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September 1, 2004

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket 040301 –TP
SUPRA'S MOTION FOR PARTIAL SUMMARY FINAL ORDER ON CONTRACTUAL ISSUES

Dear Mrs. Bayo:

Enclosed are the original and fifteen (15) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion For Partial Summary Final Order On Contractual Issues to be filed in the captioned docket with Exhibits. Supra claims confidentiality of portions of this filing, thus the filing is submitted in a sealed envelope.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

Brian Chaiken /tw

Brian Chaiken
Executive V.P. Legal Affairs

CERTIFICATE OF SERVICE
Docket No. 040301-TP

I HEREBY CERTIFY that a true and correct copy of the following was served via Facsimile and E-Mail this 1st day of September 2004 to the following:

Jason Rojas/Jeremy Susac
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Nancy White
c/o Ms. Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.
2620 S. W. 27th Avenue
Miami, FL 33133
Telephone: 305/ 476-4248
Facsimile: 305/ 443-1078

Brian Chaiken /tw

By: BRIAN CHAIKEN

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Supra Telecommunications and Information Systems, Inc.'s for arbitration with BellSouth Telecommunications, Inc.	))))	Docket No. 040301-TP Filed: September 1, 2004

SUPRA'S MOTION FOR PARTIAL SUMMARY FINAL ORDER ON CONTRACTUAL ISSUES

Supra Telecommunications and Information Systems, Inc. ("Supra") pursuant to Rule 28-106.204(4), Florida Administrative Code, moves for partial summary final order on the first two issues identified by the parties in this docket. Specifically, Supra requests that the Florida Public Service Commission ("Commission") find, pursuant to undisputed facts, including admissions made by BellSouth Telecommunications, Inc. ("BellSouth") in this proceeding, that the parties' current Florida interconnection agreement ("Current Agreement") does not contain any rates for UNE-P to UNE-L conversions, whether the loops being converted are served by copper, UDLC or IDLC. As established below, there is no genuine issue of material fact as to these issues and Supra is entitled to a partial summary final order as a matter of law.

BACKGROUND

On April 5, 2004 Supra filed a petition against BellSouth, requesting that this Commission establish rates, if the Current Agreement was found to be silent as to such (and if the Commission found that under the Current Agreement, BellSouth was entitled to recover its costs), for BellSouth's performance of conversions of Supra's working, in-service UNE-P lines to UNE-L loops under the following two scenarios: (i) lines served via copper or UDLC, and (ii) lines served via IDLC.

STATEMENT OF UNDISPUTED FACTS

The following facts are either admitted to or undisputed by BellSouth:

1. The Current Agreement does not contain or even reference a rate for UNE-P to UNE-L conversions.[1] In its pleading before the United States Bankruptcy Court, Southern District of Florida, BellSouth stated:

> BellSouth agrees that the terms of the Agreement do not explicitly reference a conversion process from the Port/Loop combination Service (i.e. UNE-P) Supra currently uses to the separate 2-Wire Analog Voice Grade Loop Service (i.e. UNE-L) Supra now Seeks to use. BellSouth **believes** that the process and rates detailed in the Present Agreement for conversion of BellSouth's retail service to UNE-L should be applied to UNE-P to UNE-L conversions because UNE-P is, for the several functions involved in conversion to UNE-L, the functional equivalent of BellSouth's retail service. BellSouth has been, and continues to be, ready to convert service consistent with the contractual process if it has adequate assurance that the applicable rates will be paid.

(Emphasis added.)

2. The unbundled rates in the Current Agreement are tied to the FPSC orders in Docket 990649-TP, which also do not contain or reference a rate for UNE-P to UNE-L conversions[2].

3. On July 15, 2003, the United States Bankruptcy Court, Southern District of Florida, held[3]:

> Supra should pay the UNE-L Conversion changes on a weekly basis at the rate proposed by BellSouth in its Motion (the "BellSouth Rate") unless BellSouth voluntarily agrees to a lower rate. This rate will be subject to later adjustment if an appropriate regulatory body fixes a lower rate (the "Regulated Rate"). **Although the BellSouth/Supra contract does not specifically set a rate for UNE-P to UNE-L conversions,** BellSouth believes the $59.31 Rate proposed in its motion applies...

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[1] See **Exhibit A** -- Emergency Motion of BellSouth Telecommunications, Inc. for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions at p. 5, para. 12.

[2] PSC-01-1181-FOF-TP, PSC-01-2051-FOF-TP, PSC-02-1311-FOF-TP, *et al.*

[3] See **Exhibit B** -- Order Granting Emergency Motion of BellSouth Telecommunications, Inc., for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions (the "Order"), at p. 2.

(Emphasis added.)

3. BellSouth's director in charge of all of BellSouth's cost studies, Daonne Caldwell, testified under oath that she neither prepared nor was ever requested to prepare a cost study for a retail to UNE-L conversion, much less a UNE-P to UNE-L conversion.[4]

4. Ms. Caldwell further testified that the Commission never once even referenced a retail to UNE-L conversion or hot cut, much less a working UNE-P to UNE-L conversion or hot cut, in any of its orders issued in the cost study docket, or any other docket.[5]

5. The cost studies upon which BellSouth relies in support of its argument is for the construction of new SL1 and SL2 loops to locations which do **not** already have it, and does not distinguish such from a retail to UNE-L conversion, or a UNE-P to UNE-L conversion.[6]

6. Although BellSouth had proposed a bulk UNE-P to UNE-L conversion process before the Commission in Docket No. 030851-TP, and although BellSouth claimed that it had prepared a cost study for such, no such cost study was ever filed with the Commission.[7]

7. **Although BellSouth had proposed eight (8) different alternatives, with** varying degrees of costs and efficiencies, for handling UNE-P to UNE-L conversions in

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[4] **See deposition transcript of BellSouth's corporate witness with most knowledge regarding** BellSouth's cost studies, Daonne Caldwell, taken on August 18, 2004 ("Caldwell Deposition"), at p. 15.

[5] Id., at p. 22.

[6] Id., at p. 19.

[7] See **Exhibit C** -- Surrebuttal Testimony of John A. Ruscilli, filed January 28, 2004, at p. 17.

which the loops are being served with IDLC, BellSouth has not submitted any cost studies regarding such alternatives to the Commission.[8]

LAW AND ANALYSIS

Rule 28-106.204(4), Florida Administrative Code, "[a]ny party may move for summary final order whenever there is no genuine issue of material fact." The purpose of summary judgment or of a summary final order is to avoid the expense and delay of trial when no dispute exists as to the material facts.[9] When a party establishes that there is no material fact on any issue that is disputed, then the burden shifts to the opponent to demonstrate the falsity of the showing.[10] "If the opponent does not do so, summary judgment is proper and should be affirmed."[11] There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.[12] Regarding the first two issues in this docket, Supra satisfies both requirements.

ISSUES 1 AND 2 -- BellSouth admits that the Current Agreement is silent as to any hot cut rates.

The two issues in question provide as follows:

1. Under the parties' existing interconnection agreement, what nonrecurring rate, if any, applies for a hot-cut from UNE-P to UNE-L, where the lines being converted are served by copper or UDLC, for (a) SL1 loops and (b) SL2 loops?

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8 See Caldwell Depo, at pp. 34 and 117.
9 See Order No. PSC-01-1427-FOF-TP at 13.
10 Id.
11 Id.
12 Id. at 14-15.

2. Under the parties' existing interconnection agreement, what nonrecurring rate, if any, applies for a hot-cut from UNE-P to UNE-L, where the lines being converted are not served by copper or UDLC, for (a) SL1 loops and (b) SL2 loops?

Either the Current Agreement provides for such rates, terms or conditions, or it does not. As BellSouth has already publicly admitted in a signed pleading that the Current Agreement is silent as to hot cut rates[13], and as the United States Bankruptcy Court, Southern District of Florida, already issued an Order[14] finding that the Current Agreement does not set such a rate, this Commission should find, on these bases alone, that Supra is entitled to summary final order as a matter of law.

