

REDACTED

ATTACHMENT B

**BellSouth Telecommunications, Inc.
FPSC Docket No. 030349-TP
Request for Confidential Classification
Page 1 of 2
05/09/03**

**REQUEST FOR CONFIDENTIAL CLASSIFICATION OF PORTIONS OF SUPRA'S
PETITION AND EXHIBITS 'E' AND 'G' IN FPSC DOCKET 030349-TP FILED ON
APRIL 18, 2003.**

TWO REDACTED COPIES FOR PUBLIC DISCLOSURE

DOCUMENT NUMBER DATE

04227 MAY -98

FPSC-COMMISSION CLERK

2001

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Supra Telecommunications)
and Information Systems, Inc., for Expedited)
Review and Cancellation of BellSouth)
Telecommunications, Inc.'s \$75 Cash Back)
Promotional Tariffs (T-030132) and For)
Investigation into BellSouth Telecommunications,)
Inc.'s Promotional Pricing and Marketing Practices)
_____)

Docket No. _____

Filed: April 18, 2003

EMERGENCY PETITION OF SUPRA TELECOMMUNICATIONS AND
INFORMATION
SYSTEMS, INC., FOR EXPEDITED REVIEW AND CANCELLATION OF
BELLSOUTH TELECOMMUNICATIONS, INC.'S \$75 CASH BACK
PROMOTION TARIFFS (T-030132)
AND
FOR INVESTIGATION INTO BELLSOUTH TELECOMMUNICATIONS,
INC.'S PROMOTIONAL PRICING AND MARKETING PRACTICES

Supra Telecommunications and Information Systems, Inc., ("Supra") by and through its undersigned counsel and pursuant to Florida Statutes § 364.058,¹ and Rules 25-2.036(2) and 25-22.036(3)(b), Florida Administrative Code, files this Emergency Complaint and request for Expedited Relief against BellSouth Telecommunications, Inc. ("BellSouth").

Supra respectfully requests that the Florida Public Service Commission ("FPSC" or "Commission") immediately Review and Cancel or, alternatively, immediately Suspend BellSouth's \$75 Cash Back Promotion tariff, T-030132 (Cash Back Tariff), and any similar tariffs filed by BellSouth. BellSouth's Cash Back Tariff is in violation of §§ 364.051(5)(b), 364.08, 364.09, 364.10, and 364.3381(1) and (2) of the Florida Statutes. This Commission has jurisdiction to review this matter pursuant to 364.3381(3), 364.01(4)(a), (c) and (g) of the Florida Statutes. Supra further requests that this Commission launch a comprehensive investigation into

¹ Section 364.058, Florida Statutes, provides: "(1) Upon petition or its own motion, the commission may conduct a limited or expedited proceeding to consider and act upon any matter within its jurisdiction."

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BellSouth's \$75 Cash Back Promo - Tariff in T - 030132**

BellSouth's promotional pricing and marketing practices pursuant to F.S. §364.3381(3). In support thereof, Supra states as follows:

1. Supra is a competitive local exchange carrier ("ALEC") certificated by the Commission to provide telecommunications services within the State of Florida. Petitioner's name, address and telephone number is as follows:

Supra Telecommunications and Information Systems, Inc.
2620 S. W. 27th Avenue,
Miami, Florida 33133
(305) 476-4200

3. The Petitioner's representative's name, address and telephone number is:

Adenet Medacier, Esq.
Jorge L. Cruz-Bustillo, Esq.
Legal Department
Supra Telecommunications and Information Systems, Inc.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476- 4240

4. BellSouth is a corporation organized and formed under the laws of the state of Georgia, with its principal office at 675 West Peachtree Street, Atlanta, Georgia, 30375. BellSouth is an Incumbent Local Exchange Carrier ("ILEC") certificated by this Commission to provide local exchange telecommunications services in the state of Florida. BellSouth's address in the State of Florida for service of process is:

Nancy B. White, General Counsel
c/o Nancy H. Sims, Director of Regulatory Affairs
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301

BACKGROUND

5. BellSouth is the dominant provider of local telecommunications service in the state of Florida. According to testimonies offered in Docket No. 960786-TL (BellSouth's 271 Petition to provide InterLATA services in the State of Florida), BellSouth's share of the overall voice market in Florida is greater than 90%. This figure is corroborated by this Commission's December 2002 Annual Report On Competition, which provided BellSouth's share of the voice market line counts as of June 30, 2002. Even by conservative estimates BellSouth is by far the single most dominant provider of local telephone service in Florida and in its service territory.

