ATTACHMENT B

FDN Communications
FPSC Docket No. 030851-TP
Request for Confidential Classification
January 16, 2004

REQUEST FOR CONFIDENTIAL CLASSIFICATION OF THE RUBUTTAL TESTIMONY OF JOHN A. RUSCILLI OF BELLSOUTH

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BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF JOHN A. RUSCILLI

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 030851-TP

JANUARY 7, 2004

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is John A. Ruscilli. I am employed by BellSouth as Senior Director – Policy Implementation and Regulatory Compliance for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes, I filed direct testimony and three exhibits on December 4, 2003.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. My rebuttal testimony addresses numerous comments contained in the direct testimony filed by other witnesses in this proceeding on December 4, 2003. Specifically, I address portions of the testimony of Mr. David E. Stahly representing Supra Telecommunications and Information Systems, Inc.

("Supra"), Mr. Joseph Gillan representing the Florida Competitive Carriers Association ("FCCA"), Dr. Mark T. Bryant, Mr. James D. Webber, and Ms. Sherry Lichtenberg representing MCI WorldCom Communications, Inc. and MCIMetro Access Transmission Services LLC ("MCI"), Mr. Brian K. Staihr representing Sprint-Florida and Sprint Communications Company LP ("Sprint"), and Mr. Stephen E. Turner and Mr. Mark D. Van de Water representing AT&T Communications of the Southern States, LLC ("AT&T").

THE ROLE OF THE FLORIDA PUBLIC SERVICE COMMISSION

Q. AT PAGES 6-10 OF HIS TESTIMONY, MR. GILLAN IMPLIES THAT SECTION 364 OF FLORIDA STATUTES REQUIRES THAT BELLSOUTH UNBUNDLE EVERY PART OF ITS LOCAL NETWORK, REGARDLESS OF THE REQUIREMENTS OF THE TELECOMMUNICATIONS ACT OF 1996 (THE "ACT"). HE STATES THAT THE ONLY REASON HE IS NOT RECOMMENDING THAT THE COMMISSION "INDEPENDENTLY ORDER THE ILECS TO OFFER UNBUNDLED LOCAL SWITCHING UNDER STATE LAW" IS BECAUSE "SUCH ACTION IS UNNECESSARY" DUE TO THE FCC'S NATIONAL FINDING ON MASS MARKET SWITCHING. PLEASE RESPOND.

A. There is no question that the Florida Legislature passed landmark legislation in 1995, well ahead of many other states in the nation. That legislation opened the local exchange markets in Florida to competition. The legislation also provided incumbent local exchange carriers ("ILECs") regulatory flexibility

via price regulation in order to respond to the competition that was already present in Florida and the competition that was coming.

The real issue in this case, however, is reconciling the language of the Florida statute, with the terms of the Act. In 2001, the Florida Public Service Commission ("Commission") addressed the scope of its decision-making authority in connection with unbundling, considering both the state and federal statute. The following excerpt from the Commission's Order No. PSC-01-0824-FOF-TP in Docket No. 000649-TP (MCI Arbitration) demonstrates the Commission's interpretation of its jurisdiction:

> We find that under Section 252(e) of the Act, we could impose additional conditions and terms in exercising our independent state law authority under Chapter 364, Florida Statutes, so long as those requirements are not inconsistent with the Act, FCC rules and orders, and controlling judicial precedent. (Page 10.)

The Commission's position is consistent with the FCC's discussion of state authority in the *Triennial Review Order ("TRO")*.[1]

> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, et al., *Report and Order and Order on Remand an Further Notice of Proposed Rulemaking*, FCC 03-36, released August 21, 2003.

"substantially prevent" its implementation...If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C). Similarly, we recognize that in at least some instances existing state requirements will not be consistent with our new framework and may frustrate its implementation. It will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules. (*TRO* ¶¶ 194-195).

There is no question that the FCC's framework for finding market-by-market non-impairment for mass-market switching is an integral part of the federal regime and any state decision regarding the local circuit switching impairment issue must be consistent with that federal regime. Despite Mr. Gillan's arguments, the plain language of this Commission's prior decision as well as the *TRO* shows the policy error in his approach.

Q. AT PAGE 16, IN DISCUSSING THE TASKS ASSIGNED TO STATE COMMISSIONS BY THE FCC, MR. GILLAN SUGGESTS THAT THIS COMMISSION'S ROLE IS TO SIMPLY "CONFIRM THAT THERE ARE NO EXCEPTIONS TO" THE FCC'S NATIONAL FINDING OF

IMPAIRMENT WITH RESPECT TO MASS MARKET SWITCHING. PLEASE COMMENT.

A. Mr. Gillan's suggestion is misguided. While the FCC did make a national finding that competitive local exchange carriers ("CLECs") are impaired without access to mass market switching on an unbundled basis, the FCC did not simply ask the states to confirm that there are no exceptions. To the contrary, in footnote 1404 of the *TRO*, the FCC specifically stated that their intent was to "make a national finding based on a more granular inquiry". In its *Order*, the FCC determined that this granular inquiry would be most appropriately conducted by the state commissions. Further, in paragraph 461 of the *TRO*, the FCC stated,

> We also recognize that a more granular analysis may reveal that a particular market is not subject to impairment in the absence of unbundled local circuit switching. We therefore set forth two triggers that state commissions ***must*** apply in determining whether requesting carriers are impaired in a given market. Our triggers are based on our conclusion that actual deployment is the best indicator of whether there is impairment, and accordingly evidence of actual deployment is given substantial weight in our impairment analysis. (Emphasis added.)

The FCC's intent that the states conduct a granular analysis of markets within the state is a far cry from Mr. Gillan's interpretation, which is much akin to simply "seconding a motion from the chair".