In addition to BellSouth's admissions and the Bankruptcy Court's findings, BellSouth's discovery responses and deposition testimony in **this** docket show that BellSouth never even submitted cost studies for the work activities that are purportedly involved in performing UNE-P to UNE-L conversions as described in issues 1 and 2 and that the Commission has **not** ever considered nor issued an order regarding such.

BellSouth tries to incorporate the UNE-P to UNE-L conversion process into its general, all purpose UNE loop SL1 and SL2 cost study. It is undisputed that this cost study allocates costs for the **construction of new** UNE loop service; however, BellSouth tries to redefine and misinterpret this cost study to somehow be inclusive of not only the costs for the construction of new service, but also for the costs of effectuating UNE-P to UNE-L conversions. BellSouth attempts this slight of hand by first claiming that the processes are identical and second that the use of averages somehow justifies the use of its general, all purpose cost study to account for many distinct and different processes. Neither of these two factual premises is true.

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[13] See Emergency Motion of BellSouth Telecommunications, Inc. for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions, p. 5, para. 12.

[14] See **Exhibit B.**

First, the processes contained in the BellSouth SL1 and SL2 cost study are different than what is necessary to effectuate conversions of working UNE-P lines serviced via copper, UDLC or IDLC lines. For example, the cost study assumes that:

[redacted]

[15] [redacted].

None of these elements, and many others, are required for a conversion of an existing UNE-P line to UNE-L, when the line is served via copper or UDLC.

Second, BellSouth's use of averages is improper for, at least, two reasons: (i) the issues in this docket break out the rates for conversions of lines served via copper and UDLC, versus those served via IDLC, and (ii) BellSouth's SL1 and SL2 cost study breaks down the processes based on work items that are irrelevant – specifically, BellSouth does not use an average of the only truly relevant factors (e.g. whether the loops are served via IDLC, the method of conversion available to such loops). Of course, as BellSouth has not even submitted cost studies in which the eight proposed alternatives for performing IDLC related conversions are involved, it is preposterous to even contend that the Current Agreement contains a rate for such.

CONCLUSION

For all of these reasons, there is no genuine issue of material fact and Supra is entitled to judgment as a matter of law on the issues of whether or not the Current Agreement contains a rate for hot cuts for lines served via copper, UDLC or IDLC. Therefore, Supra requests that the Commission grant its Motion for Partial Summary Final Order.

Exhibit – A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.,

Debtor.
_____/

Chapter 11
Case No. 02-41250-BKC-RAM

EMERGENCY MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC. FOR INTERIM RELIEF REGARDING OBLIGATION TO PERFORM UNE-P TO UNE-L CONVERSIONS

Compliance with Local Rule 9075-1
Basis for Exigency

At the June 18, 2003 hearing, the Court invited the filing of the instant Motion on an emergency basis to address BellSouth's obligations to incur substantial up-front non-recurring charges that were not dealt with in the Court's previous adequate assurance orders. In light of Supra's proffer at the June 18, 2003 hearing that it intends to place approximately 28,000 UNE-L orders in the near future, and the monetary scope of this issue (approximately $1.66 million), BellSouth may suffer direct, immediate and substantial harm in the absence of the immediate resolution of this issue.

BellSouth Telecommunications, Inc. ("BellSouth"), by and through undersigned counsel, submits this *Emergency Motion of BellSouth Telecommunications, Inc. for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions* (the "Motion"). In support of this Motion, BellSouth states:

1. On October 23, 2002 (the "Petition Date"), Supra Telecommunications & Information Systems, Inc. ("Supra"), filed its voluntary petition under Chapter 11, title 11 of the United States Code (the "Bankruptcy Code").[1]

[1] For the sake of brevity, BellSouth will recite only those facts relevant to the instant Motion. A detailed recitation of the facts and procedural history of the parties' relationship and the litigation that preceded the filing of Supra's chapter 11 case is set forth in the Motion of BellSouth Telecommunications, Inc. for Abstention or, in the Alternative, to Dismiss Case (C.P. #19).

2. Supra continues to operate its business and manage its affairs as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108.

3. On November 13, 2002, this Court entered an *Order Determining Adequate Assurance for BellSouth under Section 366 of the Bankruptcy Code and Setting Further Hearing* (the "366 Order") (C.P. # 84), requiring Supra to make weekly adequate assurance payments to BellSouth for the continuation of post-petition utility service by BellSouth to Supra. The 366 Order set forth the formula (the "Formula") by which the adequate assurance number is calculated on a weekly basis. The Formula is as follows:

- 10,400 resale lines at $400,000 per month
- (x) UNE lines at $25/line = (y)
- (y) + 400,000 = (z)
- (z) / 30 x 7 = weekly adequate assurance payment

4. On November 26, 2003, this Court entered its *Preliminary Injunction* (C.P. # 26), which provided, among other things, that BellSouth will be entitled to seek an appropriate adjustment to the Formula to the extent collocation access results in additional charges.

5. On December 2, 2002, this Court entered its *Further Adequate Assurance Order (i) Providing Formula Adjustment Procedures; (2) Requiring Debtor to Provide Additional Financial Information; and (3) Preliminary Ruling* (the "Adequate Assurance Order") (C.P. # 138).

6. The Adequate Assurance Order approved and adopted the adequate assurance adjustment procedure described in paragraphs 9, 10, and 11 of BellSouth's adequate assurance proposals (the "Adjustment Procedures").[2] The Adjustment Procedures set forth in these paragraphs permits either party to send in writing a request to modify the Formula, along with an explanation of the request and an example of the modified formula. The other party shall have

[2] A true and correct copy of BellSouth's *Supplemental Adequate Assurance Proposals* is attached hereto as Exhibit "A."

10 calendar days to respond to the party making the request, and include in its response an explanation of its response. The parties shall then have 10 days to attempt to negotiate a resolution of the proposed modification. If after the 10 day negotiation period resolution cannot be reached, the requesting party may seek a determination from the Court by motion on at least 10 day notice.

7. On May 21, 2003, BellSouth issued written notice to Supra requesting an adjustment to the Formula to address the issue of Supra's ordering of UNE-Loops ("UNE-L").[3] By ordering UNE-L, Supra is attempting to convert Supra customers from BellSouth switches to Supra switches. Such conversions will result in substantial up-front non-recurring charges that were not contemplated by the Court when it entered the 366 Order and the Adequate Assurance Order. Based on the significant costs involved and Supra's declining cash reserves, BellSouth submits that it is necessary for Supra to pay the non-recurring portion of any and all UNE-P to UNE-L conversions within one week following such conversions, as well as to adjust the Formula to reflect the recurring UNE-L costs. The need for adequate assurance is particularly acute in light of Supra's proffer at the June 18, 2003 hearing that it intends to place approximately 28,000 UNE-L orders in the near future.

8. BellSouth and Supra have reached an agreement as to the appropriate adjustment to the Formula regarding the recurring UNE-L costs, pursuant to which the recurring payments would depend on the particular SL1s provisioned.[4] Added to the specific SL1 loop rate is $.31 for special directory listings and $.57 for Operator Services and Directory Assistance Services,

[3] A true and correct copy of the May 21 Letter is attached hereto as Exhibit "B."

[4] The prices charged by BellSouth for a loop varies according to whether it is located in zone 1 (generally high population density), zone 2 (medium population density) and zone 3 (low population density).

all of which are services that Supra currently purchases from BellSouth and that Supra has agreed it will continue to purchase with UNE-L.[5] The formula is illustrated in the table below:

Line Count Numbers for Week Ending:			6/27/2003
Gains:	4000		
Losses:	3000		
Net gain:	1000		
Total Of Lines:	275000		
PAYMENT:			
10,400 DSL Lines			400,000.00
Remaining	255000	UNE P Lines @ $25 each:	6,375,000.00
	2500 SL1 (zone 1)	Lines @ $11.60 each	28,994.00
	6000 SL1 (zone 2)	Lines @ $16.11 each	96,645.60
	500 SL1 (zone 3)	Lines @ $27.88 each	13,938.80
Total Monthly			6,914,578.40
Daily (Monthly / 30)			230,485.95
Weekly (Daily * 7):			1,613,401.63
Total Payment for Week			1,613,401.63

However, the parties are unable to reach an agreement regarding the non-recurring cost associated with effectuating such conversions.

