – Non-designed

Staff recommends that the 47% factor, updated monthly, be applied to the following high capacity loops so that, using the 47% factor, 11 storm recovery line item surcharges will be assessed to each DS1 loop and 315 storm recovery line item surcharges will be assessed to each DS3 loop. The updated factor should be rounded in a consistent manner with the methodology used in computing the 11 and 315 surcharges, that is for a DS1, 47 percent x 24 channels = 11.28 surcharges, rounded down to 11. For a DS3, 47 percent x 672 channels = 315.84 surcharges, rounded down to 315. Following are the high capacity loops:

- 4-wire Unbundled DS1/ISDN Digital Grade Loop
- 4-wire Unbundled DS1/ISDN Digital Grade Loop in EEL Combination
- DS3 Unbundled Digital Loop
- DS3 Unbundled Digital Loop in EEL Combination

The total number of line item surcharges (or loop equivalents) to be assessed as of June 2006 is 477,648.

Issue 4: What is the appropriate line item charge per access line, if any?

Recommendation: Staff recommends that the appropriate monthly line item charge per access line is the amount approved in Issue 2 divided by the appropriate number of access lines, approved in Issues 3A and 3B, divided by 12, as long as this amount does not exceed the statutory limitation of $0.50 per month per customer line as defined in Section 364.051(4), Florida Statutes. Therefore, the appropriate line item charge per access line is $0.50 per month for 12 months. **(Maduro)**

Position of the Parties

BellSouth: Because BellSouth experienced over $95 million in intrastate, incremental expenses related to the 2005 Storms, BellSouth proposes to recover its intrastate, incremental expenses via a line-item charge of $.50 per month per access line for a period of 12 months.

CompSouth: For the reasons delineated in Issue No. 3, no charge should be imposed on UNEs.

OPC: No position.

Staff Analysis:

PARTIES' ARGUMENTS

BellSouth: BellSouth asserts that Florida Statutes allows for recovery of storm related expenses, including incremental interest and expenses, through a line item surcharge of up to 50 cents. Witness Blake testified that the 50 cents charge should be assessed on BellSouth's retail basic telecommunications service customers and retail nonbasic customers.[11] (TR 91) Additionally, BellSouth believes that wholesale loop unbundled network element customers should be included in the assessment of line-item charges.[12]

CompSouth: Comp-South believes there should be no line item charge assessed on wholesale UNE-P customers. Specifically, witness Wood believes that BellSouth is attempting to (1) impose a surcharge on some access lines that is much greater than the permitted $0.50 per line charge permitted by Florida Statutes, (2) apply the surcharge in a way that is not competitively neutral by assessing wholesale lines but not retail line based on the same kind of local loop, (3) apply a surcharge to wholesale unbundled network element (UNE) loops that is not permitted by the Federal Telecommunications Act and FCC pricing rules, and (4) impose the surcharge on assess lines purchased pursuant to a commercial agreement. (TR 127-128)

[11] BellSouth defines its retail customers as customers that subscribe to flat-rate residential service (i.e. 1FR) or flat-rate single line business services (i.e. 1 FB). Customers that subscribe to multi-line business services, payphone access lines, PBX trunk lines, Network Access Registers (NARs) and B channels of both Basic-Rate ISDN and ISDN PRI are considered retail nonbasic telecommunications service customers.

[12] See Issue 3B for more in-depth analysis of the utilization rate.

ANALYSIS

Section 364.051(4)(b), Florida Statutes provides that "The Commission may determine the amount of any increase that the company may charge its customers, but the charge per line item may not exceed 50 cents per month per customer line for a period of not more than 12 months." It also states that "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, its retail nonbasic telecommunications service customers, and, to the extent the Commission determines appropriate, its wholesale loop unbundled network element customers."

CONCLUSION

This issue is a calculation based on the Commission's decisions in Issues 2, 3A and 3B. Staff recommends that the appropriate monthly line item charge per access line is the amount approved in Issue 2 divided by the appropriate number of access lines, approved in Issues 3A and 3B, divided by 12, as long as this amount does not exceed the statutory limitation of $0.50 per month per customer line as defined in Section 364.051(4), Florida Statutes. Therefore, the appropriate line item charge per access line is $0.50 per month for 12 months.

Issue 5: If a line item charge is approved in Issue 4 for UNE wholesale customers, on what date should the charge become effective and on what date should the charge end?

Recommendation: If a charge is approved in Issue 4 for BellSouth wholesale UNE Loops, the charge may be assessed at BellSouth's earliest convenience, but no earlier that 30 days from the date of the Commission vote. The charge should be effective for 12 consecutive months. BellSouth should provide staff the wording to be used on its bill regarding the storm charge prior to issuance. **(Broussard)**

Position of the Parties

BellSouth: The charge should become effective as soon as possible after Commission approval, taking into consideration time for BellSouth to modify its billing processes necessary to implement the Commission's order. Accordingly, it is BellSouth's proposal that the assessment of the line-item charge begin approximately 60 days following a final order of the Commission. Once BellSouth begins billing the line-item charge, it should be allowed to apply the charge for 12 consecutive months, as permitted by the statute.

CompSouth: If the Commission approves any storm charge, it should not be applicable to wholesale UNE customers. If any charge is applied to wholesale customers, which it should not be, such a charge cannot be applied unless and until any applicable interconnection agreements are amended. Finally, any charge must end 12 months after its effective date.

OPC: No position.

Staff Analysis: At the administrative hearing held on December 6, 2006, the Commission approved stipulated language in Issue 5 as it relates to retail customers. The stipulated language stated:

> If a charge is approved in Issue 4 for BellSouth retail customers, the charge may be assessed at BellSouth's earliest convenience, but no earlier that 30 days from the date of the Commission vote. The charge should be effective for 12 consecutive months. BellSouth should provide staff the wording to be used on its bill regarding the storm charge prior to issuance.

The stipulated language above is for retail lines only as will be determined in Issue 3A. The proposed language did not apply to wholesale UNE Loops as will be determined in Issue 3B.

Staff believes the parties offer no reason for the effective and ending dates of any charges pertaining to wholesale UNE Loops to differ from those stipulated in the language for retail lines. Staff also believes the same language should be used to establish the controlling dates for wholesale UNE Loops. Therefore, regarding the effective and ending dates of any charges pertaining to wholesale UNE Loops, staff recommends that if a charge is approved in Issue 4 for BellSouth wholesale UNE Loops, the charge may be assessed at BellSouth's earliest convenience, but no earlier that 30 days from the date of the Commission vote. The charge should be effective for 12 consecutive months. BellSouth should provide staff the wording to be used on its bill regarding the storm charge prior to issuance.