Q. AT PAGE 67, MR. GILLAN RECOMMENDS THE COMMISSION OPEN YET ANOTHER PROCEEDING TO ESTABLISH A MARKET RATE FOR NETWORK ELEMENTS NO LONGER SUBJECT TO SECTION 251 PRICING STANDARDS. IS THIS APPROPRIATE?

A. No. When an ILEC has been relieved of its obligation to offer a network element under Section 251 of the Act, such as local circuit switching, it means that CLECs are no longer impaired without access to that network element. Under a finding of no impairment, there are sufficient alternatives in the market such that CLECs do not need to rely on ILEC services at regulated prices. Because CLECs have alternatives, competition will drive the market price of the network element. As such, it is appropriate for BellSouth to set its rate according to those market conditions through negotiations with the CLEC. It is neither necessary nor appropriate for this market rate to be set in a Commission proceeding. Mr. Gillan's suggestion should therefore be rejected.

Q. MR. GILLAN RECOMMENDS A TWO-YEAR QUIET PERIOD FOLLOWING THIS PROCEEDING, IN WHICH THE ILECS MAY NOT SEEK FURTHER UNBUNDLING (PAGES 68-69). IS THIS APPROPRIATE?

A. Absolutely not. Under the guise of "providing certainty to the industry", Mr. Gillan is merely attempting another strategy designed to extend the unbundled network element platform ("UNE-P") as long as possible. Although it may be appropriate to set some basic guidelines for subsequent proceedings, it should

be for the purpose of acknowledging and furthering competition rather than in protecting UNE-P. Two years in this business is a very long time and much can happen. Delaying an ILEC's ability to obtain further relief from its unbundling obligations due to an arbitrary "quiet period" is unfair to the ILEC and does not recognize the dynamics of the marketplace.

Further, with respect to those markets where CLECs continue to be impaired without access to unbundled switching, Dr. Bryant states, "If CLECs are not impaired without access to UNE switching, I would expect more CLECs to self-provision switching in the relatively near future." When that activity occurs or other evidence of no impairment surfaces, BellSouth should have the option to immediately petition for relief in that market.

Q. AT PAGES 11-13 OF HIS TESTIMONY, MR. STAHLY EXPRESSES CONCERN THAT BELLSOUTH WILL "BLATANTLY" IGNORE ANY LAWFULLY ISSUED ORDERS OF THIS COMMISSION. PLEASE COMMENT.

A. Mr. Stahly's "concern" is nothing more than an obvious attempt to disparage BellSouth by suggesting that BellSouth does not comply with lawful orders of this Commission. BellSouth has a long history of complying with orders of this Commission and there is no basis for believing that BellSouth will not continue to do so. Further, this Commission certainly has remedies including fines if the Commission believes BellSouth has willfully ignored its lawful orders. The Commission has not done so in connection with any of the claims

that Supra has leveled against BellSouth over the years.

COMPETITION AND UNE-P

Q. MR. GILLAN DISCUSSES WHAT HE CALLS THE "COMPETITIVE PROFILE" IN FLORIDA (PAGES 28-31) CONCLUDING THAT UNE-P PRODUCES STATEWIDE COMPETITION. FROM HIS ASSESSMENT, MR. GILLAN STATES THAT THE COMMISSION "SHOULD NOT RESTRICT THE AVAILABILITY OF UNBUNDLED LOCAL SWITCHING AND UNE-P UNLESS IT CAN CONCLUDE THAT AN ALTERNATIVE WILL PRODUCE A SIMILAR COMPETITIVE PROFILE." DO YOU AGREE?

A. No, I do not. First, Mr. Gillan appears to suggest that the entire state of Florida should be the market area, because he says the UNE-P produces statewide competition and any alternative should do the same. As the FCC was specific in pointing out, "State commissions have discretion to determine the contours of each market, but they may not define the market as encompassing the entire state." (*TRO* ¶ 495).

Second, there is no reference in the *TRO* that places a requirement upon this Commission to ensure that a statewide alternative to UNE-P is in place before the Commission can find no impairment in a particular market. Indeed, such a requirement would make no sense given the fact UNE-P itself will remain in place in those markets where relief is not granted.

However, there most definitely is a requirement that this Commission determine that CLECs are not impaired in a market when either the self-provisioning or wholesale triggers are met or the market is found to be conducive to competitive entry. This analysis is done on a market-by-market basis, as BellSouth has done in establishing the 31 distinct geographic markets in its territory in Florida.

Finally, it is not surprising at all that UNE-P produces some level of competition in most wire centers in the state of Florida. After all, UNE-P is nothing more than the incumbent LEC's local service offering at cheap prices.

Q. SEVERAL PARTIES ALLEGE THAT COMPETITION IN FLORIDA DEPENDS ON THE AVAILABILITY OF THE UNBUNDLED NETWORK ELEMENT PLATFORM OR UNE-P. DO YOU AGREE?

A. No. There seems to be a theme that runs through the testimony of witnesses Stahly (p. 6), Gillan (p. 58) and Bryant (pp. 15-16), that is based on the mistaken notion that CLECs cannot compete in Florida without UNE-P.

These witnesses are all incorrect. First, the *TRO* requires that either a provisioning trigger be met or potential competition be shown before a state commission can find that no impairment exists for local switching. Second, the Act envisioned provisioning of local exchange competition by three means; resale of the incumbent's retail services, purchase of unbundled network elements ("UNEs"), and interconnection via a CLEC's own facilities. All

three options, or combination of options are available to CLECs. CLECs are certainly not limited to UNE-P as an entry method.