9. In its May 29 Letter, Supra objects to the amount of BellSouth's non-recurring charge for converting an SL1 Loop ($51.09).[6] The May 29 letter states that there is no support for the $51.09 rate in the parties' interconnection agreement dated July 15, 2002 (the "Present Agreement") or any relevant FPSC order, and that such conversion should in fact cost less than $1 per loop.

[5] Supra has requested that BellSouth provide voice mail service to Supra when a line is converted from UNE-P to UNE-L. BellSouth is still researching this request. If BellSouth elects to offer such service, the monthly recurring cost for each loop will need to be adjusted accordingly.

[6] BellSouth's May 21 Letter inadvertently failed to include the $8.22 cross-connect charge.

10. CLECs have been ordering UNE-L from BellSouth for several years. BellSouth developed a process to convert lines from its switches to CLEC switches through extensive negotiations with AT&T and other CLECs. This "hot cut" process has been used and continues to be used to provision CLEC orders for stand-alone loops.

11. The public service commissions in BellSouth's region, including the FPSC, have considered this process in extensive administrative litigation concerning UNE costs, BellSouth's applications to provide in-region long distance services and other dockets. In fact, the Florida PSC in its UNE cost docket adopted the rates for the components of BellSouth's hot cut process initially in its May 25, 2001 order in Docket No. 990649-TP, and later revised the rates in its October 18, 2001 order on motions for reconsideration of its May 2001 order. It later reaffirmed these rates in its September 27, 2002 order in Docket No. 990649A-TP, where it established new recurring rates for loops. These rates are incorporated in the Present Agreement and are the rates that BellSouth seeks to collect from Supra for the conversions in question. Moreover, the cost studies filed by BellSouth and approved by the FPSC reflect the rates to convert UNE-P loops to UNE-L. There can be no doubt that Supra must pay for the cost of converting Supra's customers to its switching facilities. BellSouth believes that its conversion process, which has been accepted by all CLECs (until now) and all PSCs, is the proper method of implementing Supra's conversions. Against this background, BellSouth has asserted that Supra is required to pay the approximately $58 in charges for each hot cut.

12. BellSouth agrees that the terms of the Agreement do not explicitly reference a conversion process from the Port/Loop Combination Service (i.e., UNE-P) Supra currently uses to the separate 2-Wire Analog Voice Grade Loop Service (i.e., UNE-L) Supra now seeks to use.[7]

[7] The fact that the Present Agreement is silent on this specific conversion is not unusual, as all the other interconnection agreements between BellSouth and other CLECs similarly do not address this issue. Evidently, all other CLECs understand that the FPSC rates would apply and thus have not disputed the charges.

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BellSouth believes that the process and rates detailed in the Present Agreement for conversion of BellSouth's retail service to UNE-L should be applied to UNE-P to UNE-L conversions because UNE-P is, for the several functions involved in conversion to UNE-L, the functional equivalent of BellSouth's retail service. BellSouth has been, and continues to be, ready to convert service consistent with the contractual processes if it has adequate assurance that the applicable rates will be paid.

13. Based on the entire record of Supra letters to BellSouth and its argument to the Court, it is unclear to BellSouth whether Supra seeks to use the conversion process and rates of the Present Agreement, or whether Supra prefers a new conversion process separate from the Present Agreement. If Supra seeks a new process, BellSouth stands ready to negotiate its rates, terms, and conditions consistent with its incumbent local exchange company obligations.[8]

14. If Supra, however, desires to proceed under the Present Agreement, it should, as a debtor and debtor-in-possession, provide adequate assurance of payment, particularly in light of its declining cash flow. As a certificated CLEC, it should pay the same price for the establishment of UNE-L service that scores of other BellSouth Region CLECs pay. In Florida, those rates are: (i) Service Order: pursuant to Attachment 2, Exhibit A to the Present Agreement, the charge for submitting an electronic service order is $1.52 per order;[9] (ii) Service Provisioning: pursuant to Attachment 2, Exhibit A to the Present Agreement, the charge for

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[8] The Interconnection Agreement between BellSouth and Supra provides a process for the addition of services and elements or processes not included in the Agreement at the time of execution. Attachment 10 of the Agreement sets for the Bona Fide Request/New Business Request Process. The process contemplates Supra submitting to BellSouth its request, BellSouth processing that request pursuant to certain timeframes and then culminating in an amendment to the Agreement.

[9] The $1.52 service order charge is inadvertently identified in the box above its proper location; however, BellSouth believes that this amount is not disputed. A true and correct copy of Attachment 2, Exhibit A, Page 142 is attached hereto as Exhibit "C."

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provisioning a SL1 loop is $49.57;[10] and (iii) Cross-Connect: pursuant to Attachment 2, Exhibit A to the Present Agreement, the charge for to cross-connect a 2-wire loop is $8.22.[11] Accordingly, the total charge for converting to UNE-L is $59.31.

15. Supra has elected to take its dispute regarding the applicable rate to the FCC. BellSouth believes the Florida Public Service Commission is the correct forum for the issues Supra is now raising. Regardless, it is apparent that one or the other regulatory agency will resolve the underlying substantive dispute. Neither agency, however, can currently provide BellSouth with the appropriate adequate assurances of payment -- only this Court can. The existing formula simply does not contemplate the Supra's incurring an additional $1.66M (28,000 lines x $59.31) in conversion charges. Accordingly, the Court should adopt the adequate assurance proposal that is set forth in detail below.

16. By this Motion, BellSouth requests that this Court adopt the following procedure with respect to all UNE-P to UNE-L conversions. In its weekly line count report to Supra, which is delivered to Supra every Tuesday under the present adequate assurance procedures, BellSouth will report the number of UNE-L conversions completed during the prior week, and shall calculate the total weekly payment due to BellSouth, including the amounts due for completed conversions, based on the rates set forth in paragraphs 8 and 14. Supra shall have until Thursday (of the same week) to remit payment to BellSouth, as it does under the current adequate assurance mechanism. If the FCC, or any other regulatory agency, ultimately determines that the appropriate rate for effectuating a UNE-P to UNE-L conversion is less than $59.31, BellSouth will issue Supra a credit to be applied against future conversions. Likewise, if

[10] A true and correct copy of Attachment 2, Exhibit A, Page 142 is attached hereto as Exhibit "D."

[11] A true and correct copy of Attachment 4, Exhibit A, Page 350 is attached hereto as Exhibit "E."

the FCC, or any other regulatory agency, ultimately determines that the conversion rate is higher than $59.31, Supra shall immediately remit payment to BellSouth for all completed conversions.

17. BellSouth has made a bona fide effort to resolve this matter without the necessity of a hearing.

WHEREFORE, BellSouth respectfully requests this Court enter an Order:

A. Granting the Motion;

B. Modifying the Formula in the manner specified above; and

C. Granting such other and further relief as may be just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the *foregoing* was served via hand delivery on Michael Budwick, Esq. 200 S. Biscayne Blvd., 30th Floor, Miami, Fl 33131; the Office of the U.S. Trustee, 51 Southwest First Avenue, Room 1204, Miami, FL 33130; Robert Charbonneau, Esq., Kluger Peretz Kaplan & Berlin, P.A., Miami Center, 17th Floor, 201 South Biscayne Blvd., Miami, FL 33131; Kevin S. Neiman, Esq., 550 Brickell Avenue, PH2, Miami, FL 33131; and by first class mail, postage prepaid, without exhibits, to all other parties on the attached Master Service List this 23 day of June, 2003.

I HEREBY CERTIFY that I am admitted to the Bar of the United States District Court for the Southern District of Florida and that I am in compliance with all additional qualifications to practice before this Court as set forth in Local Rule 2090-1(A).

Respectfully submitted,

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Attorneys for BellSouth Telecommunications, Inc.