6. The Telecommunications Act of 1996 requires ILECs such as BellSouth to open their networks to competition. As a result, ALECs in the state of Florida are authorized to purchase telecommunications services from BellSouth and to offer their own package of telecommunications services. To facilitate this process, BellSouth created the Local Carrier Service Center and/or modified certain of its Operation Support Systems to allow ALECs to resell its services or order same using Unbundled Network Elements. In order to offer local exchange services, and communicate with the BellSouth's OSS, ALECs must use certain Universal Service Order Codes ("USOC"), and the services flow through BellSouth's networks.

7. BellSouth has abused its position as the dominant provider of local services as well as its monopoly position as the sole provider of network and facilities to ALECs by using anticompetitive pricing programs and promotional strategies to exclusively target customers that have switched to ALECs. BellSouth has used, and is aggressively continuing to use, its dominant market status to frustrate competition in the local voice market, thereby causing substantial and irreparable harm to Florida's ALECs and to Florida's consumers. Meanwhile,

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BellSouth continues to propose rate increases to its captive residential customers while simultaneously aggressively targeting the small population of customers that have migrated to ALECs in its service territory with its anti-competitive pricing and promotional strategies.

8. From the beginning of the third trimester of 2002 through the first quarter of 2003, BellSouth has continuously filed with this Commission promotional tariffs of temporary duration that offer a combination of Cash Back Promotional Coupons (redeemable for end users' personal use), generously discounted local services, and waiver of service connection charges, singularly or in combination. These BellSouth promotional discounts are not offered to all residential customers within the BellSouth service territory. Rather, they are only offered to residential customers who have left BellSouth and switched to Competitive LECs.

9. Since August 2002, BellSouth has embarked on a wave of "winback" promotional campaigns. (See **Composite Exhibit A**) Each of these winback promotional campaigns has at least these three factors in common: (1) they exclusively target residential customers that have just migrated to an ALEC; (2) the reacquired customers must have new service connected at the same address (and in some cases, using the same name); and (3) the promotion offers some form of a cash back coupon that is promised to the returning customers after they mail in their first month bill.

10. In its February 5, 2003, filing, BellSouth explains that qualifying customers are those who switch their local service from another provider [ALEC] to BellSouth and purchase Complete Choice or BellSouth PreferredPack (SM). The residential customers must also be located at the same address and use the same billing name.

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11. The most recent and the most offensive of these tariffs is the aforementioned Cash Back Promotional tariff (T-030132) filed on February 5, 2003 (See **Exhibit B**) – which became effective on February 20, 2003 and will remain effective through May 15, 2003. This promotion offers the following incentives to former BellSouth residential customers:

This promotion offers \$75 Cash Back for reacquisition customers who purchase Complete Choice® or BellSouth PreferredPack® plan from 02/20/03 through 05/15/03 and who are not currently using BellSouth for local service in FL.

This promotion applies to residential customers who have previously had local service with BellSouth or who have their local service with another provider. Customers must request service in the same name and at the same address².

12. In addition to \$75 in cash from BellSouth, these ALEC customers will also receive another \$40 in the form of a waiver of the service connection charge. (See **Exhibit C**). As if \$115 were not enough incentive, customers that switch back to BellSouth can also combine the Complete Choice or Preferred Pack Plans with BellSouth's Long Distance service for a monthly Flat Fee of \$49.99 (hereinafter "BellSouth Unlimited Answers Plan") and receive unlimited long distance calling.

13. Like BellSouth's previous winback tariffs (See Complaint of FDN against BellSouth in Docket No. 020119-TP and the Complaint of Arrow Communications against BellSouth in Docket No. 990043-TP), this Cash Back Promotional campaign contains many of the same problems that have previously been found unacceptable. BellSouth's current Cash Back Promotional Tariff raises the similar following problems:

- BellSouth's Cash Back Promotional Tariff violates Section 364 (4)(g) which prohibits anti-competitive behavior.

² BellSouth does add some restrictions, further discriminating against other persons similarly situated: the customer cannot have had service with BellSouth within the last 60 days, or that the customer must have disconnected their service from BellSouth at least 17 days prior to the new service connection date.

