



Public Service Commission

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COMMISSION CLERK

DATE: NOVEMBER 20, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (DODSON, SUSAN) & DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (CASEY, BROUSSARD, HALLENSTEIN, BULECZA-BRINKS)

RE: DOCKET NO. 030349-TP - COMPLAINT BY SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING BELLSOUTH'S ALLEGED USE OF CARRIER TO CARRIER INFORMATION.

AGENDA: 12/02/03 - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030349.RCM

CASE BACKGROUND

On April 18, 2003, Supra Telecommunications and Information Systems, Inc. (Supra) filed an Emergency Petition for Expedited Review of BellSouth Telecommunications, Inc.'s (BellSouth) \$75 Cash Back Promotion and Investigation into BellSouth's Pricing and Marketing Practices. On May 5, 2003, BellSouth filed its Answer to Supra's Emergency Petition.

On June 9, 2003, Supra filed for leave to amend its petition, attaching its Amended Emergency Petition alleging BellSouth's violation of 47 U.S.C. Section 222 and Florida Public Service Commission policies regarding the use of wholesale information in retail marketing. In its original petition, Supra alleged that BellSouth's \$75 Cash Back Promotion violated Florida law and that BellSouth was allegedly using carrier-to-carrier information for

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marketing purposes in violation of 47 U.S.C. Section 222(b) and Section 364.01(4)(g), Florida Statutes. In its Amended complaint, Supra removed the allegations regarding the \$75 Cash Back Promotion, stating that the purpose of the amendment is to narrow the focus of its petition to issues involving violations of 47 USC § 222, Section 364.01(4)(g), Florida Statutes, and Commission policy. This removed the anti-competitive elements of Supra's complaint.

On June 12, 2003, BellSouth filed a Motion for Continuance and/or Rescheduling to extend the date of the hearing. On June 17, 2003, by Order No. PSC-03-0721-PCO-TP, Supra was granted leave to amend its petition. On the same date, Order No. PSC-03-0718-PCO-TP, the Order Establishing Procedure, was issued. Supra also filed its response to BellSouth's Motion for Continuance and/or Rescheduling on June 18, 2003. BellSouth's Motion for Continuance was denied by Order No. PSC-03-0763-PCO-TP, issued on June 25, 2003.

On June 20, 2003, BellSouth filed its Answer to Supra's Amended Petition and a Partial Motion to Dismiss. On June 24, 2003, Supra filed its response to the Partial Motion to Dismiss. This was considered and deferred at the August 5, 2003 Agenda Conference. On June 30, 2003, Supra filed a Motion for Leave to file direct testimony one day late. By Commission Order PSC-03-0786-PCO-TP, issued July 2, 2003, Supra's Motion for Leave to file direct testimony one day late was granted.

On July 16, 2003, BellSouth filed a Motion for Extension of Time requesting a three day extension of time, or until July 25, 2003, to file its rebuttal testimony. By Commission Order PSC-03-0840-PCO-TP, issued July 21, 2003, the Commission granted BellSouth's extension of time to file rebuttal testimony and first order modifying order establishing procedure.

On August 11, 2003, the Commission issued Prehearing Order No. PSC-03-0922-PHO-TP. A hearing was conducted on August 29, 2003. Also on the same date, the Commission issued Order No. PSC-03-0981-PCO-TP, which denied BellSouth's Motion to Strike David Nilson's Supplemental Testimony on page one, lines 15-23 and page two, lines 1-14, relating to Exhibit DAN-6. In addition, BellSouth's Motion to Strike David Nilson's Supplemental Testimony was granted with respect to Bates Stamped Nos. 798-840 of DAN-7.

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This recommendation addresses Supra's Amended Emergency Petition alleging BellSouth's violation of 47 U.S.C. Section 222 and Florida Public Service Commission policies regarding the use of wholesale information in retail marketing.

DISCUSSION OF ISSUES

ISSUE A: What is the Commission's jurisdiction regarding the alleged violations of 47 U.S.C. §222(b) of the Federal Telecommunications Act of 1996?

RECOMMENDATION: Staff believes that the Commission cannot provide a remedy (federal or state) for a violation of 47 U.S.C. §222(b). If, however, the conduct at issue also constitutes anticompetitive behavior as prohibited by Section 364.01(4)(g), Florida Statutes, the Commission may impose penalties as provided in Section 364.285, Florida Statutes, for the violation of state law. In order to ensure that its decision under state law does not conflict with the federal provision, the Commission may interpret the federal provision and apply it to the facts of this case. Findings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper jurisdiction to hear and remedy complaints regarding violations of Section 222 of the Act.¹ (DODSON)

POSITION OF THE PARTIES:

SUPRA: The Commission has subject matter jurisdiction to enforce conduct that is alleged to violate an FCC rule, if such violation could be deemed anticompetitive behavior under Florida law.

BELLSOUTH: The Florida Legislature has not granted the Commission any authority to regulate, interpret, or enforce federal law regarding a carrier's use of "wholesale information" for marketing purposes. Nor do prior Commission decisions support a finding that the Commission has jurisdiction to determine a violation of Section 222(b). Further, Section 222(b) of the Act does not grant the Commission any authority to resolve and enforce purported violations of its provisions. Consequently, the Commission does not have any authority under state or federal law, either express or implied, to resolve Supra's Complaint regarding purported violations of Section 222(b) of the Act. However, BellSouth is generally prohibited from anticompetitive behavior under Florida law.

¹Staff notes the Commission might not find it necessary to make findings regarding the federal law, particularly if it finds the evidence demonstrates that the conduct at issue is clearly not in violation of Section 364.01(4)(g), Florida Statutes.

STAFF ANALYSIS:

Supra

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

We find that, in the absence of a formal complaint to [] [the FCC] that BellSouth has failed to comply with section 222(b), the winback issue in this case has been appropriately handled at the state level,' . . . PAA Order, pg. 18.

(Supra BR at 2)

Supra adds that the FCC subsequently reiterated this theme of no federal preemption:

We will continue to enforce these provisions [§ 222], and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

FCC Order No. 03-42, ¶28.

Thus, Supra contends, this Commission has subject matter jurisdiction. (Supra BR at 3)

On June 19, 2003, Supra states, this Commission issued Order No. PSC-03-0726-FOF-TP, in which it reaffirmed its prior "finding contained in Order No. PSC-02-0875-PAA-TP." Id. at 47. Finally, Supra declares that Section 364.01(4)(g), Florida Statutes, grants the Commission the authority to prohibit anti-competitive

practices. Relevant to this proceeding, *Supra* states, the FCC found that:

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

(*Supra* BR at 4)

Supra states the Commission has already found that it has subject matter jurisdiction to enforce conduct that is alleged to violate an FCC rule, if such violation could be deemed anti-competitive behavior under Florida law. See PSC-03-0578-FOF-TP.² Therefore, *Supra* reasons, because the use of a carrier change request, to trigger targeted reacquisition efforts, has already been found to be anti-competitive, this Commission has subject matter jurisdiction under Section 364.01(4)(g), Florida Statutes. (*Supra* BR at 4).

BellSouth

BellSouth argues that in order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. See Keena v. Keena, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). (*BellSouth* BR at 12). Subject matter jurisdiction arises only by virtue of law - it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2d DCA 1998). The Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction

²Final Order in Docket No. 030200-TP, Emergency petition of AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaksm Service d/b/a AT&T (AT&T) for cease and desist order and other sanctions against *Supra* Telecommunications and Information Systems, Inc., issued May 6, 2003, wherein AT&T asserted the use of AT&T's customers PIC information by *Supra* to market its own long distance services was illegal under 47 U.S.C. Sec. 222(b) and Section 364.01, Florida Statutes.

or to the extent that it seeks relief that the Commission is not authorized to grant.³

BellSouth adds that unlike a court, the Commission has a limited scope of authority because the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. See City of Cape Coral v. GAC Util., Inc., 281 So. 2d 493, 496 (Fla. 1973). (BellSouth BR at 12) Instead, BellSouth argues, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." See Deltona Corp. v. Mayo, 342 So. 2d 510, 512 n.4 (Fla. 1977); accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach, 659 So.2d 402, 404 (Fla. 4th DCA 1995) (noting that an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and that "as a creature of statute," an agency "has no common law jurisdiction or inherent power . . ."). (BellSouth BR at 12, 13)

Moreover, BellSouth contends, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917); State v. Louisville & N. R. Co., 49 So. 39 (Fla. 1909). (BellSouth BR at 13) Finally, BellSouth states, "any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977). (BellSouth BR at 13)

BellSouth further argues that the Legislature has not granted the Commission any authority under Chapter 364, Florida Statutes, to regulate, interpret, or enforce federal law regarding a carrier's use of "wholesale information" for marketing purposes. In fact, BellSouth states, Chapter 364 is silent on this issue.