In the markets where the state commission finds CLECs are not impaired without unbundled switching, the CLEC has the means to supply its own switching or can use BellSouth's local circuit switching at market prices. BellSouth must continue to provide local switching to CLECs under Section 271(c)(2)(B) of the Act. Therefore, BellSouth will offer local switching at a competitive market rate in those markets where the Commission determines that CLECs are not impaired. In addition, there will be a transitional period sufficient to allow CLECs to implement their chosen options (e.g., *TRO* ¶ 532 describes how, even after a finding of no-impairment in a particular market, UNE-P will not be phased out for a subsequent 27 months). Therefore, contrary to Dr. Bryant's statement, all consumers currently served by UNE-P CLECs will not be forced to make a change in their telephone service.

Finally, although at this time BellSouth has not attempted to demonstrate the presence of wholesale switch providers in this case, it is reasonable to expect that in markets where no impairment is found, wholesale switching will become more prevalent as an option for CLECs. For example, Florida Digital Network, Inc. ("FDN") has indicated that:

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Once the subsidized switching that BellSouth is currently required to offer is replaced by a just and reasonable market rate, switch providers will likely find that wholesale switching offers a viable and long-term market where they can compete effectively with BellSouth's market-based switching rate. The presence of a competitive switching rate should induce switch providers to market their switching to local service providers.

In summary, the parties that attempt to minimize CLEC opportunity in the absence of unbundled local switching are doing so only to preserve the cheap prices they currently pay for the UNE-P. They give little credence to the options available to them including the multiple sources of switching, and BellSouth's local switching at market rates.

Q. ON PAGES 60-62 MR. GILLAN SUGGESTS THAT UNE-P ENCOURAGES INVESTMENT. DO YOU AGREE?

A. Absolutely not. The use of UNE-P, if anything, discourages investment in facilities for both CLECs and ILECs. UNE-P is basically the resale of an

ILEC's services. While Mr. Gillan claims that CLECs invest in "billing systems, computer systems, offices and, perhaps most importantly, human capital", such investment is easily terminated if business plans change. The FCC has recognized that a CLEC who invests in facilities, i.e. collocation space, transport facilities, etc., has made a commitment to provide service in a particular market by investing in network infrastructure. In its *Pricing Flexibility Order*, in discussing the necessary competitive showing test for common line and traffic-sensitive services, the FCC states, "resold services employ only incumbent LEC facilities and thus do not indicate irreversible investment by competitors whatsoever. Similarly, a competitor providing service solely over unbundled network elements leased from the incumbent (the so-called "UNE-platform") has little, if any, sunk investment in facilities used to compete with the incumbent LEC." (*Pricing Flexibility Order* ¶ 111). Thus, the lack of sunk investment affords a CLEC more flexibility in its ability to exit a market rather than a commitment to provide service to its customers.

Mr. Gillan also suggests that UNE-P provides the capability for data LECs to continue to have access to end users. His argument for encouraging investment with this example is not clear. With the elimination of the line sharing requirement, a data LEC will be required to either purchase the entire loop to provide service to its customer or to enter into a line splitting arrangement with a "voice partner". Neither of these situations encourages investment. In both situations, the data LEC is still purchasing a stand-alone UNE loop that uses BellSouth's existing network facilities. In markets where there is no switching impairment, the only change is that switching is no longer

available at TELRIC-based rates and the data LEC or their "voice partner" purchases an unbundled network element-loop ("UNE-L"). There is no new investment by a data LEC.

Q. IS MR. GILLAN CONSISTENT WITH HIS ARGUMENTS ABOUT UNE-P ENCOURAGING INVESTMENT?

A. No. There are several statements that Mr. Gillan makes that appear to actually be arguing against UNE-P encouraging investment.

On page 60, Mr. Gillan states "Although I would disagree generally with the claim that unbundling discourages investment, there should be no debate as to whether sharing the inherited legacy network to offer conventional POTS has that effect." Also on page 62, lines 1-5, Mr. Gillan states "The POTS market is shrinking as customers chose [sic] (for themselves, and not under regulatory direction) to move to more advanced services. There is no valid policy reason to encourage additional investment in the generic local exchange facilities that underlie UNE-P." These two statements bolster BellSouth's position that UNE-P does nothing to advance the development of new technologies in a UNE-P world. CLECs who have control over their own switch decide what software and hardware to install in order to customize their various offerings. In such cases, CLECs may find new technologies that offer services ILECs are not offering. Such enhancements to their switches will drive competition and innovation among competitors and will lead to a market driven by new offerings based on new technologies.

GEOGRAPHICAL MARKET DEFINITION

Q. PLEASE DISCUSS THE APPARENT CONFLICT BETWEEN SPRINT AND MCI REGARDING THE APPROPRIATE GEOGRAPHIC MARKETS FOR MASS MARKET SWITCHING.

A. The problems with the market definitions proposed by Sprint and MCI are discussed further in the rebuttal testimony of Dr. Pleatsikas. Let me note however that what at first seems to be a conflict in their positions on geographic markets is, in reality, a design by both companies to secure the continuation of UNE-P indefinitely. Sprint suggests that geographic markets should be defined as the Metropolitan Statistical Area ("MSA"). In making this recommendation, Sprint goes on to say that there must be competition throughout the MSA and uses as support for this position a *de minimis* argument not contained in the *TRO*, which I will discuss further below. The outcome of Sprint's way of thinking is that because the geographic area of an MSA is so large and the FCC's non-impairment criteria, by Sprint's definition, is so stringent, it becomes virtually impossible for the Commission to find that CLECs are not impaired in a given MSA. By Sprint's definition of markets, it is not surprising that Sprint is not asking for relief in any market.

MCI on the other hand, recommends that markets be defined as wire centers. By defining markets as wire centers, MCI simply hopes to limit the loss of UNE-P to the greatest extent possible. MCI expects that BellSouth may be relieved of its UNE switching obligation in some wire centers, but hopes to

confine the "damage to UNE-P" to relatively small pockets. Both strategies by Sprint and MCI are designed to limit the amount of relief and continue to the extent possible the use of UNE-P in BellSouth's territory.