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- BellSouth's Cash Back Promotion violates Section 364.051(5)(c) which requires BellSouth to price its services above direct cost.
- BellSouth's Cash Back Promotion violates Section 364.051(5)(a) because it discriminates between "Similarly Situated Customers"
- BellSouth is raising the rates of captive residential ratepayers to finance its selective \$75 Cash Back Promotional Tariff and \$40 Service Connection Waiver.
- BellSouth is using CPNI data in Violation of CPNI laws to target and selectively market to residential customers that are served by ALECs.
- Expedited Commission Review is required to prevent Supra and other ALECs from suffering further irreparable harm caused by BellSouth's Cash Back Tariff Promotion.

BellSouth's Cash Back Promotional Tariff Violates Section 364, Which Prohibits Anti-Competitive Behavior.

14. As the incumbent LEC and dominant provider of local telecommunications services with approximately 90% market share in its service territory, BellSouth wields enormous market power. Recognizing this historically embedded advantage, the Florida legislature has tried to create a level playing field by passing laws to prevent BellSouth from abusing its market power and to give ALECs an opportunity to compete in the local telecommunications market. Section 364 enjoins BellSouth from any type of marketing or pricing that could be deemed anti-competitive. Specifically, section 364.01 (4)(g) states that the Commission shall exercise its exclusive jurisdiction in order to:

ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

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BellSouth's Cash Back Tariff violates section 364 (4)(g) because it is an anticompetitive offering which can cause irreparable financial and economic harm to its ALEC competitors. The Commission has already reviewed similar anticompetitive BellSouth tariffs previously. In Docket No. 990043-TP, the Complaint of Arrow Communications, the Commission suspended BellSouth's infamous "Three Free" tariff after staff found that BellSouth's winback tariff contained several problems requiring investigation. BellSouth quickly withdrew the tariff before the Commission could investigate it and most likely reject it.

BellSouth's Cash Back Promotion Violates Section 364.3381, Which Requires BellSouth to Price its Services Above Direct Cost.

15. BellSouth's Cash Back Tariff is in violation of §364.3381. Section 364.3381 states as follows:

(1) The price of a nonbasic telecommunications service provided by a local exchange telecommunications company shall not be below its cost by use of subsidization from rates paid by customers of basic services.

(2) A local exchange telecommunications company which offers both basic and nonbasic telecommunications services shall establish prices for such services that ensure that nonbasic telecommunications services are not subsidized by basic telecommunications services. The cost standard for determining cross-subsidization is whether the total revenue from a nonbasic service is less than the total long-run incremental cost of the service. Total long-run incremental cost means service-specific volume and nonvolume sensitive costs. F.S. § 364.3381

16. BellSouth's Cash Back promotion is violative of the Florida Statutes in that it does not cover its cost of providing local exchange services. The Cash Back tariff offers a select few residential customers a check for \$75 from BellSouth, plus those customers will also receive another \$40 in the form of a waiver of the service connection charge for a total of \$115.

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BellSouth's Complete Choice product offering is only \$30 per month.³ Thus, an ALEC customer that switches back to BellSouth and purchases Complete Choice will, in effect, receive nearly four month's of local service from BellSouth for free (\$115 Cash Back rebate divided by \$30 monthly fee for Complete Choice = 3.8 months of free service). In 1999, the Commission suspended BellSouth's Three Free tariff in Docket No. 990043-TP for concerns that it was anticompetitive. Inasmuch as BellSouth is now giving away four months of free service, the Commission should likewise suspend BellSouth's Cash Back Tariff and investigate any similar tariffs.

17. Tellingly, BellSouth's Cash Back tariff undercuts the costs of provisioning the same services and/or elements to ALECs, which must purchase these services from BellSouth. Within the framework of the Act, the Florida ALECs cannot offer the same services to customers within the targeted group at the same price. BellSouth, however, because of its dominant market share, can afford to lose money on these customers, even for a prolonged period of time. This gives BellSouth the ability to take market share from ALECs and irreparably harm the ALECs' collective financial and economic ability to increase their already frail market share.