³Citing, Order Granting Motion to Dismiss, (Order No. PSC-01-2178-FOF-TP in Docket No. 010345-TP issued November 6, 2001) (granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation."); Order Denying Complaint and Dismissing Petition, (Order No. PSC-99-1054-FOF-EI in Docket No. 981923-EI, issued May 24, 1999) (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved "a claim for monetary damages, an assertion of tortious liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.") (BellSouth Br. at 12).

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Consequently, the Commission does not have any authority under state law, either express or implied, to resolve Supra's Complaint regarding purported violations of Section 222(b) of the Act. See Deltona Corp., 342 So. 2d at 512 n.4 (Fla. 1977). (BellSouth BR at 13)

BellSouth adds that the Commission does not have any authority under federal law to resolve Supra's allegations concerning Section 222(b) violations, because the instant Complaint is not a Section 252 arbitration proceeding, but an enforcement proceeding. BellSouth states that while the Commission has authority under Section 252 to interpret and resolve issues of federal law in arbitration proceedings, the Act does not grant the Commission any authority to resolve and enforce purported violations of Section 222(b) of the Act. See e.g., 47 U.S.C. § 251; In re: Petition of AT&T Communications of the Southern States, Inc., Order No. PSC-01-1402-FOF-TP at 22, in Docket No. 000731-TP, (describing in detail the scope of the Commission's authority in Section 252 arbitration proceedings). Because this is not a Section 252 arbitration proceeding, BellSouth reasons, the Commission is not, and cannot, act as a "deputized federal regulator." Accordingly, BellSouth argues, the Commission should dismiss Supra's Complaint because the FCC and not this Commission is the appropriate forum to resolve the alleged Section 222(b) violations, especially when, as here, the issues to be decided are solely limited to the interpretation and enforcement of FCC rules and orders. (BellSouth BR at 13, 14).

BellSouth distinguishes Commission Order No. PSC-03-0578-FOF-TP ("AT&T Slamming Order") in Docket No. 030200-TP, issued May 6, 2003. In that decision, Supra attempted to argue that the Commission did not have jurisdiction to "enforce an FCC statute." See Supra's Motion to Dismiss at 27. BellSouth states that the Commission rejected Supra's argument and determined that "under Section 364.01, Florida Statutes, we have jurisdiction to review conduct that is alleged to violate an FCC rule if such violation could be deemed anticompetitive behavior under Florida law." See Order No. PSC-03-0578-FOF-TP. BellSouth does not dispute that the Commission has the authority to review conduct that violates federal law if that conduct can also be deemed to be anticompetitive behavior under Florida law. But, BellSouth argues, such a finding does not translate into a determination that the Commission has subject matter jurisdiction to find that BellSouth has actually violated federal law. (BellSouth BR at 14, 15)

Furthermore, BellSouth adds, the Commission's Key Customer Order does not require a different conclusion. In that decision, the Commission held that BellSouth is prohibited from sharing wholesale information with its retail operations. See Order No. PSC-03-0726-FOF-TP at 47. BellSouth states that this holding does not support a finding that the Commission has jurisdiction to determine that BellSouth is in violation of Section 222(b) of the Act. Rather, it supports a finding that, for anticompetitive purposes, BellSouth is generally prohibited from sharing wholesale information between its retail and wholesale operations, which is consistent with the Commission's grant of authority under Florida law as well as with the pronouncements of the FCC. (BellSouth BR at 15)

BellSouth further states, that even if the Commission has jurisdiction to resolve Supra's Complaint regarding alleged violations of Section 222(b), the Commission is prohibited from making any findings that conflict with federal law. See Order No. PSC-01-1402-FOF-TP at 22; 47 U.S.C. § 252(e). (BellSouth BR at 16) In fact, BellSouth adds, the FCC expressly recognized this limitation in FCC Order 03-42, wherein it held that "our decision here is not intended to preclude individual State actions in this area that are consistent with our rules." FCC Order 03-42⁴ at ¶ 28. Accordingly, BellSouth contends, to the extent the Commission finds it has jurisdiction under federal or state law to resolve Supra's Complaint, any decision must be consistent with the rules and orders of the FCC. Further, BellSouth adds, no previous Commission decision, including the Key Customer Order, can be used as a vehicle to support a finding contrary to the rules and regulations previously established by the FCC. (BellSouth BR at 16, 17).

ANALYSIS

Federal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes. Curtis v. Taylor, 648 F.2d 946 (5th Cir. 1986). State agencies, as well as federal agencies, are only empowered by the

⁴Order FCC 03-42, Third Order on Reconsideration and Second Further Notice of Proposed Rulemaking, (CC Docket No. 94-129 In the Matter of: Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996: Policies and Rules Concerning Unauthorized Changers of Consumers' Long Distance Carriers) Adopted: February 28, 2003, Released March 17, 2003.

statutes pursuant to which they were created. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374, 375 (1986); Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1254-1255 (Fla. 1990); Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, 1082 (Fla. 1st DCA 1995).

However, the U.S. Supreme Court, in FERC v. Mississippi, 456 U.S. 742 (1982), also recognized that the effect of federal and state legislation is often intertwined and requires that state agencies act in accordance with laws mandated by Congress's vision when implementing similar state law. Thus, to the extent the Commission needs to construe and apply the federal provision in order to make sure its decision under state law does not conflict, the Commission can and should make such an analysis of federal law. See Testa v. Katt, 330 U.S. 386 (1947); see also Bernice Richard v. Rosenman Colin Freund Lewis & Cohen, 1985 U.S. Dist. LEXIS 15483 (S.D.N.Y. 1985) (interpretation of federal law does not invariably raise a substantial question of federal law); and Petersburg Cellular Partnership d/b/a 360° Communications v. Bd., 205 F.3d 688 (4th Cir. 2000) (state commission may not take action in an area where Congress has demonstrated a desire for the federal government to act, because it would promote conflicting patchwork of [state and federal] requirements "that the Act was designed to eliminate.")

Section 222 of the Act, which was included as part of the 1996 Federal Telecommunications Act, does not recognize a role for state commissions in the enforcement of the provision, unlike other provisions of the Act⁵. 47 U.S.C. Section 222(b) reads as follows:

CONFIDENTIALITY OF CARRIER INFORMATION. - A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use

⁵The Federal Telecommunications Act of 1996 (Act) provides a jurisdictional scheme of "cooperative federalism." In the Act, Congress has specifically designated areas in which it anticipates that state commissions should have a role. Some of the areas in which Congress has either specifically stated, or recognized, that state law may be affected, are Sections 252(b)(1), 252(b)(4)(c), 261(b) and (c), 230(d)(3), 251(e)(1); 252(d)(3), 252(e)(3), 253(b) and (c), 254(f).

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such information only for such purpose, and shall not use such information for its own marketing efforts.⁶

Staff is not aware of any instance in which this Commission has asserted jurisdiction to enforce an alleged violation of the 1996 Act in any situation in which it could not also claim state authority for doing so.