Exhibit - B

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re:	CASE NO. 02-41250-BKC-RAM
	CHAPTER 11
SUPRA TELECOMMUNICATIONS, d/b/a SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS,	
Debtor.	

ORDER GRANTING EMERGENCY MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC., FOR INTERIM RELIEF REGARDING OBLIGATION TO PERFORM UNE-P TO UNE-L CONVERSIONS

The Court conducted a hearing, on June 25, 2003, on the Emergency Motion of BellSouth Telecommunications, Inc., for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions ("Motion") (CP# 617) and the Response of Supra Telecommunications and Information Systems, Inc. To BellSouth Telecommunications, Inc.'s Emergency Motion for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions ("Opposition") (CP# 626). The Court heard argument of counsel, reviewed the Motion and Opposition, and is otherwise fully advised in the premises. The Court also reviewed BellSouth's July 3, 2003 supplement to its original Motion and reviewed the parties' proposed Orders, portions of which are incorporated in this Order.

The Motion relates to certain non-recurring charges for the conversion of UNE-P lines to UNE-L lines (the "UNE-L Conversions"), a process that is part of Supra's efforts to convert its customers from BellSouth switches to Supra switches.

The parties do not agree on the correct charge for effectuating the conversions. BellSouth filed the Motion because (1) these charges may be substantial if Supra begins to order thousands of UNE-L Conversions as it stated it intends to do; and (2) the cost of these UNE-L Conversions was not considered when the Court established the amount of Supra's weekly adequate assurance payments to BellSouth in its November 13, 2002 Order Determining Adequate Assurance (the "366 Order").

The Court finds that Supra should pay the UNE-L Conversion changes on a weekly basis at the rate proposed by BellSouth in its Motion (the "BellSouth Rate") unless BellSouth voluntarily agrees to a lower rate. This rate will be subject to later adjustment if an appropriate regulatory body fixes a lower rate (the "Regulated Rate"). Although the BellSouth/Supra contract does not specifically set a rate for UNE-P to UNE-L conversions, BellSouth believes the $59.31 BellSouth Rate proposed in its Motion applies since (1) that is the contract rate for the conversion of a BellSouth retail line to UNE-L service; and (2) BellSouth asserts that the procedures necessary to do a retail to UNE-L conversion are substantially the same as the procedures for converting a UNE-P line to UNE-L.

The rate that should apply to UNE-P to UNE-L conversions should be determined by the FCC or Florida PSC, not by this Court. In the interim, to ensure that BellSouth is not charging Supra the BellSouth Rates without reasonable justification, the

Court is reserving the right to require BellSouth to refund twice the difference between the BellSouth Rate and the ultimately determined Regulatory Rate.

The Court is not finding nor implying that BellSouth is intentionally overcharging Supra, nor is it indicating that sanctions will be imposed simply because the regulators fix a lower rate. The purpose of announcing a "twice the difference" refund possibility is simply to induce BellSouth to charge a lower rate now if it has substantial reason to believe that the Regulatory Rate will be materially lower than the $59.31 BellSouth Rate it presently proposes to charge. This "twice the difference" refund may be imposed even if BellSouth has a colorable argument for charging the BellSouth Rate under the contract. This may occur, for example, if the FCC or Florida PSC find that BellSouth's costs for converting UNE-P to UNE-L are significantly less than its costs for converting retail lines to UNE-L, or, if the regulators otherwise make findings in the rate proceedings that cast substantial doubt on BellSouth's justification for using the retail to UNE-L rates for the UNE-L Conversions requested by Supra.

For the foregoing reasons, it is -

ORDERED as follows:

1. The Motion is granted.

2. Commencing with the date of the entry of this Order, in the weekly line count report that BellSouth issues to the Debtor,

and which is delivered to the Debtor every Tuesday under the present adequate assurance procedures, BellSouth shall also report the total number of UNE-L conversions completed during the prior week, and shall calculate the total weekly payment due to BellSouth, including the amounts due for completed conversions, based on the BellSouth Rates set forth in paragraphs 8 and 14 of the Motion. The Debtor shall have until Thursday (of the same week) to remit payment to BellSouth for UNE-L conversions completed during the prior week based on the prices provided for in the BellSouth Rates, in the same manner as it does under the current adequate assurance mechanism.[1]

3. The Debtor has disputed the BellSouth Rates and has filed an action with the Federal Communications Commission ("FCC") seeking a determination of the appropriate amounts that BellSouth may charge the Debtor (as defined earlier, the "Regulated Rates"). If an appropriate regulatory body determines that (1) the Regulated Rates are materially lower than the BellSouth Rates and (2) BellSouth had substantial reason to believe that the Regulated Rates would be materially lower, then, as more fully discussed earlier in this Order, the Court may consider sanctions against BellSouth. At the Court's discretion, these sanctions may consist of a refund in an amount equal to twice the difference between the BellSouth Rates and the

[1]BellSouth's rights under the 366 Order and related Orders shall also be applicable under this Order.

Regulated Rates for each converted line.

ORDERED in the Southern District of Florida, this 15th day of July, 2003.

ROBERT A. MARK
Chief U.S. Bankruptcy Judge

COPIES FURNISHED TO:
Paul Singerman, Esq.
Michael Budwick, Esq.

(Attorney Budwick is directed to serve a copy of this Order on all other interested parties herein)

BELLSOUTH TELECOMMUNICATIONS, INC.

SURREBUTTAL TESTIMONY OF JOHN A. RUSCILLI

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 030851-TP

JANUARY 28, 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 and rebuttal testimony and one exhibit on January 7, 2004.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY AND HOW HAVE YOU ORGANIZED IT?

A. My surrebuttal testimony addresses numerous comments contained in the rebuttal testimony filed by other witnesses in this proceeding on January 7, 2004.

In the first section of my testimony, I make some general observations regarding the rebuttal testimony filed in this proceeding. I then walk through each step of the investigation that the Federal Communications Commission ("FCC") asked the state commissions to undertake to determine whether CLECs are impaired without unbundled local switching – namely, in this proceeding established by the Florida Public Service Commission ("Commission"), to determine the definition of the geographical market and the mass market/enterprise crossover (Issues 1 and 2), the application of the triggers and potential deployment tests (Issues 4 and 5), and the approval of a batch cut process (Issue 3) – and discuss the remarks of other witnesses who have filed rebuttal testimony relevant to each issue. I highlight areas of agreement and summarize rationales for BellSouth's positions where disagreement exists. More detailed arguments can be found in the testimonies of other BellSouth witnesses, who I will refer to as appropriate. As no one has presented meaningful rebuttal of my original discussion of Issue 6, the transitional use of unbundled switching, I do not discuss this topic further here.

GENERAL OBSERVATIONS

Q. ARE YOU FAMILIAR WITH THE REMARKS OF OTHER WITNESSES WHO HAVE FILED REBUTTAL TO BELLSOUTH'S DIRECT TESTIMONY?

A. Yes. I have studied the testimonies of the numerous witnesses who have filed rebuttal testimony in this proceeding, including that on behalf of AT&T, the FCCA, FDN, MCI, Sprint, Supra, and the Citizens of the State of Florida.

Q. WHAT IS YOUR GENERAL IMPRESSION OF THE REBUTTAL TESTIMONY?

A. I would make three general observations. First, there seems to be a general tendency toward selective obfuscation. That is, although the FCC has left some issues to the interpretation of this Commission, there are other issues – such as the application of the triggers tests or the type of CLEC to be modeled in the potential deployment test – on which the *TRO* is crystal clear. Although one would expect there to be legitimate differences of opinion where interpretation is required, I find an unfortunate tendency to cloud issues where clarity has been provided by the FCC. As I will discuss below, Drs. Staihr, Johnson and Bryant and Messrs. Gillan and Bradbury are all particularly prone to this, creating unnecessary complication where none is required, presumably because they do not like the clear direction given by the *TRO*.