18. This Commission should also note that BellSouth's Cash Back tariff does not require a contractual arrangement between BellSouth and the winback/reacquisition customers that will ensure retention of these customers for a period of time sufficient to allow BellSouth to break even on each individual winback customer. Thus, if an ALEC customer switches back to an ALEC after a three month period (after they have received their \$75 rebate check), BellSouth would have virtually given the customer three month's of free local service. True competitive

³ See BellSouth's Florida General Subscriber Service Tariff section A3.4.3

service offerings are priced above cost and are sustainable over a long period of time. Services that are sold below cost are intended to unfairly steal market share and harm competition. Inasmuch as BellSouth has not provided any evidence regarding how it will, at a minimum, break even on its local service offerings with the Cash Back tariff, it appears that BellSouth's real intent in offering its Cash Back tariff is not to offer a great plan to Florida consumers, but to thwart competition in the local telecommunications market and to permanently entrench BellSouth's dominant market position. Because of BellSouth's large local market share and revenue base, it has the financial wherewithal to withstand any short-term revenue losses on these customers. Once BellSouth is successful in driving ALEC competitors out of the local market through its anticompetitive pricing, BellSouth can then raise the rates of its local services to recoup those losses.

BellSouth's Cash Back Promotion Violates Section 364.051(5)(a) Because it Discriminates Between "Similarly Situated Customers"

19. BellSouth's Cash Back Tariff violates section 364.051(5)(a) because it discriminates among "similarly situated customers" in the residential market. BellSouth's Cash Back Tariff is only available to residential customers that are presently served by an ALEC and switch back to BellSouth. Thus, if customer "A" is an ALEC customer and purchases BellSouth's Complete Choice, they receive a \$75 cash back coupon and a waiver of service connection charge of \$40, but if customer "A's" neighbor is an existing BellSouth customer and purchases BellSouth Complete Choice, they do not receive a \$75 cash back bonus. BellSouth is discriminating by offering a discount to some BellSouth customers, but not to others. Such discrimination is prohibited by Section 364.051(5)(b). This section states, in pertinent part, that:

“...the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.”

By comparison, Supra's prices are offered to every customer regardless of where they came from - BellSouth or another ALEC or an existing Supra customer. BellSouth, on the other hand, is only offering the Cash Back tariff discount to customers of an ALEC, but not to its existing customers.

20. BellSouth takes great pains to ensure that its special promotional discounts are marketed only to ALEC customers. BellSouth uses company data to identify and market to these ALEC customers. In Cindy Cox's testimony in Docket No. 960786A (BellSouth 271 Proceeding), she testified that one way BellSouth identifies ALEC customers for their win-back campaign is based on their ability to segregate disconnected customers into two classes: those that still maintain the same address and those that have a forwarding address. The assumption is that those disconnected customers that still have the same address switched to an ALEC. Ms. Cox testified:

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

BellSouth's intent seems clear that it seeks to discriminate among similarly situated customers and only offer special pricing to a few of those customers.

21. Previously, this Commission suspended a similar anticompetitive BellSouth winback tariff in Docket No. 990043-TP in part, because the tariff was only available to customers served

by an ALEC and thus, discriminated against similarly situated customers. Inasmuch as BellSouth's current set of Cash Back tariff offerings likewise discriminates against similarly situated customers by only being available to customers served by an ALEC, the Commission should follow past precedent and suspend and investigate this and other similar BellSouth Cash Back promotional offerings.

BellSouth is Raising the Rates of Captive Ratepayers to Finance its Selective \$75 Cash Back Promotion Tariff and \$40 Service Connection Waiver.

22. BellSouth is abusing its monopoly power in its monopoly markets to finance its marketing giveaways in more competitive markets. Since October 2002, BellSouth has filed at least four notices with the Commission indicating that it is increasing rates for a number of consumer and business services including increasing rates for flat rate individual consumer lines and consumers' ISDN lines, vertical services, extension services, operator surcharges, and other services. (See Composite Exhibit D) Given BellSouth's virtual monopoly position in many geographic and product-specific markets in which ALECs have yet to compete, BellSouth has a cache of captive ratepayers upon which it can foist rate increases that it can use to finance its steep discounts in the more competitive markets. This behavior is anticompetitive to ALECs and patently unfair to those captive ratepayers who still have no alternative to their local monopoly ILEC. The Commission should investigate this anticompetitive practice of BellSouth.

BellSouth is Using CPNI in Violation of CPNI Laws (47 U.S.C. § 222(c)) to Target and Selectively Market to Residential Customers that are Served by ALECs.

23. BellSouth's Cash Back tariff is in violation of 47 USC § 222(c) (hereinafter "CPNI") the CPNI rules state as follows:

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Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information by virtue of its provision of a telecommunications service shall only use, disclose, or permit access to individually identifiable customer proprietary network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories. 47 USC §(c)(1).