Supra relies on Commission Order No. PSC-03-0578-FOF-TP, issued May 6, 2003, in Docket No. 030200-TP, and Order No. PSC-03-0726-FOF-TP, issued June 19, 2003, in Docket No. 021252-TP, which reaffirmed the Commission's finding in Order No. PSC-02-0875-PAA-TP, issued June 28, 2002. (Supra BR at 2-4) Staff agrees with Supra's reliance on these orders, but emphasizes that, in both dockets, the Commission based its decisions only on the broad authority granted under Section 364.01(4)(g), Florida Statutes, to prevent anticompetitive behavior.

In addition, the FCC has stated that states are not precluded from taking actions under state law so long as those actions are consistent with FCC rules. FCC Order 03-42 at ¶28. See also FCC 02-214, 17 FCC Rcd. 14860 at ¶69 (wherein the FCC stated that it will only preempt state law when the regulation would interfere with FCC authority). The Florida Legislature has also authorized this Commission to employ procedures consistent with the Act. See Section 120.80(13)(d), Florida Statutes.

Pursuant to Section 364.285(1), Florida Statutes, this Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 for each day a violation continues, if such entity is found to have *refused to comply with* or to have *willfully violated* any lawful rule or order of this Commission, or any provision of Chapter 364, Florida Statutes, or revoke any certificate issued by it for any such violation.

⁶However, in Comments of the Florida Public Service Commission Regarding Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, dated October 7, 2002, Dockets 96-115, 96-149, and 00-257, the PSC agreed with FCC Chairman Powell when he commented that "states continue to be uniquely positioned to assess the proper scope of CPNI use and may adopt more stringent notification requirements" The PSC emphasized that the Florida Legislature has already taken steps to address this issued in the context of Section 364.24(2), Florida Statutes.

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CONCLUSION

Based on the above, staff believes that the Commission cannot provide a remedy (federal or state) for a violation of 47 U.S.C. §222(b). If however, the conduct at issue also constitutes anticompetitive behavior as prohibited by Section 364.01(4)(g), Florida Statutes, the Commission may impose penalties as provided in Section 364.285, Florida Statutes, for the violation of state law. In order to ensure that its decision under state law does not conflict with the federal provision, the Commission may interpret the federal provision and apply it to the facts of this case. Findings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper jurisdiction to hear and remedy complaints regarding violations of Section 222 of the Act.

ISSUE 1: Can BellSouth share carrier-to-carrier information, acquired from its wholesale Operational Support System (OSS) and/or wholesale operations, with its retail division to market to its current and potential customers?

RECOMMENDATION: No, BellSouth cannot share carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, with its retail division to market to its current and potential customers. Staff recommends that the Commission affirm its findings in Order PSC-02-0875-PAA-TP, issued June 28, 2002, in Docket No. 020119-TP, and Order PSC-03-0726-FOF-TP, issued June 19, 2003, in Docket Nos. 020119-TP, 020578-TP, and 021252-TP, which prohibit BellSouth's wholesale division from sharing information with its retail division. **(CASEY, BROUSSARD, HALLENSTEIN)**

POSITION OF THE PARTIES

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

BELLSOUTH: BellSouth cannot share wholesale information with its retail operations; however, Operation Sunrise⁷ does not use wholesale information in identifying and marketing to former customers. Rather, Sunrise uses the fact that BellSouth lost a retail customer, which the retail operations learn of through the ordinary course and through their normal channels.

STAFF ANALYSIS: Wholesale information is information that BellSouth has in its possession because it provides services to other carriers that provide services to end user customers. (TR 191) Both parties in this docket agree that BellSouth cannot share wholesale, or carrier to carrier, information with its retail marketing operations in order to trigger marketing reacquisition efforts. The primary question for Supra in this docket, which will be addressed in Issue 3, is whether the information BellSouth receives on a Supra local service request (LSR) (which indicates a customer is switching carriers from BellSouth to Supra), remains

⁷ Operation Sunrise, or Sunrise, is a program of activities that was developed by BellSouth's consumer marketing to address three specific areas: (1) retail residential local service reacquisition; (2) residential local toll reacquisition; and (3) retail residential product or feature reacquisition. (TR 320)

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wholesale information even after the customer switch is complete.

Supra, in its opening statement at hearing, acknowledged the prohibition on use of wholesale information by stating "BellSouth cannot share information from its wholesale side to its retail side." (TR 49) BellSouth recognized the prohibition on use of wholesale information in witness Ruscilli's direct testimony, stating:

The Commission determined in its June 28, 2002 order in Docket No. 020119-TP, that BellSouth is prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC. (See FPSC Order No. PSC-02-0875-PAA-TP at page 21). More recently in its June 19, 2003 Order in Docket Nos. 020119-TP, 020578-TP, and 021252-TP ("Key Customer Order"), the Commission reaffirmed its previous finding when it examined BellSouth's policies concerning Customer Proprietary Network Information ("CPNI") and use of wholesale information, concluding that it was "satisfied that BellSouth has the appropriate policies in place." (See FPSC Order No. PSC-03-0726- FOF-TP at page 47) (TR 190-191)

Staff believes it is important to distinguish customer proprietary network information (CPNI), from wholesale or carrier-to-carrier information. BellSouth witness Ruscilli differentiates the two in his rebuttal testimony, stating:

Customer Proprietary Network Information or CPNI as defined in Section 222(f)(1) of the Telecommunications Act of 1996, means "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." Therefore, the phone number and address information of a

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customer is not CPNI. However, information pertaining to the features the customer has on their line is CPNI.

Wholesale information, on the other hand, is information that BellSouth has in its possession because it provides services to other carriers that provide services to end user customers. (TR 199-200)

The FCC has addressed the use of CPNI and wholesale information when winback activities are initiated and explains that winback marketing can involve two types of marketing. In Order FCC 99-223, released September 3, 1999, the FCC stated:

...“win-back” can be divided into two distinct types of marketing: marketing intended either to (1) regain a customer, or (2) retain a customer. Regaining a customer applies to the marketing situation where a customer has already switched to and is receiving service from another provider. Retention marketing, by contrast, refers to a carrier’s attempts to persuade a customer to remain with that carrier before the customer’s service is switched to another provider.

FCC 99-233 (¶ 64) For purposes of this docket, staff will only concentrate on the marketing situation in which BellSouth attempts to regain a customer lost to Supra, in other words, when the transition to Supra is complete. During cross examination by BellSouth, witness Nilson was asked if Supra was alleging that BellSouth targets, through direct mailings or through leads, customers who have pending orders. He replied, “Not in this docket sir.” (TR 158) Therefore, retention marketing is not an issue in this docket.

The FCC has addressed win-back marketing promotions to regain customers in a number of orders. In Order FCC 99-223, released September 3, 1999, the FCC states:

Some commenters argue that ILECs should be restricted from engaging in “win-back” campaigns, as a matter of policy, because of the ILECs’ unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC

is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation at Part V.C.3, *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice. (¶ 69) Because "win-back" campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.

The FCC again addressed "win-back" campaigns in Order No. FCC 02-147⁸, released May 15, 2002. In answer to commenters remarks about BellSouth's marketing tactics, the FCC acknowledged state commission actions and stated:

We find that, in the absence of a formal complaint to us that BellSouth has failed to comply with section 222(b), the winback issue in this case has been appropriately handled at the state level, and that the actions undertaken by the state commissions and BellSouth should be sufficient to ensure it does not recur. The Georgia Commission issued an interim measure to prohibit BellSouth from engaging in any winback activities once a customer switches to another local telephone service provider. Since the Georgia Commission issued the interim measure, the Georgia Commission has opened a proceeding to investigate the allegations submitted to the state Commission, and determined that the staff of the Georgia Commission and the interested parties should develop a code of conduct for the industry. While there have been no formal complaints against BellSouth on this issue in Louisiana, the Louisiana Commission ordered BellSouth to abstain from any winback activities for seven days after a customer switches to another local telephone service provider, prohibited BellSouth's

⁸In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana.

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wholesale divisions from sharing information with its retail division, and prohibited the inclusion of marketing information in the final bill sent to a customer that has switched providers.