Q. PLEASE FURTHER ADDRESS MCI'S CHOICE OF THE WIRE CENTER AS THE CORRECT DEFINITION OF GEOGRAPHIC MARKET IN THIS PROCEEDING?

A. MCI's position is inconsistent with testimony filed by its own witnesses in previous proceedings. Here, Dr. Bryant touts the wire center as the appropriate market definition, stating at page 29, "ILEC wire center boundaries are the most natural geographic boundaries for purposes of defining markets for several reasons." In contrast, in testimony filed in previous arbitration cases, MCI discounts the geographic area of an ILEC's wire center when compared to the more updated CLEC networks. Specifically, in Georgia Docket No. 11901-U, Mr. Ron Martinez compared BellSouth's network to MCI's network:

> ILEC networks, developed over many decades, employ an architecture characterized by a large number of switches within a hierarchical system, with relatively short copper based subscriber loops. By contrast, WorldCom's local network employs state-of-the-art equipment and design principles based on the technology available today, particularly optical fiber rings utilizing SONET transmission. In general, using this transmission based architecture, it is possible for *WorldCom to access a much larger geographic area from a single switch* than does the ILEC switch in the traditional copper based

> architecture. This is why, in any given service territory, WorldCom has deployed fewer switches than the ILEC. *Any CLEC will begin serving a metropolitan area with a single switch and grow to multiple switches as its customer base grows.*
>
> In general, at least for now, WorldCom's switches serve rate centers at least equal in size to the serving area of the ILEC tandem. WorldCom is able to serve such large geographic areas via fiber network and bears the cost of transport of that owned network. (Emphasis added.) (Direct Testimony, pp. 35-36.)

MCI demonstrates with its previous testimony that a geographic market should not be defined by the decades old ILEC wire center because MCI reaches well beyond the wire center to serve its market. By its own admission MCI does not use the wire center to identify the customers it targets. It uses a number of other factors and appears to be limited in its market reach only as a function of its fiber network.

Q. WHAT GUIDANCE DID THE FCC PROVIDE IN DETERMINING GEOGRAPHIC MARKETS?

A. Paragraph 495 of the *TRO* gives guidance to state commissions in designing geographic markets. State commissions must consider locations of customers actually being served, variation in factors affecting the competitors' ability to serve groups of customers, and the ability to target and serve specific markets economically and efficiently using currently available technology. However, the FCC was also specific in pointing out

> While a more granular analysis is generally preferable, states should not define the market so narrowly that a competitor serving that market alone would not be able to take advantage of available scale and scope economies from serving a wider market. State commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. The state commission must use the same market definitions for all of its analysis. (Footnotes omitted)

If the FCC believed that the ILECs' wire centers represent the appropriate geographic markets, it would have said so in the *TRO*. The fact that it was concerned that the geographic area not be defined as the entire state indicates its belief that market areas would be something substantially larger than the ILECs' wire centers. BellSouth's proposal to use the individual UNE rate

zones adopted by this Commission, subdivided into smaller areas using the Component Economic Areas ("CEAs") as developed by the Bureau of Economic Analysis of the United States Department of Commerce represents a more appropriate definition of geographic markets. UNE rate zones are an appropriate starting point for the market definition because, by design, they reflect the locations of customers currently being served by CLECs. CEAs are defined by natural geographic aggregations of economic activity and cover the entire state of Florida. BellSouth recommends the Commission adopt its definition of geographic markets and reject both MCI's and Sprint's proposed definitions of geographic markets.

SWITCHING TRIGGERS

Q. IN DISCUSSING WHAT CRITERIA HE RECOMMENDS THE COMMISSION APPLY WHEN IDENTIFYING SELF-PROVISIONING TRIGGER CANDIDATES, MR. GILLAN STATES THAT THE COMMISSION SHOULD EXCLUDE CANDIDATES THAT DO NOT RELY ON ILEC ANALOG LOOPS (PAGES 36 & 44-47). PLEASE ADDRESS THIS COMMENT.

A. Mr. Gillan states that "Self-Providers Must Be Relying on ILEC Loops" (page 44) in order for them to be included as candidates that meet the self-provisioning trigger. This is clearly inconsistent with the *TRO* – as footnote 1560 explains:

> We recognize that when one or more of the three competitive providers is also self-deploying its own local loops, this evidence may bear less heavily on the ability to use a self-deployed switch as a means of accessing the incumbent's loops. Nevertheless, the presence of three competitors in a market using self-provisioned switching and loops, shows the feasibility of an entrant serving the mass market with its own facilities.

Mr. Gillan would have this Commission exclude carriers that do not rely upon BellSouth's local loop facilities to provide service to their customers. However, the *TRO* clearly states that the Commission can, and should consider such carriers as trigger candidates.

Q. MR. GILLAN RECOMMENDS THAT A "*DE MINIMUS*" [SIC] CRITERION BE ADDED BY THE STATE COMMISSIONS TO THE TRIGGERS TEST (PAGE 49). IS THIS ADVICE CONSISTENT WITH THE REQUIREMENTS OF THE *TRO*?

A. No. The *TRO* does not establish any size requirements or specific quantitative standard regarding the number of customers in a market that must be served before a self-provisioning carrier can be "counted" for purposes of the triggers test. Any imposition of a *de minimis* requirement regarding the number of customers served would be completely outside the explicit dictates of the *TRO*.

Q. WHY DO THE PARAGRAPHS CITED BY MR. GILLAN NOT SUPPORT A REQUIREMENT THAT A TRIGGER CANDIDATE PASS A *DE MINIMIS* TEST?