Admittedly, by actively going after these customers through third party telemarketing agents, and through direct mailing, BellSouth is in violation of the CPNI rules. (Exhibit C). BellSouth is both a wholesaler and a competitor to ALECs. By unlawfully utilizing CPNI, BellSouth knows exactly which customers to target, and in fact uses CPNI to support its predatory promotion, and offer a price that Florida ALECs cannot match.

24. In Ms. Cox's testimony, discussed earlier, she stated in part that, "there is a list that is generated at some point in time that will say here are customers that have disconnected, ..." Ms. **Cox was careful to not state how this list was generated, who generates it, and when this list is generated.** Supra obtained information from BellSouth that directly contradicts Ms. Cox's testimony. BellSouth has a computer program known as [REDACTED]. In this program, BellSouth created a [REDACTED] that enables BellSouth to [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

25. According to BellSouth, [REDACTED]

[REDACTED]

[REDACTED]

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While [REDACTED] handles and processes intraLATA [local] toll conversions from BellSouth to an ALEC, [REDACTED] handles and processes local service conversions. For ALEC purposes, all of these systems are integral parts of the OSS that they use to place Local Service Request (LSR) orders. These systems were created as part of BellSouth's wholesale business to assist ALECs in placing local service and intraLATA toll conversion orders. However, BellSouth also appears to be illegally utilizing these systems for its retail marketing functions to winback customers that have switched to an ALEC.

26. According to BellSouth's [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] These

two groups are important to BellSouth winback programs, because either of them will assist BellSouth's retail marketing arm in identifying ALEC customers.

27. It is standard practice for an ALEC to bundle its dial tone [local] service with its local toll service. This being the case, BellSouth targets customers that have migrated from its local toll service in an attempt to camouflage its winback effort as though they are not going after the local service disconnection. Regardless of how BellSouth seeks to disguise its efforts, it is using CPNI to identify customers that have switched to an ALEC.

28. After BellSouth identifies these customers using the [REDACTED] targeting criteria, BellSouth then decides how best to contact the customer. For local toll winback customers, part of the information BellSouth uses includes the [REDACTED]

[REDACTED] For local service, BellSouth uses [REDACTED]

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[REDACTED] However,
BellSouth's [REDACTED]. According to
the [REDACTED] document,

[REDACTED]

Both [REDACTED] are utilized to process migrating or "[REDACTED]" customers' change orders.
Additionally, both [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is highly unlikely that all
ALECs' customers interact with BellSouth one day prior to initiating a migration to an ALEC.
Hence, there is a question as to how the customer's "active record at the time of the switch or
prior to the date of the switch" gets into SIW. However, BellSouth handles both the retail and

⁴ [REDACTED]

(Emphasis added)

wholesale transactions and BellSouth alone has access to this CPNI information. Thus, the ALECs' conversion information is obtained as they submit LSRs to BellSouth for processing.

29. BellSouth indicates that for local toll winback, [REDACTED]

[REDACTED] Indeed, this [REDACTED]

[REDACTED] This means that BellSouth retains customer information at the time it processes a customer conversion and later compares this information to the customer's old information. The use of customer information obtained when processing the customer's change order in this manner is a flagrant violation of CPNI rules, and the anticompetitive use of BellSouth's monopoly power. The violation of the CPNI rules arises because BellSouth obtains the customer's conversion information due to its ILEC status. The use of such information is a direct contravention of the confidentiality provision of the Carrier information, which states that:

A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications services shall use such information only for such purpose, **and shall not use such information for its own marketing efforts.** (Section 222 (C)(1)) (Emphasis added)

Yet, this is exactly what BellSouth does with information that it obtains during the processing of a customer's conversion order to competing ALECs. To ensure that anti-competitive practices such as this do not happen, the FCC concluded that:

... that section 222(d)(1) permits the former (or soon-to-be former) carrier to use the CPNI of its former customer (*i.e.*, a customer that has placed an order for service from a competing provider) for "customer retention" purposes. Consequently, a local exchange carrier is precluded from using or accessing CPNI derived from the provision of local exchange service, for example, to regain the business of a customer that has chosen another provider. The use of

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CPNI in this context is not statutorily permitted under section 222(d)(1), insofar as such use would be undertaken to market a service to which a customer previously subscribed, rather than to "initiate" a service within the meaning of that provision. Nor do we believe that the use of CPNI for customer retention purposes is permissible under section 222(c)(1) because such use is not carried out "in [the] provision" of service, but rather, for the purpose of retaining a customer that had already undertaken steps to change its service provider. (FCC 98-27 in CC Docket No. 96-115, *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, ¶ 85)