Second, there seems to be substantial disagreement amongst the parties attacking BellSouth's positions: some find BellSouth's suggested market definition too small, others find it too large; some find the BACE model too sensitive to inputs, others too insensitive; some claim that BellSouth has counted the wrong trigger candidates, but then admit in other forums (notably the current appeal from the FCC's TRO order pending in the courts) that these companies (the cable companies) can be counted. To me, this lack of consensus supports my conviction that in areas where judgments need to be made, and where legitimate differences

of opinion are therefore to be expected, BellSouth has proposed reasonable middle-ground positions that this Commission can feel comfortable adopting.

Finally, there are several witnesses (e.g., Messrs. Wood and Gillan) who seek to downplay the responsibility that this Commission has to determine where impairment exists and where it does not. They imply that the *TRO*'s presumption of impairment for mass-market switching based on aggregate, nationwide data shuts the door to a finding of non-impairment based on data reflecting local market conditions. In fact, nothing could be farther from the truth. The whole point of devolving responsibility to the states is so that commissions such as this one can use their knowledge to conduct the granular decision making that an important issue such as this deserves. Indeed, as the FCC itself explained in their brief to the DC Circuit Court of Appeals: "In making certain national findings of impairment, the Commission also recognized that the record before it was not sufficiently detailed to support the nuanced decisionmaking that *USTA* required. To address those situations – involving, for example, local circuit switching, high capacity local loops, and dedicated transport – the Commission enlisted state commissions to gather and evaluate information relevant to impairment in their states. These very specific delegations were reasonably designed to ensure accurate and nuanced analyses of impairment on a market-specific basis." (Brief for Respondent at 21, *USTA v. FCC,* Case No. 00-1012 (DC Cir).) (Emphasis added). Therefore, if one believes what the FCC has said, to suggest all this Commission has to do is apply nationwide CLEC market share to local markets (Gillan, pp.21-22) or that the potential deployment test is essentially irrelevant (Wood, pp. 6-7) is clearly incorrect.

ISSUES 1 AND 2: MARKET DEFINITION

Q. WHAT IS BELLSOUTH'S POSITION WITH REGARD TO THE DEFINITION OF THE GEOGRAPHICAL MARKET THAT SHOULD BE USED TO EVALUATE IMPAIRMENT?

A. BellSouth has proposed the use of UNE rate zones that this Commission has defined previously, subdivided into component economic areas ("CEAs") as defined by the Bureau of Economic Analysis, U.S. Department of Commerce. As described in the direct, rebuttal, and surrebuttal testimonies of Dr. Christopher Pleatsikas, this definition satisfies the multiple criteria laid out in the *TRO* and results in economically meaningful "markets" in which to consider impairment.

Q. WHAT HAVE OTHER WITNESSES SUGGESTED IN THEIR REBUTTAL TESTIMONY FOR THE GEOGRAPHICAL MARKET DEFINITION?

A. Mr. Gillan on behalf of the FCCA recommends that the entire service footprint, or else the LATA, should be considered a market. Notwithstanding his client's membership in the FCCA, on whose behalf Mr. Gillan testifies, Dr. Bryant, on behalf of MCI, suggests that each individual customer represents the appropriate economic market, although he concedes that a wire-center definition would be administratively simpler. Dr. Staihr suggests MSAs combined with RSAs, Mr. Nilson mentions retail rate centers, although he finally recommends wire centers, and Dr. Johnson, on behalf of the Citizens of the State of Florida, recommends *ad*

hoc aggregations of wire centers that have "reasonably homogeneous [demand] characteristics". Although Mr. Bradbury is keen to defend wire centers as the geographical unit of competition (pp. 22-23), another witness for AT&T has suggested LATAs as the appropriate market definition in discovery. (AT&T Response to Interrogatory No. 156.)

Q. HOW WOULD YOU CHARACTERIZE THESE ALTERNATIVE POSITIONS?

A. Geographical market definition is one of those issues that supports my general observation above: while Mr. Gillan and AT&T find BellSouth's market definition is too small, Messrs. Bryant, Stahr, and Nilson find it is too large, and as Dr. Pleatsikas describes, Dr Johnson's suggestion is logically impossible to implement, which to me suggests BellSouth's proposal may actually be just right.

Furthermore, it is interesting that the parties not only contradict each other, but also appear to be contradicting themselves: MCI is arguing for a larger market definition through the FCCA's witness Mr. Gillan and a smaller definition through its own witness, Dr. Bryant; AT&T is suggesting a LATA in discovery (AT&T Response to Interrogatory No. 156), while its witness, Mr. Bradbury, emphasizes that this Commission "must assure itself that UNE-L competition will exist in every wirecenter." Both MCI and AT&T have previously argued against too small a geographical market definition because their switches can provide service to a comparable area as BellSouth's tandem switches (see Ruscilli Rebuttal, p. 15), even though both are now defending individual wire centers as the unit of meaningful competition (Bradbury, pp. 22-23, Bryant p. 43-51).

Q. WHAT SHOULD THE COMMISSION DECIDE IN THE FACE OF THESE COMPETING ALTERNATIVES?

A. It is hardly surprising that many alternative definitions of the geographical market have been propounded – this is an issue that has been left up to this Commission's judgment, and where, although I believe that UNE Zones cut by CEAs is the most logical definition, there is likely no "right answer." As Dr. Pleatsikas explains, however, there are two definite "wrong answers," both of which should obviously be avoided. The first would be to define the whole State of Florida as a market; the second would be to define every wire center within Florida as a market. Either of these approaches would run afoul of *TRO* ¶ 495 (the former is too big, the latter is too small). As long as the Commission steers between these two "icebergs," however, I believe its analysis will be reasonable.

Q. TURNING FROM THE GEOGRAPHICAL MARKET TO THE DEFINITION OF "MASS MARKET," WHAT IS THIS COMMISSION'S TASK?

A. The *TRO* (¶ 497) is quite clear on this point: "Some mass market customers (i.e., very small businesses) purchase multiple DS0s at a single location…Therefore as part of the economic and operational analysis discussed below, a state must determine the appropriate cut-off for multiline DS0 customers as part of its more granular review." The Commission's task is no more and no less than to set a number of DS0s below which a customer is classified as "mass market" and

above which it is classified as "enterprise" (and therefore no longer eligible for unbundled switching, per *TRO* ¶ 419).

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THE APPROPRIATE CUTOFF?

A. As described in my direct Testimony (p.8), BellSouth has accepted the FCC default delineation that customers with three or fewer CLEC DS0 lines serving them should be deemed "mass market." This position has also been tentatively adopted by the Ohio PUC. (See *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Regarding Local Circuit Switching in the Mass Market,* Case No. 03-2040-TP-COI, *Entry*, dated October 2, 2003, p.5.)

Q. WHAT HAVE OTHER WITNESSES SUGGESTED IN THEIR REBUTTAL TESTIMONY FOR THE CUTOFF?

A. On this issue, there is a lot of smoke, but not much in the way of concrete suggestions. Mr. Gillan proposes a 12-line cutoff for BellSouth's territory, and an *ad hoc* definition for Verizon's territory (although why the crossover should vary by ILEC is not explained). Mr. Nilson variously suggests 6-8 lines (footnote 10, p. 14), 5-6 lines (p. 52) and 10-12 lines (p. 53). Mr. Johnson agrees that "the FCC adopted a cut-over of four lines" (p. 36) (contrary to Mr. Gillan, who claims that they didn't (p.17)) and correctly points out that the higher the cut-over is set, the more customers are included in the "mass market" category, and so the more

likely it is that no mass-market impairment will be found. However, he then goes on a somewhat bizarre tangent (pp. 38-47) in which – directly contradicting the *TRO* as quoted above – he suggests that the "mass market" should be further subdivided into "residential" and "small business" segments to which the triggers tests should be applied independently (p. 46), or as an alternative, the cutoff should be performed "on the basis of revenue per customer, or on the basis of gross profit margin per customer (revenues minus direct costs), rather than purely on the basis of the number of DS0 lines."