A. The only support that Mr. Gillan provides for his assertion that there should be a quantitative analysis is language in a section of the *TRO* (¶ 438) that appears well before the section that establishes the triggers test (¶¶ 498 – 505). Paragraph 438 of the *TRO* addresses the finding of *national* impairment and merely indicates that the FCC found *in aggregate* that the evidence in the record regarding the *overall* level of switch deployment was insufficient to warrant a finding in the *TRO* that CLECs are not impaired on a national basis. By contrast, the triggers tests, which are described some forty pages later in the *TRO*, posit a set of bright-line rules that, if met, overcome this presumption of national impairment. The discussion in paragraph 438 of the *TRO* is neither a part of the triggers tests nor is it logically linked to the tests.

Q. ARE THERE REASONS TO BELIEVE THAT THE FCC INTENDED TO ESTABLISH A *DE MINIMIS* STANDARD AS A PART OF ITS TRIGGERS TESTS?

A. No. At one point in his testimony, Mr. Gillan argues that the *TRO* requires state commissions to apply "judgment, experience, and knowledge of local competitive conditions" to implement the triggers test, but he is simply grasping at straws. In fact, the *TRO* is clear that it wishes to *remove* as many subjective elements as possible from the triggers test, and that is why the test is

defined so objectively. (*TRO* ¶ 428, ¶ 498). The FCC was clear to spell out a number of criteria that it *did* intend for the state commissions to apply (e.g., the number of carriers required to demonstrate "multiple, competitive supply", *TRO* ¶ 501). If the FCC had intended state commissions to assess the "size" of carriers or their operations, it surely would have explicitly said so – just as it has done in countless other instances where it has established such bright line tests. Indeed, after describing in paragraph 499 the factors that are to be considered by the state commissions, the *TRO* explicitly indicates that "[f]or purposes of these triggers, we find that states shall not evaluate any *other* factors..." (*TRO* ¶ 500, emphasis added).

Q. ARE THERE GOOD REASONS THAT THE FCC WOULD HAVE REJECTED THE ADDITION OF A *DE MINIMIS* SIZE REQUIREMENT TO THE TRIGGERS TEST?

A. Yes. Apart from the desire for administrative simplicity and to avoid interpretive ambiguity, it makes good sense not to add a *de minimis* size requirement to the triggers test. As Chairman Powell notes in his separate statement, there is significant evidence that the availability of TELRIC-priced, wholesale switching deters facilities-based competitors. (Separate Statement of Chairman Michael Powell at p. 6). This suggests that creating a minimum penetration standard would virtually ensure that the non-impairment tests would never be met, because the availability of UNE-P would itself deter the level of penetration required for a finding of non-impairment.

Q. PLEASE DESCRIBE DR. STAIHR'S RELATED ARGUMENT (PAGE 14-15).

A. Dr. Staihr proposes that the self-provisioning trigger test requires some minimum number of mass-market lines served by the CLECs, in aggregate, using their own switches, and that these lines be distributed generally throughout the market area. Dr. Staihr describes his numbers-related proposal as a "*de minimus*" [sic] test. I will address this test, and Dr. Pleatsikas addresses Dr. Staihr's proposal that these lines must be dispersed throughout the relevant geographic market.

Q. PLEASE EXPLAIN THE FLAWS WITH DR. STAIHR'S "*DE MINIMUS*" [SIC] TEST.

A. Like Mr. Gillan's proposal, Dr. Staihr's proposal is not supported by the *TRO*, and its use by this Commission would invite precisely the sort of analytical quagmire that is contrary to the provisions of the trigger tests in the *TRO*, and contrary to the FCC's desire to fashion objective tests that are not subject to delays caused by protracted administrative proceedings.

Moreover, the FCC specifically requires that there be *three* self-provisioning CLECs in a market, rather than one or two. A smaller required number of CLECs would also arguably demonstrate that entry is not impaired without access to unbundled local switching, but the FCC chose to impose a higher standard and a specific quantitative threshold. As I discussed in response to Mr. Gillan, had the FCC wanted to add an additional quantitative threshold in

addition to the one it articulated, it presumably would have done so explicitly and not left it to argument and advocacy to determine what the test was in fact meant to be. Dr. Staihr does not explain why, conceptually, it would be appropriate to add an aggregate line test on top of the existing three-CLEC requirement for the self-provisioning trigger. It is clear that none is called for in the *TRO*.

Q. WHAT BASIS DOES DR. STAIHR CLAIM FOR HIS "*DE MINIMUS*" [SIC] TEST?

A. Like Mr. Gillan, Dr. Staihr points to paragraph 438 of the *TRO* as being generally supportive of a "*de minimus*" [sic] test. Dr. Staihr also points to paragraph 441 of the *TRO*. In reality, neither paragraph proposes or even mentions anything about a *de minimis* or any other market-share test related to the self-provisioning trigger. Instead, these paragraphs are found within a general discussion mass-market competition and the hot cut process. In this discussion, the FCC is arguing that there is considerable evidence of switch deployment, but that the deployment primarily appears to serve enterprise customers and does "not accurately depict the ability of an entering competitive LEC to overcome the barriers to entry generated by the hot cut process, and to serve the mass market using incumbent LEC loops." (*TRO* ¶ 439) Thus, in this discussion, the FCC addresses the issue of hot cuts, not trigger candidates. The FCC does not mention trigger candidates at all in this discussion. There is simply no reasonable basis for inferring anything about triggers candidates from that discussion.

Q. DOES DR. STAIHR PROVIDE ANY OTHER SUPPORT FOR HIS PROPOSED "*DE MINIMIS*" TEST?

A. Dr. Staihr argues that the lack of a *de minimis* test would be contrary to situations that the FCC seeks to avoid, such as CLECs serving (and intending to serve) only a handful of mass-market customers. However, the need to discern the "intentions" of CLECs is the type of ambiguity that the FCC sought to avoid in fashioning bright-line rules for the triggers. (*TRO* ¶ 428, ¶ 498)

Q. DOES DR. BRYANT PROPOSE A "*DE MINIMIS*" TEST?

A. Yes. In response to BellSouth's interrogatory 3-119 on this topic, Dr. Bryant admits that he proposes such a test and cites to paragraph 499 of the *TRO*. In that response, Dr. Bryant specifically points to the FCC's statement that " . . . the identified competitive switch providers should be actively providing voice service to mass market customers in the market" as implying "that some determination be made regarding the number of customers being served."