It should be noted that the interim measure discussed in the above paragraph, which the Georgia Commission issued to prohibit BellSouth from engaging in any winback activities once a customer has switched to another service provider, was a 7-day waiting period. The FCC also addressed retention marketing and the use of CPNI and wholesale information in FCC Order 03-42, issued March 17, 2003, stating:

We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. This is consistent with our finding in the Second Report and Order that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier. Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations. (¶ 27)

We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate

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action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules. (¶ 28)

These orders clearly indicate that wholesale information received by BellSouth cannot be shared with its retail division. By Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, in Docket No. 020119-TP, In Re: Petition for Expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc., this Commission agreed with the FCC's finding, stating:

...BellSouth's wholesale division shall be prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC.

By Order No. PSC-03-0726-PAA-TP, issued June 19, 2003, in consolidated Docket Nos. 020119-TP, In Re: Petition for Expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc., 020578-TP, In Re: Petition for Expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association, and 021252-TP, In Re: Petition for Expedited review and cancellation or suspension of BellSouth Telecommunications, Inc.'s Key Customer tariff filed 12/16/02, by Florida Digital Network, Inc., this Commission affirmed that finding by stating:

We have examined BellSouth's policies concerning CPNI and use of wholesale information, and are satisfied that BellSouth has the appropriate policies in place. However, we affirm our finding contained in Order No. PSC-02-0875-PAA-TP, issued June 28, 2002, prohibiting BellSouth's wholesale division from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC. That finding by us was not protested.

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Staff believes that these findings, in these Orders, are supported by both federal and state law. Not only is sharing of information prohibited by Section 222 of the federal Act, it also appears to present a barrier to competition as prohibited by state law. See Section 364.01(4), Florida Statutes.⁹

Conclusion

Both parties agree that BellSouth cannot share wholesale, or carrier-to-carrier, information with its retail marketing operations in order to trigger marketing reacquisition efforts. Therefore, staff recommends that the Commission affirm its findings in Order PSC-02-0875-PAA-TP, issued June 28, 2002, and Order PSC-03-0726-FOF-TP, issued June 19, 2003, which prohibit BellSouth's wholesale division from sharing information with its retail division.

⁹Arguably, sharing of information also raises a concern under Section 364.24(2), Florida Statutes, although this is not as clearly problematic.

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

RECOMMENDATION: Staff recommends that BellSouth should not be allowed to use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, to furnish leads and/or marketing data to its in-house and third party marketers. (**CASEY, BROUSSARD, HALLENSTEIN**)

POSITION OF THE PARTIES

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

BELLSOUTH: BellSouth cannot use wholesale information to furnish leads to its in-house and third party marketers; however, Operation Sunrise does not use wholesale information to establish a list of potential reacquisition targets.

STAFF ANALYSIS: Both parties agree that BellSouth cannot use wholesale information to furnish leads to its in-house and third party marketers. BellSouth witness Ruscilli addresses whether BellSouth uses wholesale information to furnish leads to its marketers in his direct testimony, stating:

BellSouth's wholesale operations do not provide leads to its retail operations. Any information used by BellSouth's retail operations to develop lists of former customers that are potentially eligible for promotional offerings are obtained from retail information sources - not wholesale sources. (Ruscilli Direct, p.4, lines 23-25, p.5, lines 1-2)

Both parties agree on how the information regarding a customer change of provider from BellSouth to Supra is provided through BellSouth's OSS system for purposes of winback marketing to regain a customer. The remaining question, which is addressed in issue three, is whether the information that is relayed to BellSouth in-house marketing, or outside third-party marketers, is wholesale or retail information. For purposes of this issue, staff will limit

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the scope of its discussion to the question as to whether BellSouth can share wholesale information with in-house or third-party marketers.

The third sentence of paragraph 28 of FCC 03-42 contains the pertinent verbiage relating to this issue:

...carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier.

Staff believes the FCC, by this order, clearly indicates that wholesale information cannot be used to furnish leads and/or marketing data to its in-house or third-party marketers to initiate winback activities to regain a customer.

Conclusion

As noted above in the issue positions, both parties agree that BellSouth cannot use wholesale information to furnish leads to its in-house and/or third-party marketers. Staff believes these positions conform with paragraph 28 of Order FCC 03-42, and Commission Orders PSC-02-0875-PAA-TP, and PSC-03-0726-FOF-TP. Therefore, staff recommends that BellSouth should not be allowed to use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, to furnish leads and/or marketing data to its in-house and third party marketers.

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

PRIMARY RECOMMENDATION: Primary staff recommends that BellSouth, due to a manual coding error, did, between July 18, 2003, and August 27, 2003, share and/or use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail division, with its in-house marketers and/or third party marketers for marketing purposes. However, this was an isolated incident which, when discovered, was immediately corrected by BellSouth. Since the mistake was minor, no harm was caused to Supra, and the error was corrected immediately by BellSouth, primary staff does not recommend BellSouth be penalized or fined for this coding error, but primary staff does recommend that BellSouth be put on notice that future non-compliance of Order No. PSC-02-0875-PAA-TP, or any other order or rule of this Commission, will not be tolerated. **(DODSON, CASEY, BROUSSARD, HALLENSTEIN)**

ALTERNATIVE RECOMMENDATION: Alternate staff recommends that BellSouth, due to a manual coding error, did, between July 18, 2003, and August 27, 2003, share and/or use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail division, with its in-house marketers and/or third party marketers for marketing purposes in violation of Commission Order No. PSC-02-0875-PAA-TP. Therefore, Alternate staff recommends that BellSouth be fined \$10,000 for each of the three instances where customers in Florida received marketing mailings based on the use of wholesale information which was provided to BellSouth's retail division. The penalty should be paid within 14 calendar days after the issuance of the Final Order to the Florida Public Service Commission, and be remitted to the Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285 (1), Florida Statutes. **(SUSAC, CASEY, BROUSSARD, HALLENSTEIN)**

POSITION OF THE PARTIES

SUPRA: Yes. BellSouth has shared and used carrier-to-carrier information, acquired from its wholesale operations, with its retail-marketing group (known as MKIS) for the purpose of

generating marketing leads. These marketing leads are furnished to third-party marketers.

BELLSOUTH: BellSouth, through Operation Sunrise, does not use or share carrier-to-carrier information with its retail operations for marketing purposes.

GENERAL STAFF ANALYSIS: Supra is alleging that BellSouth is using wholesale information to furnish leads and/or marketing data to its in-house or third-party marketers. Witness Nilson states:

The questions raised in this docket (i.e. Docket No. 030349-TP) are quite different from the Key Customer Tariff Docket. This docket involves a specific admitted "practice" - not addressed in any way in the former docket - in which BellSouth's Marketing Information Support ("MKIS") group: (1) utilizes information that originates from a carrier change request (Local Service Request "LSR") for purposes of triggering market retention efforts, and (2) then shares that same information with an outside third party for market retention efforts. The question is whether this admitted practice is legal. This question was not addressed in any way in the Key Customer Tariff Docket. (TR 98)

For efficiency purposes, staff will breakdown this issue into four categories: A) BellSouth's Competitive Local Exchange Company (CLEC) ordering system; B) Operation Sunrise; C) Supra's Complaint; and D) the Second Sweep Incident of Sharing Wholesale Information.