Q. WHAT SHOULD THE COMMISSION DECIDE IN THE FACE OF THESE COMPETING ALTERNATIVES?

A. Again, there is likely no "right" answer. Obviously, BellSouth believes its position is a reasonable one and comes closest to assuaging Mr. Johnson's concern that "no other party in this proceeding has recognized the importance of studying residential and small business customers separately," (p.38) by staying within the *TRO*'s mandate to include multiline DS0 customers while establishing an explicit cutoff. On the other hand, raising the cutoff, as Mr. Gillan suggests, only improves the chances of finding mass-market non-impairment, and so is not unappealing to BellSouth. The only thing that I would propose this Commission avoid is not following the clear guidance of the *TRO* and the FCC rule by failing to come up with a single, clear cutoff point between "mass market" and "enterprise" customer segments.

ISSUES 4 AND 5: THE TRIGGERS AND POTENTIAL DEPLOYMENT TESTS

Q. WHAT DO YOU MEAN BY THE "TRIGGERS AND POTENTIAL DEPLOYMENT TESTS"?

A. Having defined the geographical markets and the "mass market" cutoff, the *TRO* lays out a clear process by which this Commission should determine whether impairment exists for local switching. All witnesses in this proceeding agree that the Commission should examine each geographical market in turn, first applying the "triggers tests," which examine whether there is actual deployment of CLEC switching on either a retail or wholesale basis, and then – if neither of those tests are passed – the "potential deployment test," which weighs evidence of actual deployment, operational barriers, and economic barriers to determine whether self-provisioning of facilities is potentially economic, even if it has not yet occurred to the extent required to meet either of the triggers.

Q. LET US BEGIN WITH THE TRIGGERS TESTS. WHAT IS BELLSOUTH'S INTERPRETATION OF THESE TESTS?

A. Actually, very little interpretation is required. The *TRO* is crystal clear about the nature of these tests. Furthermore, BellSouth is not claiming that the wholesale facilities trigger is met in any market at this time, which simplifies matters because it means that this Commission only has to consider the self-provisioning trigger. As it is easy to get lost in the lengthy, seemingly plausible, but in fact

mostly fictitious, "interpretations" of the trigger test presented by Drs. Staihr, Johnson and Bryant and Messrs. Gillan, Nilson and Bradbury in their rebuttal testimonies, let me quote *in its entirety* the FCC's rule describing this test: "Local switching self-provisioning trigger. To satisfy this trigger, a state commission must find that three or more competing providers not affiliated with each other or the incumbent LEC, including intermodal providers of service comparable in quality to that of the incumbent LEC, each are serving mass market customers in the particular market with the use of their own local switches." (47 C.F.R. § 51.319 (d)(2)(iii)(A).)

Although BellSouth would prefer the trigger to be met with the presence of one or two competing providers, the text is quite clear that three is the threshold. Similarly, although many witnesses would prefer the trigger to be met only if additional criteria – such as a *de minimis* threshold, or a requirement that every customer in the market be served, or that trigger candidates have to use ILEC loops and "mass market switches" (whatever those may be) are satisfied – the text is quite clear that none of these additional standards have been imposed.

Ms. Pam Tipton further elaborates on these fictional criteria in her testimony, and describes how, in contrast, BellSouth has simply applied the FCC's straightforward test to the markets that have been proposed. That is, in each market BellSouth has counted how many competing providers – through their own admission in discovery and BellSouth's internal data – are serving mass-market customers. In the markets where there are three or more competing providers, the trigger has been met, and this Commission should immediately find

non-impairment. In the markets where there are fewer than three competing providers, the trigger has not been met, and therefore, the Commission should continue their examination to see if the markets pass the potential deployment test.

Q. HOW HAS BELLSOUTH DEFINED "COMPETING PROVIDERS"?

A. BellSouth has been rather conservative in defining "competing providers." For example, despite the evidence in the *TRO* itself that "local services are widely available through CMRS providers" (¶ 230), that CMRS providers are sufficiently competitive with the incumbent LEC that they should qualify for UNEs (¶ 140), and that CMRS is "growing as a...replacement for *primary* fixed voice wireline service" (¶ 230), BellSouth chose not to challenge the FCC's statement that "at this time we do not expect state commissions to consider CMRS providers in their application of the triggers" (fn. 1549). Similarly, BellSouth did not include internet-based telephone providers, such as Vonage, as trigger candidates, although internet-based telephone providers and CMRS providers are clearly a growing presence and a direct and ubiquitous substitute for the incumbent LEC's voice service in Florida. (See Exhibit JAR-5.)

Eliminating these two categories of trigger candidates leaves only wireline CLECs as included as "competing providers." I should mention in passing that BellSouth has of course included cable companies as trigger candidates – this is contrary to the assertions of Mr. Nilson (pp. 36-38) and Mr. Bryant (pp.10-12), but more importantly is consistent with the *TRO* and with the CLECs own

position in their DC Circuit brief where they state that "the FCC acknowledged that its triggers may 'count' carriers like cable companies". (Brief of CLEC Petitioners and Intervenors, *USTA v. FCC,* Case No. 00-1012 (DC Cir), p. 37.)

Q. ON PAGE 39 OF HIS TESTIMONY, MR. NILSON SUGGESTS THAT FUTURE MERGER ACTIVITY THAT RESULTS IN A REDUCTION IN THE NUMBER OF LOCAL EXCHANGE CARRIERS IN A GIVEN MARKET WOULD REQUIRE THE COMMISSION TO REVISIT WHETHER THE TRIGGER HAD BEEN MET FOR THAT MARKET. DO YOU AGREE?

A. No. First, this point is well beyond the scope of this proceeding and outside of the issues presented. This point anticipates what will happen in the future, after the Commission has made a finding of "no impairment" in a market. However, even with this said, Mr. Nilson's point is simply wrong. The FCC has established the triggers as the proof that CLECs can serve mass market customers without unbundled switching. Once that proposition has been established by applying the triggers, it is established regardless of whether three CLECs continue indefinitely to provide service in that particular market. Subsequent merger activity has absolutely no impact on this finding once it has been made.

Q. WITH RESPECT TO THE "POTENTIAL DEPLOYMENT" TEST, HOW SHOULD THIS TEST BE APPLIED?

A. Although it is not quite as straightforward as the "bright-line" self-provisioning trigger test, the potential deployment test is also well described in the *TRO.* In

markets where neither of the triggers tests has been met, this Commission needs to examine three criteria: evidence of actual switching deployment, operational barriers (such as the availability of collocation space and cross-connects), and economic barriers. (47 C.F.R. § 51.319 (d)(2)(iii)(B)(1)-(3).) If, having weighed these criteria, the Commission decides that self-provisioning of local switching could be economic, then it should make a finding of non-impairment.

Q. HOW HAS BELLSOUTH APPLIED THIS TEST?

A. BellSouth has presented details regarding each of these three criteria: evidence of actual switching deployment is described in the direct testimony of Ms. Tipton; the lack of operational barriers is described in my direct testimony, pp.19-23, and the assessment of economic barriers is discussed in the direct testimony of Dr. Aron.

Q. WHAT HAVE OTHER WITNESSES SUGGESTED IN THEIR REBUTTAL TESTIMONY REGARDING THE POTENTIAL DEPLOYMENT TEST?

A. The focus of other witness's rebuttal testimony has been on BellSouth's assessment of the economic barriers. This assessment was based on the BACE model, a detailed business case for a UNE-L CLEC entering the Florida market. In sponsoring the BACE model, BellSouth has made an effort unparalleled by any other carrier in the country to provide the Commission with a tool to assess economic impairment in a way that meets the criteria laid out in the *TRO* (see for example *TRO* ¶ 485 and the direct testimony of Mr. James Stegeman, pp. 6-18).

Indeed, no other party has even attempted to claim that the models they originally presented in direct testimony are better suited to the task at hand. Unfortunately, instead of engaging in a constructive debate about the BACE model, the rebuttal testimonies of Drs. Staihr and Bryant and Messrs. Dickerson, Nilson, Webber, Bradbury and Wood by and large satisfy themselves with making unfounded attacks on the input parameters or superficial complaints about the structure of the model. The former group of complaints is comprehensively dealt with in the surrebuttal testimonies of Drs. Aron and Billingsley, who show that most of the issues are the results of definitional misunderstandings or attempts to substitute the months of documented research that the BellSouth witnesses have performed regarding variables such as churn, cost of capital, and selling, general and administrative ("SG&A") costs, with offhand assumptions. The latter group of complaints is handled in the surrebuttal testimonies of Messrs. Stegeman, Milner and Gray, who demonstrate that none of the witnesses appear to have made a good faith attempt to understand the model, with the result that many of their alleged critiques are inaccurate and mutually contradictory.