Q. PLEASE COMMENT ON THE INTERPRETATION OF THE *TRO* AS MADE BY DR. BRYANT.

A. Dr. Bryant's proposal simply is not supported by the FCC's statement. There is no mention in that statement of customer counts, hurdles, market shares or any other quantitative indicator of "active" provision of service. The FCC is perfectly capable of making such quantitative requirements, but it did not.

Indeed, a further reading of that general section of the *TRO* shows that the FCC proposes a *qualitative* indicator of "active" provision of service. In footnote 1556, the FCC notes that "actively providing" can be determined by reviewing whether the competitive switching provider has filed a notice to terminate service in the market. Such an investigation should satisfy the Commission that there is "active" provisioning of service, since in paragraph 500 of the *TRO*, the FCC obliges states *not* to evaluate any other factors regarding CLEC provisioning because, as the FCC notes, even carriers in Chapter 11 bankruptcy protection "are often still providing service." The FCC's proscriptions would rule out open-ended requirements such as Dr. Bryant's proposal and the similar arguments made by Mr. Gillan (p. 8) and Dr. Staihr (p. 40). Dr. Bryant's attempt to bootstrap an additional rule is undermined, not supported, by the section of the *TRO* that he identifies and his proposal should be rejected as being inconsistent with the FCC's desire for a bright-line test that is designed to reduce administrative delay.

Q. SHOULD THIS COMMISSION CONSIDER ANY OF THESE ARGUMENTS?

A. No. These arguments do not represent genuine proposals. Rather, they are assertions of vague and unspecified steps that would compromise the bright-line test that the FCC requires. In creating the triggers tests, the FCC concluded that the thresholds that it created are "based on our agency expertise, our interpretation of the record, and our desire to provide bright-line rules to guide the state commission in implementing section 251." (*TRO* ¶

498) The FCC declined to create ambiguous thresholds that would result in implementation issues and administrative delay.

Q. MR. GILLAN AND DR. STAIHR CONTEND THAT, IN CONDUCTING A TRIGGERS ANALYSIS, THERE IS A DIFFERENCE BETWEEN AN "ENTERPRISE SWITCH" AND A "MASS MARKET SWITCH". (GILLAN DIRECT PP. 37-39; STAIHR DIRECT PP. 12-13). CAN YOU RESPOND TO THAT?

A. Certainly. This contention is simply a distraction that the Commission should reject. The actual rules refer only to "local switches" (for the self-provisioning trigger) and "switches" (for the wholesale trigger). There is no distinction between a so-called "enterprise" and "mass market" switch, despite Mr. Gillan and Dr. Staihr suggestions to the contrary.

The text of the *TRO* is consistent with the rules – in the triggers analysis portion of the text, the FCC does not make any distinction between or require that a particular switch be dedicated solely to providing enterprise or mass market switching. Contrary to these witnesses' contentions, the language of the *TRO* clearly contemplates that carriers will use a single switch or switches to serve *both* enterprise *markets* and mass *markets*. This language is reflected in the paragraphs Mr. Gillan relies upon in his testimony,

specifically, at ¶ 441 the FCC states:

> For example, in order to enable a switch serving large enterprise customers to serve mass market customers, competitive LECs *may* need to purchase additional analog equipment, acquire additional collocation space, and purchase additional cabling and power. (Emphasis added).

Likewise, at ¶ 508:

> We determine that to the extent that there are two wholesale providers or three self-provisioners of switching serving the voice *enterprise* market, and the state commission determines that these providers are operationally and economically capable of serving the *mass* market, this evidence must be given substantial weight by the state commissions in evaluating impairment in the mass market. We find that the existence of serving customers in the *enterprise* market to be a significant indicator of the possibility of serving the mass market because of the demonstrated scale and scope economies of serving numerous customers in a wire center using a single switch. (Emphasis in original.)

Clearly, the FCC expects carriers to use a single switch to serve customers in both the enterprise and mass markets. While the FCC has precluded the use of switches that serve *only* the enterprise market from qualifying for the triggers analysis, it is ludicrous to exclude as triggers candidates switches that serve *both* markets, which is the ultimate outcome of a competitive market. It would

be equally absurd to engage in some type of capacity counting exercise, as witness Staihr suggests, and try to allocate switch capacity between various markets. The rules require only that the switches used to meet the triggers analysis are serving either mass market customers or DS0 capacity loops and any attempt to create additional requirements where none exist should be rejected by this Commission.

BELLSOUTH'S HOT CUT PROCESS

Q. PLEASE ADDRESS MR. STAHLY'S COMMENTS ON PAGES 42-43, CONCERNING BELLSOUTH'S PRICES FOR CONVERTING UNE-P SERVICE TO UNE-L SERVICE.

A. Mr. Stahly says BellSouth's nonrecurring charge to convert UNE-P service to UNE-L is "exorbitant" and estimates that the charge is 20 times more than the actual cost to BellSouth. Like some other witnesses in this case, Mr. Stahly wants this Commission to believe that a conversion to UNE-L is as inexpensive as the conversion from BellSouth's retail service to UNE-P. Had this been the case, however, the Commission would have set the UNE-L nonrecurring charges in Docket No. 990649A-TP at the same level as the price to convert retail services to UNE-P. Instead, the Commission recognized the physical activity associated with provisioning a UNE-L to a CLEC's collocation space and set a rate based on the cost of that activity. As Mr. Stahly correctly points out, that rate is $49.57 for the first loop and $22.83 for each additional loop on the same order. However, what Mr. Stahly regards as

a further increase of the rate to $51.09, citing a May 21, 2003 letter from BellSouth simply reflects the inclusion of the $1.52 electronic service ordering charge approved by this Commission.