A) BellSouth's CLEC Ordering System

To address this issue, staff believes a basic understanding of BellSouth's OSS system for CLEC ordering is necessary. It is important to note that Supra is not suggesting that BellSouth does not provide non-discriminatory access to its OSS systems. In an August 22, 2003, deposition of Supra witness Nilson, BellSouth asked if it is Supra's position in this case that BellSouth is not providing nondiscriminatory access to its OSS. Witness Nilson replied "that's not the purpose of this testimony. The purpose of this testimony was to provide background information so that people could understand the way orders flow. I'm not making a claim of discriminatory or nondiscriminatory access or parity or anything of that nature." (Exhibit 5, p.43, lines 1-6)

BellSouth witness Pate describes what an OSS system involves in his rebuttal testimony, stating:

The Federal Communications Commission ("FCC") has defined OSS "as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information. OSS includes the manual, computerized, and automated systems, together with associated business processes and the up-to-date data maintained in those systems ... Specifically, the Commission identified the five functions of OSS that incumbent LECs must make available to competitors on an unbundled basis: pre-ordering, ordering, provisioning, repair and maintenance and billing." (TR 217)

The following copy of Supra Exhibit 15 is a visual representation of BellSouth's CLEC ordering system that was presented and used at the August 29, 2003, Commission hearing. "R" represents BellSouth's retail operation, while "W" represents BellSouth's wholesale operation. Staff will use this exhibit to demonstrate the flow of a CLEC LSR order.

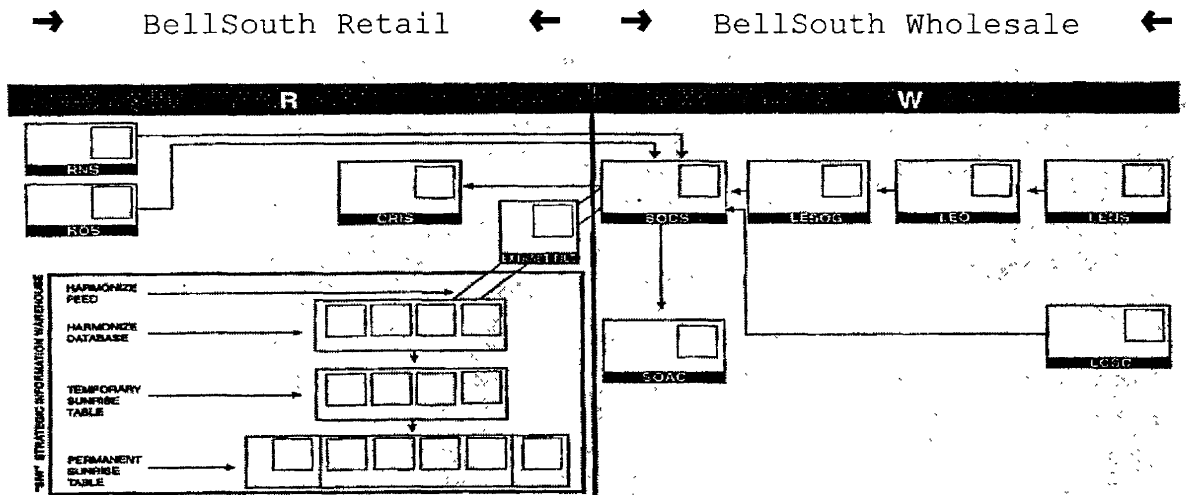


Exhibit No. 15

1) LOCAL EXCHANGE NAVIGATION SYSTEM (LENS) - When Supra places an order to switch a customer from BellSouth to Supra, an LSR

is typically placed in LENS. (TR 35) For conversions from BellSouth to Supra over resale or UNE, a single C order is used. A single C order is a non-complex change order developed by BellSouth and used by the wholesale community for resale or UNE-P conversions in lieu of having to initiate separate disconnect (D) and new (N) orders. Supra uses the single C conversion order process approximately 99 percent of the time. The other one percent of orders are usually complex orders which are handled through BellSouth's local carrier service center (LCSC). (TR 34-35) The LCSC handles CLEC orders which are submitted manually, along with electronically submitted LSRs that fall out during the electronic ordering process and need manual intervention. (TR 262) All LSRs submitted via LENS are routed from LENS to the service gate gateway (SGG) which performs some high level edits, then to the local service request router (LSRR) which sends it to the local exchange ordering system (LEO) if it is not a Local Number Portability (LNP) request. (TR 258)

2) Local Exchange Ordering System (LEO) - Accurate and complete non-LNP and non-Digital Subscriber Line (DSL) LSRs flow mechanically to the LEO system. The LEO system receives the LSR and mechanically performs edit checks to determine if all the required fields have been correctly populated. If the LSR fails the edit checks in LEO, it will be returned to the CLEC via the applicable interface as a fatal reject. Fatal rejects are errors that prevent an LSR from being processed further. The CLEC receives a fatal error notification that contains an error code and an English-language description of the fatal reject. (TR 235) If an LSR passes LEO's edit checks, it then will mechanically "flow" from LEO to the local exchange service order generator. (TR 236)

3) Local Exchange Service Order Generator (LESOG) - LESOG performs further checks for errors and provides manual fallout for LSRs that cannot be mechanically handled. If the LSR contains an error or errors, or if it is not a candidate for mechanical handling, it will not flow-through to Service Order Communications System (SOCS). (TR 236)

If an LSR is "passed" by LESOG, LESOG will mechanically transform the LSR into the service order format that can be accepted by the SOCS and by the other downstream BellSouth systems through which BellSouth's own service orders, as well

as CLEC orders, are processed. From LESOG, the CLEC service order flows to and is accepted by SOCS without any manual intervention. (TR 236)

4) Service Order Communications System (SOCS) - SOCS is responsible for the collection, storage, and distribution of service orders, either CLECs' or BellSouth's, to all user departments, including service order-driven mechanized systems. SOCS is an on-line system used by many departments to process service orders. In addition to the SOCS online programs, the SOCS daily off-line cycle performs data base maintenance and report generation functions necessary to administer the pending order file. The major functions of the off-line programs are to purge completed and canceled orders, create statistical and administrative reports, and create service order files for other mechanized systems. BellSouth believes it is important to note that SOCS is the common point of entry into the BellSouth OSS for provisioning of service orders by both the BellSouth retail units and the CLECs. (TR 245)

SOCS receives service requests from BellSouth retail operations and from the CLECs. (TR 245) BellSouth's retail operations use the Regional Negotiation System (RNS) for most types of residential service requests, and the Regional Ordering System (ROS) for business customers. (TR 239)

Service requests submitted via RNS and ROS are handled similarly to the way CLEC requests are handled. In both systems, pre-order transactions are performed to validate addresses, calculated due dates, determine available products and services, reserve telephone numbers or circuit IDS, and perform loop qualification. For its own business needs, BellSouth also obtains end user credit information and customer profile information so that the service representative can determine the best product mix to offer the end user. A CLEC can, likewise, perform similar functions with its end user customer. Upon completion of gathering all the necessary information for submission of a service request and basic edit validations are "passed", ROS/RNS mechanically transforms the request into the service order format that can be accepted by SOCS and by the other downstream BellSouth systems for provisioning. (TR 239-240) At the time SOCS accepts the request, whether it be from a CLEC or BellSouth

retail, the request is considered to be a completed order and the provisioning process begins. (TR 245)

5) Service Order Activation and Control System (SOAC) - SOCS communicates the order with the SOAC, which manages the service order process with respect to the specialized systems that design and activate network-based services, assign facilities, maintain central office inventory, and manage customer account information. In doing so, SOAC directs each service order through all steps necessary to complete the order and provision the service. (TR 245)

6) Customer Record Information System (CRIS) - Upon completion of the order and provision of the service, SOCS provides the necessary information to CRIS which is located on the retail side of BellSouth's operation, so that BellSouth's retail end-user customer records will be updated to process a final bill and so that a new record will be established to bill the acquiring CLEC. (TR 255)

B) OPERATION SUNRISE

Operation Sunrise, or Sunrise, is a program of activities that was developed by BellSouth's consumer marketing to address three specific areas: (1) retail residential local service reacquisition; (2) residential local toll reacquisition; and (3) retail residential product or feature reacquisition. Beginning in the fall of 2002, BellSouth has also used Operation Sunrise for residential interLATA long distance reacquisition. (TR 320)

BellSouth's marketing information systems organization (MKIS), through Operation Sunrise, provides marketing support in terms of list management and distribution for target marketing. MKIS is an organization within BellSouth that supports the marketing organization by providing various statistics and information about the sales performance of various BellSouth retail products and services. MKIS tracks information such as retail line loss, the ordering and cancellation by BellSouth retail customers of various products and services, and numerous other retail data that assist the Marketing organization in creating products and services that appeal to customers. (TR 319)