I would urge this Commission to make use of the powerful tool that is the BACE model. Contrary to the assertion of Mr. Wood that the potential deployment test is essentially irrelevant because the absence of self-deployment "should eliminate any question regarding the ability of CLECs to enter a market and successfully compete for mass market customers is impaired without access to UNE local circuit switching [sic]" (pp.6-7), the *TRO* lays out a detailed and thoughtful test for state commissions to apply where the triggers are not met. So long as UNE-P promotes artificial competition by distorting market prices and subsidizing

arbitrage players with no interest in making real investments in the state of Florida, this test may be consumers' only hope of benefiting from real, facilities-based competition and therefore deserves to be taken seriously.

ISSUE 3: BATCH CUTS

Q. ON PAGES 5-6 OF HIS TESTIMONY, MR. VAN DE WATER CLAIMS THAT THIS COMMISSION CAN NOT RELY ON ITS 271 FINDINGS WITH RESPECT TO THE HOT CUT PROCESS. HOW DO YOU RESPOND?

A. The FCC's decision not to rely on the objective hot cut performance data on which it relied in at least forty-nine 271 cases to find that ILECs provide nondiscriminatory access to loops is erroneous. This Commission should not make the same error. It would make no sense for this Commission to ignore its finding from a year ago that BellSouth has a 251/271-compliant hot cut process, and then today, find that the process is unacceptable.

Moreover, even if this Commission does not rely solely on its 271 holding, BellSouth's objective performance data should inform this Commission's decision far more than the CLEC's uncorroborated and anecdotal evidence that BellSouth's process "might not work." BellSouth's witnesses have presented a seamless and efficient batch hot cut process, and have presented performance data and a third party test that demonstrates its effectiveness. When weighed against the CLECs' speculative musings, BellSouth's case is far more compelling. There is no doubt that the Commission's findings in the 271 case should inform its

decision, but the Commission can, and should, adopt BellSouth's batch hot cut process based on the evidentiary record in this case.

Q. MR. VAN DE WATER (PAGES 27-28) AND MR. GALLAGHER (PAGE 14) CRITIZE BELLSOUTH FOR NOT FILING THE COST STUDY YOU MENTION IN YOUR TESTIMONY (RUSCILLI DIRECT, P. 18). IS A COST STUDY RELEVANT TO THIS PROCEEDING?

A. No. The cost study BellSouth conducted of the batch hot cut process was done using BellSouth's cost model with the inputs BellSouth contends are correct. The estimated costs for the batch hot cut process were less than the original filed costs for the standalone loop; however, they were still higher than the ordered loop rates set by this Commission because of the adjustments made by the Commission to the inputs. To account for the Commission's Order, BellSouth applied the same adjustments and discounts that the Commission applied to BellSouth's filed costs for the loop that established the individual hot cut rate to the estimated batch hot cut rates. This resulted in the proposed batch hot cut rate being approximately 10% below the ordered loop rate. The rate is driven, therefore, not by BellSouth's cost study so much as by the Commission's UNE Cost Order.

Q. MR. VAN DE WATER AND MR. NEPTUNE ARGUE THAT THE RATE BELLSOUTH IS PROPOSING IS TOO HIGH. PLEASE COMMENT.

A. As I discussed in my rebuttal testimony, the rate BellSouth is proposing for the batch hot cut process is a discount off the Commission-approved TELRIC-based

rates set forth by this Commission in the UNE Cost Proceeding, Docket No. 990649-TP, Order No. PSC-01-2051-FOF-TP. During the UNE Cost Proceeding, this Commission engaged in a thorough, detailed analysis of the evidence (from BellSouth and CLECs) regarding the proposed hot cut rates. At the conclusion of the proceeding, this Commission ordered the nonrecurring rates for hot cuts with modifications of certain inputs, as well as reductions to certain work times. As a result, the Commission's established rate was substantially lower than what BellSouth had proposed. Taking into consideration the already reduced hot cut rates, BellSouth's additional 10% discount for the batch hot cut process is a true cost-savings for CLECs.

Q. DID AT&T OR SUPRA PARTICIPATE IN THE UNE COST PROCEEDING?

A. AT&T did, Supra did not. However, AT&T never raised a concern about the proposed hot cut costs. Even after the UNE Cost Order had been issued, AT&T did not request the Commission to reconsider the rates established for hot cuts. Now, some 2 ½ years after the fact, AT&T is attempting to request a modification of the UNE Cost Order.

Q. MR. VAN DE WATER AND MR. NEPTUNE CONTINUE TO TRY AND COMPARE A RETAIL TO UNE-P MIGRATION TO A RETAIL TO UNE-L MIGRATION. IS SUCH A COMPARISON APPROPRIATE?

A. Absolutely not. As I explained in detail in my rebuttal testimony, the work required to migrate a CLEC's service from UNE-P to UNE-L is much more

involved than converting retail service to UNE-P. The Commission has recognized this fact in at least two ways. First, it established higher rates for hot cuts than for conversions to UNE-P, recognizing the different work effort in each. Second, it established different benchmarks and retail analogues for UNE-L performance measures than for UNE-P performance measures. The fact that UNE-L and UNE-P are different is no surprise to this Commission. Congress also recognized the difference between UNE-L and UNE-P – it is simply the difference between true facilities-based competition with the UNE-L and synthetic competition with the UNE-P. The question for the Commission is not whether UNE-P is the same as UNE-L, but rather whether an efficient CLEC can economically enter the market without access to unbundled switching. Because the answer to the second question, the correct question, is unequivocally "yes", the CLECs are trying to change the question.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

[#522525]

A Debate on Web Phone Service

By MATT RICHTEL
2,236 words
5 January 2004
The New York Times
Late Edition - Final
1
English

Charles Davidson, a self-proclaimed gadget freak in Tallahassee, Fla., began using Internet-based telephone service last week. He can call anyone -- not just the other 100,000 pioneers around the nation using such service, but any of the millions of people who use conventional telephones, like his parents in Elizabethton, Tenn.

But Mr. Davidson is more than an adventuresome consumer. As a member of the Florida Public Service Commission, he is a regulator who is eager to see Internet telephone service spread because he predicts it can make the nation's phone services less expensive and richer in features.

That is why Mr. Davidson wants the federal and state governments to let Internet-based phone service blossom, free from regulation, taxes and surcharges. Like a growing number of officials who advocate minimal oversight of the service -- including Michael K. Powell, the chairman of the Federal Communications Commission -- Mr. Davidson says Internet telephone service should be treated just like other unregulated Internet services, including e-mail messaging and Web surfing.

But unlike some proponents of deregulation, Mr. Davidson also has a nagging concern. Because Internet-based phone service rides over traditional telephone or cable lines, it will not work unless the conventional phone network is intact. The government has long regarded that network as a national asset akin to roads and highways, and it is a communications system whose reliability and virtual ubiquity make it the envy of most of the rest of the world. In fact, if users of Internet phones were not able to communicate with all the millions of people still plugged into the conventional telephone network, Internet telephone service would be little more than a hobbyist's experiment.

So Internet telephone service raises a public policy question: If the government does not continue to play a role in ensuring that the telephone network is reliable and universally available, does the nation risk losing a vital asset?

"It's a great question," Mr. Davidson said. "Do we, as a society, want to maintain a policy of 'always on'?"

Mr. Davidson, a former antitrust lawyer appointed to the Florida commission by the governor, Jeb Bush, a Republican, is still weighing his answer. But he says he tends to think that markets are more efficient than regulators -- in other words, that laissez-faire can walk hand in hand with "always on."