Mr. Stahly argues that such a nonrecurring rate is not contained in Supra's interconnection agreement with BellSouth. He is incorrect. The applicable rates for either installing a new UNE-L or converting retail service or UNE-P service to UNE-L are the rates approved by this Commission in the UNE Cost Docket (990649A-TP) and are set forth in the parties' interconnection agreement. Moreover, although Supra was a party to the UNE Cost Docket, Supra did not dispute the Commission's determination of cost-based rates in that docket including the nonrecurring charges of $49.57 and $22.83 for installation of first and additional UNE-L service in Florida. Finally, Supra has made an identical claim at the FCC and thus should be barred from raising it here.

Q. THE CLECS CITE TO THE FCC'S CONCLUSIONS ON THE HOT CUT PROCESS AS EVIDENCE THAT BELLSOUTH'S HOT CUT PROCESS IS FLAWED. IS THIS VALID?

A. No. The FCC's reasoning on hot cuts in the *TRO* is flawed. The FCC ignored specific data, the same data upon which it relied in its 271 decisions, in favor of vague, unreliable and out-of-date information. For example, the *TRO* credited an AT&T assertion that, several years ago, it lost customers in several states, including Texas and New York, because of hot cut difficulties.

Conversely, the FCC rejected nearly identical claims made by AT&T when it granted long-distance authority to Verizon and SBC in each of these states. Since that time, the FCC has considered hot cut issues in all other 271 proceedings and has reached the same conclusion; that RBOCs are meeting their 271 obligations. Thus, the FCC has granted their applications. However, the FCC's analysis on this issue in the *TRO* was woefully inadequate, and its conclusion that *all* RBOC hot cut processes are flawed should not be relied upon by this Commission.

Q. AT&T WITNESS VAN DE WATER, AT PAGE 61, MCI WITNESS WEBBER, AT PAGE 7, AND MCI WITNESS LICHTENBERG, AT PAGES 19-21, SUGGEST THAT THE HOT CUT PROCESS SHOULD MIRROR THE SEAMLESS NATURE OF UNE-P MIGRATIONS AND PIC CHANGES. DO YOU AGREE?

A. Absolutely not. To implement the scenario the CLECs advocate would require as much as an $8 billion region-wide investment on BellSouth's part. Neither BellSouth nor any other RBOC can accomplish electronic loop provisioning ("ELP") today with existing network architectures. Rather than discussing the hot cut process applicable to the network that exists today, the CLECs are talking about a process that might only be possible in an entirely new network. BellSouth witness Gary Tennyson discusses the impact of the CLEC position in detail.

Q. MS. LICHTENBERG ALLEGES (PAGE 16) THAT THE FCC "RECOGNIZED" THAT HOT CUTS MUST BE "AS SEAMLESS AND TROUBLE-FREE AS THEY ARE WITH LONG-DISTANCE AND UNE-P." IS SHE RIGHT?

A. No. In fact, the FCC found exactly the opposite when it flatly rejected AT&T's ELP proposal. The FCC declared that to make the necessary system changes called for by AT&T's ELP proposal "would require significant and costly upgrades to the existing local network at both the remote terminal and central office. AT&T's ELP proposal proposes to 'packetize' the entire public switched telephone network for both voice and data traffic, at a cost one party estimates to be more than $100 billion. Incumbent LECs state that AT&T's proposal would entail a fundamental change in the manner in which local switches are provided and would require dramatic and extensive alterations to the overall architecture of every incumbent LEC local telephone network. Given our conclusion above, we decline to require ELP at this time..." (*TRO* ¶ 491). This Commission should give ELP no more consideration than did the FCC.

Q. MR. VAN DE WATER CONTENDS (AT PAGE 18) THAT THE RATE FOR HOT CUTS SHOULD BE BASED ON ELECTRONIC LOOP PROVISIONING. DO YOU AGREE? DID THE FCC AGREE?

A. No, I do not agree and neither did the FCC. As stated above, the FCC flatly rejected AT&T's ELP proposal. The FCC directed state commissions to

approve a batch cut process which it expects will be lower in cost than single hot cut rates. BellSouth has developed such an offering. Mr. Van de Water compares the rate BellSouth charges for PIC changes and UNE-P changes to the rate for hot cuts. As noted above, such a comparison is inappropriate. The cost incurred for PIC changes and UNE-P migrations are different than the cost incurred to perform a hot cut of a UNE-L because the UNE-L hot cut requires physical work. The Commission already has considered these facts and established TELRIC hot cut rates.

Q. MR. STAHLY STATES (PAGE 39) THAT "BELLSOUTH HAS PROPOSED A RATE OF MORE THAN $50.00 TO SUPRA FOR A SINGLE CUT OVER. WHILE I DO NOT OFFER A SPECIFIC PRICE POINT AT THIS TIME, I SUSPECT THAT THE ACTUAL COST IS LESS THAN 5% OF BELLSOUTH'S ACTUAL CHARGE." PLEASE RESPOND.

A. First, if Mr. Stahly is not proposing a specific price point "at this time," I wonder at what time Mr. Stahly will introduce such a proposal. Second, a 95% reduction would result in a per hot cut charge of $5.00. Mr. Stahly offers no process, no work times, no salary or wage calculations, no overhead determinations, or anything else for that matter that might substantiate such a rate.