When an end user's local service is disconnected from BellSouth for any reason, a disconnect or change order is

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generated. In the case of a CLEC converting a BellSouth retail customer to the CLEC, the disconnect or change order originates from the CLEC's LSR, which is sent to BellSouth either manually or electronically. In the case of a BellSouth retail customer calling to disconnect his or her service, an abandoned station, a retail customer's nonpayment of his account, or numerous other reasons, the disconnect order originates from BellSouth's retail operations. In either case, a specialized reason code is assigned to each order. (TR 320-321)

For an LSR sent by a CLEC, the disconnect or change order and the appropriate disconnect reason code are generated electronically by BellSouth's OSS or generated by the LCSC if the CLEC has sent the LSR manually. For a retail customer who has called BellSouth to disconnect service, the reason code is assigned by the retail customer service agent who handles the call. Regardless of origin, this reason code indicates why the disconnection occurred, if known. (TR 321)

Each night, SOCS creates an extract file of all orders from the preceding 24-hour period. Also each night, various types of orders - including retail and wholesale disconnect orders and orders of other types - are harvested from this extract file and downloaded into a database called the Harmonize database. (TR 326)

Once each week, completed residential orders from the preceding seven days are downloaded into a temporary table known as the Operation Sunrise temporary table. If an order has not completed or is not associated with a residential account, it is not downloaded into the temporary table. Next, Operation Sunrise eliminates all orders except disconnect (D) and single C (or change) orders. At this point, the temporary table contains all orders in SOCS from the previous seven days that involve completed disconnections of residential retail service - both CLEC-initiated disconnections and those initiated by BellSouth's retail operations. (TR 326)

Next, Operation Sunrise eliminates from the temporary table orders that do not have disconnect reason codes, and orders that have certain retail-inserted disconnect reason codes indicating that the disconnect was for a reason other than a switch to a competitor. What remains is a pool of disconnect orders with no disconnect reason codes. BellSouth presumes that all of these remaining orders are competitive disconnections; in reality, some

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of them are, but others are non-competitive retail-initiated disconnections. (TR 327)

Next, Operation Sunrise copies into a permanent table in the Sunrise database certain data from each remaining disconnect order: the NPA, the NXX, the line, the customer code, and the date the data was extracted from SOCS. The temporary table is then purged completely. At this point, all information contained in the disconnect order that could be considered CPNI or wholesale information is gone. (TR 327)

Then, using the data in the permanent Sunrise table, Operation Sunrise matches each disconnect order to a former BellSouth customer service record. The customer service record, which is actually a snapshot extract from the CRIS database, shows the last information BellSouth had concerning the customer's name, address, and subscribed-to services before the disconnection occurred. (TR 327, 368)

Once the information from the permanent Sunrise table is matched with the CRIS snapshot data, it is put in a target table where leads are generated. (TR 43) Operation Sunrise uses that information to generate leads for the retail marketing organization, which, in turn, are sent to third-party vendors. (TR 327)

The BellSouth records sent to the third-party vendors include the former BellSouth customer's name, billing address, working telephone number, account number, language preference, NPA state code, and, in some cases, a product availability indicator, geographical indicator, and a feature spend calculation, along with directions instructing the vendor what letter or marketing piece should be sent to that former customer and when it should be sent. (TR 330-331)

Once the above process is complete, Operation Sunrise conducts a second sweep of the Harmonize Database to identify D orders containing certain retail noncompetitive disconnect reasons codes, such as NF (No Further Activity), CO (Competition), and AS (Abandoned Station), which were previously excluded in the first sweep addressing competitive disconnects. Once identified, Operation Sunrise extracts the selected D order information into the empty temporary table. From the temporary table, Operation Sunrise then extracts the following service order information and

places it in the permanent candidate table: retail noncompetitive disconnect reason code, NPA, NXX, line, customer code, and the order completion date. The temporary table is purged again and the information in the permanent candidate table is matched against the CRIS snapshot of retail customer data, and leads are generated. (TR 338)

C) Supra Complaint

In order to address the Supra Complaint, staff has identified the following Supra issues for discussion: 1) Operation Sunrise Information vs Line Loss Reports; 2) Supra Evidence of Alleged Wholesale Information Sharing - BellSouth Mailings; 3) Local Toll Reacquisition; 4) Business Customer Reacquisition; and 5) Wholesale vs Retail Information.

1) Operation Sunrise Information vs Line Loss Reports

BellSouth maintains that the information obtained from Operation Sunrise is comparable to the information received by CLECs through the Performance Measurement and Analysis Platform (PMAP) Line Loss Notification reports. The Line Loss Notification reports provide notification to CLECs that they have lost an entire account or portion of an account. The reports contain a Disconnect Reason code for each account providing an indication to the losing carrier of the reason for the disconnect or partial disconnect. (TR 207)

The Line Loss Notification reports post daily, except Sunday, to the CLECs' individual Internet web pages and contain only the individual CLEC's accounts. (TR 207) BellSouth asserts that the PMAP line loss report actually provides more information than Sunrise provides, since it provides the name of the customer and specifically notifies Supra that they lost a customer to another carrier. (TR 46)

Supra agrees that the PMAP line loss report provides it with a list of customers that have disconnected service from Supra, but it stated that, although it could, it does not use the PMAP line loss report to identify potential winback targets. (TR 137) Supra believes that when it comes to form, the information that is available to them in PMAP is not substantially different on a technical basis than what BellSouth has available to it in its Sunrise table. (TR 167)

Under Supra's interpretation of FCC rules and orders, it believes it could use the fact that it received notice through PMAP that it lost a customer for winback purposes, but BellSouth can't use the notice it receives from Operation Sunrise for winback purposes. (TR 147)

The FCC addressed the use of wholesale information for winback purposes in FCC Order 03-42, issued March 17, 2003, stating:

We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. This is consistent with our finding in the Second Report and Order that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier. Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations. (¶ 27)

We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in

violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules. (§ 28)

A discussion was held at hearing regarding the phrase "in a form available throughout the retail industry" contained in the first sentence of paragraph 27. Supra believes that "in order for it to be available throughout the retail industry, it would have to be available to anyone who wanted to either acquire it or purchase it if there was a charge for acquiring it and not be something that was available to only one carrier like Supra." (TR 150)

Staff disagrees. Staff believes that "in a form available throughout the retail industry" means that equivalent information is provided throughout the industry, not exact information. Supra would not want its PMAP report available to other carriers, just as BellSouth would not want its Operation Sunrise information available to the entire industry. As mentioned above, Supra believes the PMAP information it receives is not substantially different than what BellSouth receives from Operation Sunrise. (TR 167) Staff believes that BellSouth should be allowed to receive equivalent information regarding lost customers just as it provides to the CLECs through the PMAP reports.

2) Supra Evidence of Alleged Wholesale Information Sharing - BellSouth Mailings

In his direct testimony, Supra witness Nilson alleges that three BellSouth mailings received by Supra employees show that BellSouth is sharing wholesale information with its retail unit. (TR 82-84)

The first mailing is a notice from BellSouth Advertising and Publishing Corporation (BAPCO) stating that BAPCO's records indicate that a change in telephone service has occurred, and states that if the customer needs a directory, to contact them through a special 800 number. A pin number is provided to identify the customer needing the directory. Witness Nilson states that this mailing was received on two occasions this year, once when his Supra line was converted from resale to UNE, and once when his number was placed in a

list of lines scheduled for disconnection for non-payment. (TR 82-83)

In response to the first mailing, BellSouth states that the letter simply advises him of a automated toll-free number, along with an order number and pin number that can be used to order directories through an automated system. The letter was sent by BAPCO, not BellSouth's retail operations. BAPCO gets notification of service orders for both BellSouth and CLEC customers that are not true new connects, and these customers may or may not need directories. (TR 204-205) In answer to Interrogatory No. 16 of staff's second set of interrogatories, BellSouth did state that BAPCO determined that certain "C" orders were carrying an indicator in the directory section that was interpreted as a request for directories. Subsequently, BAPCO put a block on these "C" orders to prevent the directory cards from being sent out to customers who did not need directories.