For "[redacted]" local service, BellSouth states that [redacted]
[redacted] The

reality is that the "[redacted]" letters that BellSouth send out to ALECs' customers are really "winback" letters. (See Exhibit C) The "[redacted]" letter that BellSouth mailed to a Supra employee that migrated from BellSouth reads as follows:

We're always disappointed to lose a valued customer like you. So in hopes of bringing you back, we have created something new and really special – a money-saving, make-your-life-simple calling plan. Introducing the BellSouth Unlimited Answers Plan! Come back today and get unlimited long distance and local service and the BellSouth Complete Choice Plan – all for one low monthly fee of just \$49.99.

Clearly, BellSouth's letter is a marketing winback letter, not a letter that simply acknowledges a customer switch. In its [redacted] literature, BellSouth intentionally mis-references this winback letter as an "[redacted]" letter. The [redacted] literature states that, [redacted]

[redacted] However, as can be seen from the excerpt above, the intent of the letter is to winback the customer, not to acknowledge a switch.

Expedited Commission Review is Required to Prevent Supra and Other ALECs from Suffering Further Irreparable Harm Caused by BellSouth's Cash Back Tariff Promotion.

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30. Supra and other ALECs are suffering irreparable competitive harm caused by BellSouth's Cash Back tariff promotions.. The Cash Back promotional campaigns are anticompetitive and require an expedited Commission review to prevent the further irreparable harm that will result from these tariffs.

31. The Commission has ample authority to cancel or to suspend/postpone anticompetitive, discriminatory, or otherwise unlawful tariffs, and to order a halt to anticompetitive, discriminatory or unlawful conduct, pursuant to Sections 364.01(4)(a), (c) and (g), 364.051(6), 364.08, 364.09, 364.10 and 364.3381(3), Florida Statutes. This authority pertains even if a tariff is "presumptively valid" under Section 367.051(5), Florida Statutes.

32. In Docket No. 990043-TP, Arrow Communications petitioned the Commission to review and cancel BellSouth's "Three Free" winback tariff (T-981783). The Commission voted that it had the power to suspend or postpone the effective date of a price regulated tariff upon a prima facie showing that irreparable anticompetitive harm would result from that tariff. Arrow, a reseller, asked the Commission to cancel a BellSouth promotional tariff that offered discounts roughly equal to a reseller's wholesale discount to any customer who had switched from BellSouth to an ALEC as of a certain date. The Commission voted to suspend the Three Free promotional tariff pending resolution of Arrow's petition, finding irreparable competitive harm would result otherwise.

33. Likewise in Docket No. 020019-TP, Florida Digital Network petitioned the Commission to review and cancel BellSouth's "2002 Key Customer" tariffs which offered discounts of up to 75% for certain services but only for business customers that had competitive alternatives for local service. Again, the Commission voted that it had the power to suspend or postpone the

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effective date of a price regulated tariff upon a prima facie showing that irreparable anticompetitive harm would result from that tariff.

34. The promotional scheme embodied in BellSouth's Cash Back tariff (T-030132) is similar to those embodied in the "Three Free" and the "2002 Key Customers" tariffs. It is anticompetitive and violates sections 364.01(4)(a), (c) and (g), 364.051(5) and 364.3381(3), Florida Statutes. There is simply no other way to characterize the conduct of a dominant, monopolistic provider who undercuts the prices of its competitors by selling below costs, and even offering some services for free, through inducements made exclusively to its competitors' customers.

35. As noted in *Arrow v. BellSouth* and in *FDN v. BellSouth*, ALECs compete with BellSouth largely on the basis of price. Supra, also, competes with BellSouth largely on the basis of price. BellSouth's Cash Back tariffs offering select customers a cash bonus of \$75 plus a \$40 service connection waiver undercuts the prices Supra can profitably offer a customer. Florida ALECs cannot compete with BellSouth because BellSouth's \$115 promotional offer extended exclusively to the ALECs' customers will be virtually impossible to match. As a UNE-P provider of local services, Supra pays service connection charges to BellSouth to switch a customer. Thus, if Supra matches BellSouth's offer to waive the connection charge, Supra doesn't recover the service connection charge from the customer. Additionally, if Supra tries to match BellSouth's \$75 Cash Back coupon, Supra doesn't have a large customer base upon which it can raise rates to offset the \$75 for winback customers. The Cash Back Promotional tariffs are designed solely to eliminate ALEC competition. If BellSouth's Cash Back tariff pricing were not

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designed to eliminate the competition, they would be offered to all qualifying customers, and not just to ALEC and potential ALEC customers.