Q. MR. WEBBER STATES (PAGE 25) THAT ONE OF THE REASONS ILECS ARGUE AGAINST THE IMPLEMENTATION OF AN AUTOMATED

MIGRATION SYSTEM IS TO PRECLUDE THE GROWTH OF UNE-L. DO YOU AGREE WITH HIS ASSESSMENT?

A. No, I do not agree. The creation of an automated UNE-L migration system would be cost prohibitive for all carriers involved in interconnecting to the network. Such a change would be a fundamental change in how the telephone network processes information. The FCC recognized this when they rejected AT&T's ELP proposal. Mr. Webber's argument that "the largest hindrance with respect to these automated systems is one of incentive, not of technology" is absolutely incorrect. As BellSouth witness Gary Tennyson describes, moving to an automated system, one that is not in place today, would cost billions of dollars to develop and would require deployment of equipment that in many cases does not ever exist at commercially viable levels.

Q. ON PAGES 41-42, MR. TURNER ALLEGES THAT BELLSOUTH'S FLORIDA HOT CUT CHARGES CONSTITUTE AN ECONOMIC IMPAIRMENT TO UNE-L. ARE BELLSOUTH'S HOT CUT CHARGES TELRIC-COMPLIANT AND COMMISSION-APPROVED?

A. Yes. This Commission approved the non-recurring charges for the elements necessary for hot cuts in its UNE Cost Docket (Docket No. 990649).[2] When the Commission released its order approving BellSouth's UNE rates (Order No. PSC-01-1181-FOF-TP), AT&T had the opportunity to raise its concern

[2] The elements included in a hot cut are the type of loop (i.e., SL1, SL2, UCL), order coordination, electronic service order, and cross connects.

that nonrecurring charges constituted an economic impairment. While AT&T did file a Motion for Reconsideration, there was no mention of a concern relating to nonrecurring charges for UNE-Ls. Raising the argument now, as AT&T and others have attempted to do, constitutes an untimely request for the Commission to reconsider the rates they approved two years ago.

OTHER ISSUES

Q. MR. WEBBER, ON PAGE 59 OF HIS TESTIMONY, TRIES TO LINK THIS COMMISSION'S DECISION ON SWITCHING WITH THIS COMMISSION'S DECISION ON TRANSPORT. IS THAT APPROPRIATE?

A. Absolutely not. This Commission has established a separate proceeding (Docket No. 030852-TP) to determine impairment issues relating to UNE Transport. Any issues that Mr. Webber wants to raise relating to UNE Transport should be addressed in that proceeding, not this one.

Q. ON PAGE 44, MS. LICHTENBERG ARGUES THAT MCI IS ENTITLED TO A "DUMP" OF THE ILEC DATABASES. HASN'T THIS ISSUE ALREADY BEEN RAISED AND REJECTED?

A. Yes. In Docket No. 000649-TP, MCI raised this same issue during its arbitration with BellSouth. In Order No. PSC-01-0824-FOF-TP, this Commission determined that "BellSouth currently meets its obligation to

provide unbundled access to its calling name ("CNAM") database. WorldCom has not demonstrated that it would be impaired if it did not have physical custody of BellSouth's CNAM database. Accordingly, we find that BellSouth is not required to provide WorldCom the calling name database via electronic download, magnetic tape, or via similar convenient media.

Q. ON PAGE 16 OF HIS TESTIMONY, MR. STAHLY STATES "USING UNE-P OVER THE PAST TWO YEARS, SUPRA HAS BEEN ABLE TO SAVE FLORIDA'S RESIDENTIAL TELEPHONE USERS CLOSE TO $100 MILLION DOLLARS." DO YOUR AGREE WITH MR. STAHLY'S STATEMENT?

A. While I have no reason to dispute Mr. Stahly's statement, I must take issue with the circumstances that enabled Supra to offer lower prices to its retail customers. When a company refuses to pay portions of its suppliers' bills it can naturally afford to offer service to its retail customer at lower prices. As long as Supra did not pay BellSouth for the services it obtained pursuant its Interconnection Agreement, Supra was able to pass those "savings" along to its end users. However, once the Federal judge handling Supra's bankruptcy proceeding ordered Supra to make weekly payments to BellSouth for those services BellSouth provided after Supra's voluntary bankruptcy filing, Supra almost immediately raised the prices it charges its customers. See Supra's "Notice to Customers" posted on its website shortly before year-end 2002 regarding rate increases effective January 1, 2003. I have attached a copy of Supra's website notice to my testimony as Exhibit JAR-4.

Q. ON PAGE 16 OF HIS TESTIMONY, MR. STAHLY GOES ON TO STATE "BELLSOUTH FURTHER ADDS INSULT TO INJURY BY OFFERING LARGE DISCOUNTS AND CASH BACK OFFERS, WHICH NO CLEC CAN MATCH, AND WHICH UNDERCUT THE DISCOUNTS AND CASH BACK OFFERINGS CLECs CAN OFFER." DO YOU AGREE WITH MR. STAHLY'S STATEMENT?

A. Of course not. As this Commission is aware, BellSouth must notify CLECs in advance of any special promotions BellSouth will offer. That notification allows CLECs to match or beat BellSouth's offer in the marketplace. More importantly, Mr. Stahly once again offers not even one example to support his view that CLECs cannot match BellSouth's retail offers.

Q. ON PAGE 2 OF HIS TESTIMONY, MR. STAHLY STATES "BELLSOUTH SUCCESSFULLY RAN ADS OVER THE LAST TWO YEARS DISPARAGING CLECs AS COMPANIES WITH UNRELIABLE NETWORKS. TO WHAT ADVERTISEMENTS IS MR. STAHLY REFERRING?

A. I don't know and he doesn't say. As with so much of his testimony, Mr. Stahly is long on hyperbole and short on facts. BellSouth's policy is to not disparage its CLEC customers and its advertisements follow that policy.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

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