The second mailing is a general BellSouth letter that is addressed to "Neighbor", offering BellSouth service and BellSouth's Complete Choice Plan. Supra alleges that this letter was sent to a Supra attorney within a week of the attorney converting to Supra from BellSouth. (TR 83) BellSouth responds that this letter is typical of an effort by BellSouth's retail operations to reacquire a customer that has left BellSouth for another local carrier, and believes that there is nothing improper about the letter. It believes that it is evidence that information is properly flowing from SOCS to initiate disconnection of the customer from BellSouth's retail operations when the customer leaves BellSouth for another local carrier. (TR 205-206)

The third mailing is a BellSouth winback letter which includes a \$75.00 cash back offer for signing up for the Complete Choice plan, along with a waiver of the local service connection fee. Supra states that the customer that received this letter has not had a single change to his service, and nothing regarding his service flowed through SOCS for 619 days. Supra believes that the only way for BellSouth to know which lines are in service is to broach the retail/wholesale barrier and exchange information. (TR 84)

BellSouth responds to the third mailing by stating that BellSouth may send winback mailings to former customers for a period of months or even years, and that it is not unrealistic for former BellSouth customers that left several years ago to be the subject of reacquisition efforts. (TR 206-207)

Supra would like the Commission to require BellSouth to personalize any winback mailing with the date of printing at the same time the letter is printed for mailing. It believes a dated letter would help to clearly identify when winback marketing efforts are initiated. (TR 89)

BellSouth believes dating the winback letters is not necessary. It believes that the 10-day waiting period before winback marketing is initiated is sufficient to ensure that there is no issue with BellSouth undertaking winback activity prior to the completion of a disconnect of BellSouth's service. (TR 210)

Supra also suggests in its testimony that the Commission should prohibit BellSouth from sending any sort of letter to former customers for a period of 90-days after the switch is complete. (TR 90) By Commission Order No. PSC-03-0726-FOF-TP, the Commission acknowledged BellSouth's voluntary 10-day waiting period after a customer has switched to a competitor, before winback marketing is initiated. Staff sees no sufficient evidence in the record as to why the 10-day waiting period should be expanded to 90 days. Winback campaigns can promote competition in the marketplace and result in lower prices for Florida consumers.

After review of each of the mailings, staff believes there is no evidence contained in them which would suggest any violations of the use of wholesale information. Staff believes that BellSouth has provided a satisfactory explanation for each of the mailings. Staff also believes that dating winback letters is unnecessary since winback marketing cannot begin until 10 days after the transfer of the customer is complete.

3) Local Toll Reacquisition

Supra alleges that BellSouth's use of the Customer Account Record Exchange (CARE) as its source to generate

targeted marketing leads is a violation of section 222(b) and this Commissions previous Orders. (Supra PH Brief p.23)

CARE is an industry-wide interface, created and managed by BellSouth's interconnection services, that interexchange carriers (IXCs) and local exchange carriers (LECs) use to communicate when an interLATA or intraLATA toll customer has been acquired or lost. Any time a transaction occurs that affects an end user's interLATA or intraLATA toll service, CARE sends certain data to (1) the acquiring interLATA or intraLATA carrier, (2) the losing interLATA or intraLATA carrier, and (3) the end user's local exchange carrier. The first two pieces of data serve to notify the acquiring and losing interLATA or intraLATA carriers that a customer has been lost or gained. The third piece of data serves to notify the end user's local exchange carrier that one of its customers has undergone a change in interLATA or intraLATA toll carriers. (TR 332)

Supra believes that the establishment of CARE was appropriate, but that BellSouth's use of it as its source to generate targeted marketing leads is improper. CARE data is used as part of BellSouth's local toll reacquisition. (TR 334) The CARE records flow nightly into Sunrise, which processes these feeds once each week. Sunrise uses the information in the records to identify leads for various local toll campaigns. BellSouth's retail operating unit subscribes to CARE like any other carrier, and receives exactly the same data as any other carrier.

Staff believes that the use of CARE information by BellSouth's retail unit for local toll reacquisition is appropriate since, as any other carrier, it only receives notification of a lost local toll customer when the transfer is complete.

4) Business Customer Reacquisition

Supra believes that if it is illegal for MKIS to harvest records from SOCS and CRIS to generate a marketing list, then it is also illegal for BellSouth's Marketing Communications Database (MCDB) to generate a similar list for business accounts using the same sources for information. (Supra PH Brief pp. 22-23)

BellSouth's business customer reacquisition program is handled through MCDB. The database uses retail information to develop a list of retail locations where service with BellSouth has been disconnected. The leads are developed by taking a monthly snapshot of the monthly billing data to see if the retail service has been discontinued; and then, the Harmonize database is used to make sure that the customer is not contacted during BellSouth's ten-day voluntary waiting period. (TR 307) No Operation Sunrise data or processes are used in BellSouth's business customer reacquisition efforts. (TR 308)

Staff believes the process used by BellSouth for business customer reacquisition does not violate any wholesale information rules or Orders. BellSouth uses retail information that a customer already has left BellSouth, and then verifies that the ten-day waiting period has passed, before initiating winback marketing of business customers.

5) Wholesale vs Retail Information

Supra's complaint alleges that BellSouth is using carrier-to-carrier, or wholesale information, to trigger marketing reacquisition efforts. (TR 33) Supra does not have a problem with the way the information flows through BellSouth's ordering system to populate the permanent Operation Sunrise table. BellSouth has also stated that "the parties agree pretty much to the process." (TR 45) Supra does contend that all of the records and orders that populate the permanent Operation Sunrise table are orders which originated from the wholesale side of BellSouth's operations and not the retail side. (TR 38) Supra believes that the information contained in the permanent Operation Sunrise table is wholesale information and thus cannot not be used for winback efforts by BellSouth retail marketing operations or third party vendors.

Supra believes that information contained on the Supra LSR must remain wholesale information throughout, and after, the completion of the conversion of the customer to Supra. (Supra Brief p.13) Supra references FCC Order 03-42 which discusses WorldCom's request that the FCC clarify that an executing carrier is prohibited from using information obtained from a carrier change request to winback the customer

after carrier change completion and disconnection, even if the disconnect information reveals that a customer's service was disconnected as the result of a carrier change order. (¶26) The FCC clarified its position regarding WorldCom's request by stating in FCC 03-42:

We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. (¶ 27)

Staff disagrees with Supra's position that carrier change information obtained from an LSR remains wholesale information even after the carrier change is completed. Staff believes that once the information in CRIS is updated showing that Supra is now the provider of service, the information that a customer has switched to Supra is no longer wholesale information.

Both parties agree that the CRIS database is located on the retail side of BellSouth. Supra agrees that certain functions on the retail side of BellSouth's operations have to be updated when a BellSouth customer is switching to Supra. However, Supra contends that the MKIS winback operations are the only people that cannot get this information. (TR 49)

Staff believes that once CRIS is updated showing Supra as the new provider, the information regarding the switch of a BellSouth customer to Supra is no longer wholesale information, it becomes retail information, not subject to the wholesale information rules contained in the FCC orders, or Order Nos. PSC-02-0875-PAA-TP, and PSC-03-0726-FOF-TP. Staff believes the information of the carrier change is obtained in the normal course of business as CRIS is updated.

D) The Second Sweep Incident of Sharing Wholesale Information

On August 27, 2003, BellSouth advised the Commission (via letter), and Supra (via e-mail) that beginning on July 18, 2003, the second sweep of the Harmonize data base extracted disconnect

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orders associated with at least two wholesale disconnect codes because of a coding error. The two wholesale codes were CC and RT. CC is UNE CLEC to reseller, UNE CLEC to UNE CLEC, or reseller to UNE CLEC. RT is reseller to reseller. (TR 20) This resulted in a sharing of BellSouth wholesale information with its retail division in violation of Commission Order No. PSC-02-0875-PAA-TP which states:

...BellSouth's wholesale division shall be prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC.