Some of Mr. Davidson's counterparts in other states sound just as certain that only government referees can preserve the decades-old tradition of universal, reliable telephone service.

"If somebody doesn't regulate this, it's buyer beware," said Loretta Lynch, a member of the California Public Utilities Commission, who was appointed by the former governor, Gray Davis, a Democrat. Ms. Lynch, a lawyer, said the role of the telephone was too important to leave in the hands of market forces. "Telecommunications is essential to our democracy," she said. "It's essential, in fact, to keeping an informed populace."

If the issue were limited to the 100,000 or so customers currently using Internet-based telephones, the debate might remain largely theoretical. But the service seems on the verge of a takeoff.

The field's current leader is the Vonage Holdings Corporation, an Edison, N.J., company with about 80 percent of the market so far. Mr. Davidson is among its customers. Vonage estimates that it will have 250,000 customers by the end of 2004 and one million by 2006. Time Warner Cable, a unit of Time Warner Inc., and the AT&T Corporation have both announced major initiatives to roll out Internet-based phone service. The regional Bell company Qwest Communications International Inc. plans to offer Internet telephone service in its 14-state Rocky Mountain region as an alternative to conventional phone service. And every other major

telecommunications provider has plans to introduce Internet-based service to take advantage of the technology's lower costs and the lack of regulation.

The F.C.C. has embarked on a series of public hearings around the country on whether and how to regulate Internet telephony. The agency's chairman, Mr. Powell, has said that his instinct is to subject telephone calls made using Internet technology to only minimal regulation in order to avoid costs and bureaucracy that he says would slow innovation and competition.

The public policy questions go to the heart of a social compact born in the 1930's. Then, the government granted regulated monopolies in individual markets to AT&T and other, smaller companies. In exchange, policy makers exacted a price: the telephone monopolies had to meet service quality standards and collect taxes and surcharges to support affordable, universal access even in rural or remote areas where free-market economics would not have made it cost effective to string telephone wires.

Although AT&T's Bell System was split up in 1984, the existing four major telephone companies descending from it -- Verizon Communications, the BellSouth Corporation, Qwest and SBC Communications Inc. -- still face substantial regulation from the federal and state governments. Now, though, with the advent of Internet-based telephone service, as well as competition from wireless providers, there is growing momentum to rewrite 70 years of rules.

"The economic regulation was quid pro quo for giving it a monopoly," said Mr. Davidson of the rules governing the Bell companies. Now, he said, "there is no monopoly."

Mr. Davidson said he thought that competition from cable and wireless companies provided consumers an array of new choices. But among the various state and federal regulators who will weigh in on the Internet-phone issue, there are many nuanced notions about how to proceed. Some want to see state regulation eliminated; others want to see regulation streamlined but kept intact. Many want to retain guarantees of 911 service and universal service for low-income and rural residents, but they differ considerably on how to achieve those goals. Even within the National Association of Utility Regulators, an influential lobbying group of state regulators, some top officials have greatly divergent views about how to regulate telecommunications in the 21st century.

Not all industry executives agree, either, although most companies favor a significant rollback of regulations. One of the most unabashed supporters of Internet-based telephone service is Richard C. Notebaert, the chief executive of Qwest. Mr. Notebaert said Qwest, besides introducing Internet-based calling across its region, might even offer it nationwide.

Mr. Notebaert said that with Internet telephone service, he could save his customers 25 percent to 30 percent on their bills because they would not be required to pay the taxes and surcharges assessed to conventional phone service to support such things as phone service for low-income and rural residents. He said Internet-based service would enable his company to save "hundreds of millions" of dollars a year in costs associated with following regulatory requirements like tracking and reporting Qwest's customer service performance by various measures.

Mr. Notebaert acknowledged that moving to Internet telephone service would mean tradeoffs. "You're going to have to give things up to get 25 to 30 percent savings," Mr. Notebaert said. As to regulation, including universal service, he said, "I do not think it should be retained at all."

Some of the lower costs of Internet telephone service are a result of the underlying architecture. In the conventional telephone network, voice calls travel over a line that stretches from the home to a piece of phone company equipment called a circuit switch. The switch, and many others like it along the way, routes the call to its destination over local or long-distance networks. The switches can be expensive, as much as $10 million each, said John Hodulik, a telecommunications analyst with UBS Securities.

And adding to the costs is the fact that with conventional telephone service the line that carries the voice signal to and from homes is dedicated exclusively to one call at a time. With Internet-based calls, the information is broken down into small packets, so that the lines that carry the voice conversations can simultaneously transport many other packets of Internet traffic, like e-mail messages and World Wide Web pages. And Internet calls do not require lots of expensive circuit switches, because each packet of data carries an address that helps it find its own way across the network.

Were telephone companies to build a network from scratch today, they likely would do so using the less expensive Internet architecture that has enabled start-up companies like Vonage to enter the market.

Vonage has invested a mere $12 million in technology, the company's chief executive, Jeffrey A. Citron, said. That, he said, is a far cry from the $75 million to $100 million that some companies must spend to begin offering conventional telephone service. And Vonage spends only about

$200 to set up each new customer, while a service provider selling conventional phone service might need to spend as much as $600 a customer, Mr. Citron said.

But some critics say a big reason Vonage and other Internet-based phone providers can cut costs is because they do not have to adhere to the same rules and regulations as the conventional telephone companies on whose local and national networks the Internet providers depend. Even an Internet telephony fan like Jeff Pulver, who was formerly on the Vonage board, acknowledged that a substantial amount of cost savings comes from avoiding the taxes, surcharges and access fees used to support the traditional phone network.

"Vonage benefits by not having to comply with those rules," he said. Mr. Pulver acknowledges that the Internet upstarts are practicing regulatory "arbitrage." But in his view the public policy response should be to deregulate all phone companies.

The fact that Vonage is not regulated and did not pay to build the national network may obscure the real cost of providing Internet-based phone service. Likewise, the cost to customers is not as low as it may seem. While consumers may pay less each month for Internet telephone service than for regular phone service, they cannot obtain the service unless they first have high-speed Internet access -- on which they are likely to spend $40 to $70 a month. So the ability to use Internet phone service may actually require a total monthly outlay of $100 or more.

Those are table stakes far higher than the bare-bones "lifeline" conventional telephone service subsidized by the regulated industry's universal service fund, which can make basic dial tone and 911 service available to the poor or elderly for less than $10 a month in some states.

That is why policy makers like Ms. Lynch of the California resist the idea that Internet telephone service will lead to a telecommunications market so competitive that government regulation becomes unnecessary. She said that if conventional telephone companies like Qwest were allowed to avoid regulation by moving their business to Internet-based service, it would drain money from the universal service funds that have enabled low-income residents, as well as schools and libraries, to afford basic phone service.

"The pot of money used to make sure people can communicate will shrink," Ms. Lynch said. "It's a death spiral."

She also questions the premise that a competitive marketplace will satisfy consumer demands for reliable, affordable telecommunications. There are six major mobile phone companies, Ms. Lynch said, and despite vibrant competition, wireless service is still highly unreliable.

"Economic theory is not today's reality," Ms. Lynch said. "My job is not to hypothesize about Nirvana. My job is to deal with the realities today."

Mr. Davidson, in Florida, says he agrees that universal service is an important goal. But, he says he thinks the Internet phone technology should be allowed to mature before it is subjected to taxes and surcharges.

He also says he thinks that Internet-based telephone service providers should eventually be required to provide 911 service. But there, too, he would rather not force the issue just yet -- in part because 911 service is difficult for Internet-based telephone services to accomplish. Compared with traditional telephone calls, it is complicated to determine the precise location from which an Internet-based call has been placed, meaning that 911 operators would need to ask the caller to provide that information -- even as the house is burning or the child is choking. Mr. Davidson said companies should have to disclose that shortcoming.

"The industry has a very clear obligation," Mr. Davidson said, "to let folks know that this isn't your father's 911."

But when asked when the industry would be mature enough to make 911 service mandatory, he showed his laissez-faire side. "I don't know," he said. "We should allow companies some time to get there."