36. The Commission needs to review the cost basis for the Cash Back promotional discounts. The Commission may act to halt (at least temporarily) any pricing conduct that is more anticompetitive than pro-competitive. It is highly unlikely that BellSouth's Cash Back Tariff prices are priced above cost. The Commission must investigate: (a) why BellSouth does not offer the Cash Back Tariff prices to all of its customers, (b) how BellSouth can offer significantly discounted service without creating cross subsidies, (c) why BellSouth continues to increase rates to its other retail customers, and (d) how BellSouth can claim these services are priced above their direct cost.

37. BellSouth's Cash Back tariff pricing undercuts the prices Supra and most ALECs are able to offer and still remain viable, and Supra has and will continue to lose market share due to BellSouth's Cash Back tariff pricing. The harm that Supra has suffered and will continue to suffer from BellSouth's Cash Back tariff cannot be undone and cannot be adequately compensated by damages or readily measured by pecuniary standards. That harm has been constant, frequent, and continuous in character. BellSouth's Cash Back tariff also harms Florida's consumers. As competitors are eliminated as a result of the BellSouth's Cash Back tariff, consumers will have fewer competitive choices and will be subject to higher prices thereafter.

38. BellSouth is not harmed by suspension or postponement of its Cash Back tariff and any similar tariff. In balancing the interests of BellSouth, Supra and all ALECs, the irreparable harm

Supra and all other ALECs will suffer clearly outweighs any possible disadvantage to BellSouth from delayed implementation of the tariff described above.

Conclusion

39. The allegations in the paragraphs above warrant Commission investigation into BellSouth's promotional pricing and marketing of promotions. A prompt and comprehensive review becomes even more critical if the Commission is to assure Florida's consumers that the promotional prices BellSouth offers to some customers who have a competitive choice are not financed by those ratepayers who have no competitive choice.

40. A review of BellSouth's marketing of promotions is likewise critical to assure Florida's ALECs and the public that BellSouth is competing fairly. BellSouth must not be allowed to use CPNI to target and market to ALEC customers. The FCC has stated that ILECs cannot “use CPNI to retain soon-to-be former customer where the carrier gained notice of a customer's imminent cancellation for service through the provision of carrier-to-carrier service.” BellSouth's handling and use of CPNI data must be reviewed to determine if they are complying with Federal law which proscribes the use of such data for marketing purposes.

41. Supra suggests that administrative efficiency favors addressing the various issues involved in BellSouth's Cash Back Promotional campaigns on a comprehensive basis. BellSouth's intentions to file tariffs for anticompetitive and/or discriminatory discounted prices in the future is clear by its having done so in the past. Thus, the Commission, BellSouth, and ALECs would benefit from (1) an expedited Commission decision as to the pricing and marketing of promotional programs even if the subject promotional tariffs are withdrawn or

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expire by their own terms and (2) pronouncement of definitive guidelines governing unacceptable anticompetitive behaviors relative to ILEC discounted pricing.

42. The Florida Commission must act immediately and decisively on claims of ILEC anticompetitive behavior, in order to continue to promote local competition in Florida.

WHEREFORE and in consideration of the above, Supra Telecom respectfully requests the Commission to cancel or, in the alternative, suspend or postpone the effectiveness of, BellSouth's Cash Back tariffs and to initiate an investigation of BellSouth's promotional pricing and marketing conduct and practices on an expedited basis.

RESPECTFULLY SUBMITTED this 18th day of April 2003.

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4240
Facsimile: (305) 443-9516

By: _____
ADENET MEDACIER

**Supra's Petition for Expedited Review and Cancellation of
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered by U.S. Mail to the persons listed below this 18TH day of April 2003.

Ms. Nancy White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street
Suite 400
Tallahassee, FL 32301

Ms. Beth Keating
Legal Division
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

By: *Adenet Medacier*
ADENET MEDACIER

EXHIBIT “E”

**ENTIRE DOCUMENT
REDACTED**

EXHIBIT “G”

**ENTIRE DOCUMENT
REDACTED**