As a result of the list, which included CC and RT as well as legitimate and appropriate codes, at least 478,457 marketing pieces were sent in BellSouth's region, of which at least 140,555 of which were sent in Florida. Eleven CC and nine RT customers received these marketing pieces. Out of those twenty customers, one CC and two RT Florida customers received them. None of the CC and RT customers who were sent marketing pieces returned to BellSouth. (TR 20-21)

To correct these coding errors, BellSouth has stated that it immediately suspended all marketing efforts or customer contact associated with any customer list that could have included customers identified through D orders containing the disconnect code of CC and RT, and also removed CC and RT from the list of disconnect codes that the second sweep of Operation Sunrise extracts.

Staff examined BellSouth's OSS ordering system and believes that the system itself, as designed, does not allow wholesale information to be shared with BellSouth's retail division. This incident of sharing wholesale information was caused by a manual coding error which BellSouth discovered and then reported.

Supra believes that the fact that BellSouth acknowledged that it had sent marketing letters out using wholesale information is not central to this case. It believes that the issue is whether or not BellSouth can use information initially obtained from CLEC LSRs for marketing purposes. (TR 15) Although the coding errors which began on the July 18, 2003, second sweep of the Harmonize database did not cause harm to Supra since no customers were lost, BellSouth

did cause wholesale information to be shared with its retail winback operations in violation of a Commission Order.

Supra, in its petition, has recommended that the following penalties be imposed on BellSouth if the Commission finds that BellSouth has shared wholesale information with its retail division:

1. \$25K for each day that violation has been occurring until now. (Statutory option)
2. Suspension of certificate. (Statutory option)
3. Dismantle the harmonize feed/or order that BST provide direct access to the harmonize feed for when a customer switches away from the CLEC, the CLEC can send a Letter of Acknowledgment.
4. Require BST to print a date on the letter at the same time they personalize the customer name/address showing "when" the letter was mailed. This date must not be preprinted, or postdated. It must be the actual date the letter is printed.
5. Prohibit a Letter of any sort from being sent to the customers for 90 days - presently Commission policy is 10 days. The - feed takes 7 days for the letter to be generated so 10 days is right on target for when a customer could receive the letter at the earliest. 90 day ban would ensure that if BST continues to use - in the future, the customer is with the competitor for at least three billing cycles.
6. Order that BST shall be required to allow a OSS expert to examine BST's system, twice a year at random. The expert shall be chosen by Supra, but paid for by BellSouth. This expert will report back to see if BellSouth is still utilizing this feed or some other similar system.

(TR 90-91, 209-211)

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Jurisdiction for penalties for violations of Commission Orders can be found in Section 364.285(1), Florida Statutes, which provides that:

The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter a penalty for each offense of not more than \$25,000, which penalty shall be fixed, imposed, and collected by the commission; or the commission may, for any such violation, amend, suspend, or revoke any certificate issued by it. Each day that such refusal or violation continues constitutes a separate offense. Each penalty shall be a lien upon the real and personal property of the entity, enforceable by the commission as a statutory lien under chapter 85. Collected penalties shall be deposited in the General Revenue Fund unallocated.

Notification of the coding error which resulted in BellSouth's sharing of wholesale information with its retail division was provided to the PSC by BellSouth through an August 27, 2003 letter, and notification at hearing by BellSouth Counsel. The second sweep of BellSouth's harmonize database which included the CC and RT codes by error, was initiated July 18, 2003.

Pursuant to Section 364.285(1), Florida Statutes, this Commission is authorized to impose upon any entity subject to its jurisdiction a penalty of not more than \$25,000 for each day a violation continues, if such entity is found to have *refused to comply with* or *to have willfully violated* any lawful rule or order of this Commission, or any provision of Chapter 364, Florida Statutes, or revoke any certificate issued by it for any such violation.

Section 364.285(1), Florida Statutes, however, does not define what it is to "willfully violate" a rule or order. Nevertheless, it appears plain that the intent of the statutory language is to penalize those who affirmatively act in opposition to a Commission order or rule. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 & n.4 (Fla. 1963); c.f., McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1st DCA 1982) (there must be an intentional commission of an act violative of a statute with knowledge that such an act is

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likely to result in serious injury) [citing Smit v. Geyer Detective Agency, Inc., 130 So.2d 882, 884 (Fla. 1961)]. Thus, a "willful violation of law" at least covers an act of purposefulness.

However, "willful violation" need not be limited to acts of commission. The phrase "willful violation" can mean either an intentional act of commission or one of omission, that is *failing to act*. See, Nuger v. State Insurance Commissioner, 238 Md. 55, 67, 207 A.2d 619, 625 (1965)[emphasis added]. As the First District Court of Appeal stated, "willfully" can be defined as:

An act or omission is 'willfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or *with the specific intent to fail to do something the law requires to be done*; that is to say, with bad purpose either to disobey or to disregard the law.

Metropolitan Dade County v. State Department of Environmental Protection, 714 So.2d 512, 517 (Fla. 1st DCA 1998)[emphasis added]. In other words, a willful violation of a statute, rule or order is also one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation. See, L. R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982).

PRIMARY STAFF ANALYSIS: Primary staff believes that the inclusion of the CC and RT codes in Operation Sunrise's permanent table was simply a glitch in initiating a new marketing program. Only three customers in the State of Florida wrongfully received winback letters, and none of the three returned their service to BellSouth, therefore Supra was not harmed. BellSouth is the party which brought this wholesale/retail breach to the attention of the Commission as soon as it was discovered. BellSouth also took immediate steps to correct the coding errors, suspending all marketing efforts or customer contact associated with any customer list that could have included customers identified through D orders containing the disconnect code of CC or RT, and removed CC and RT from the list of disconnect codes that the second sweep of Operation Sunrise extracts.

Therefore, primary staff recommends that BellSouth, due to a manual coding error, did, between July 18, 2003, and August 27, 2003, share and/or use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail

division, with its in-house marketers and/or third party marketers for marketing purposes. However, this was an isolated incident immediately corrected by BellSouth. Since the mistake was minor, no harm was caused to Supra, and the error was corrected immediately by BellSouth, primary staff does not recommend BellSouth be penalized or fined for this coding error, but primary staff does recommend that BellSouth be put on notice that future non-compliance of Order No. PSC-02-0875-PAA-TP, or any other order or rule of this Commission, will not be tolerated.

ALTERNATIVE STAFF ANALYSIS: Alternate staff believe that although only three customers were sent marketing information as a result of a breach of wholesale information to the retail side of BellSouth, this action was a violation of Commission Order No. PSC-02-0875-PAA-TP and remedial action should be taken against BellSouth. As addressed in Issue A of this recommendation, a "willful violation" need not be limited to acts of commission. A willful violation of a statute, rule or order is also one done with an intentional disregard of, or a plain indifference to, the applicable statute or regulation.

Alternate staff recommends that BellSouth, due to a manual coding error, did, between July 18, 2003, and August 27, 2003, share and/or use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail division, with its in-house marketers and/or third party marketers for marketing purposes in violation of Commission Order No. PSC-02-0875-PAA-TP. Therefore, Alternate staff recommends that BellSouth be fined \$10,000 for each of the three instances where customers received marketing mailings based on the use of wholesale information which was provided to BellSouth's retail division. The penalty should be paid within 14 calendar days after the issuance of the Final Order to the Florida Public Service Commission, and be remitted to the Department of Financial Services for deposit in the State of Florida General Revenue Fund, pursuant to Section 364.285 (1), Florida Statutes.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: The docket should be closed after the time for filing an appeal has run. **(DODSON, SUSAC)**

STAFF ANALYSIS: The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.