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March 4, 2005

Ms. Blanca Bayo, Director
The Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RE: DOCKET NO. 041269-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of Supra Telecommunications and Information Systems, Inc., in the above-referenced docket, please find our Petition and Request for Emergency Relief.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Steven B. Chaiken/ahs

Steven B. Chaiken
General Counsel

Attachments

cc: All Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to establish generic docket to consider Amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.	))))	Docket No. 041269-TP Filed: March 4, 2005

PETITION AND REQUEST FOR EMERGENCY RELIEF

COMES NOW, Supra Telecommunications and Information Systems, Inc. ("Supra"), pursuant to section 364.01(g), Florida Statutes, requesting that the Florida Public Service Commission ("Commission") issue an order finding that BellSouth Telecommunications Inc. ("BellSouth") may not unilaterally amend or breach its existing interconnection agreement with Supra entered into by and between BellSouth and Supra (collectively, "the Parties"). As basis Supra would show:

PARTIES

1. Supra is a Florida corporation with its principal place of business at 2901 S W 149th Ave, Suite 300, Miramar, Florida 33027. Supra is a certificated competitive local exchange carrier that is authorized to provide local exchange service in Florida. Supra is a "telecommunications carrier" and "local exchange carrier" under the Communications Act of 1934, as amended ("the Act") and is a party to an interconnection agreement with BellSouth.

2. BellSouth is a Georgia corporation, having offices at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Act, and section 364, Florida Statutes.

3. Notices and communications with respect to this petition and docket should be addressed to:

Brian Chaiken
Steven Chaiken
2901 SW 149th Ave
Suite 300
Miramar, Florida 33027

Ann Shelfer
Jonathan Audu
1311 Executive Center Drive
Suite 220
Tallahassee, FL 32301

BASIS FOR RELIEF REQUESTED

4. On March 1, 2005, NuVox Communications, Inc. ("NuVox"), Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC ("Xspedius"), KMC Telecom III, LLC ("KMC III"), and KMC Telecom V, Inc. ("KMC V") filed a Petition and Request for Emergency Relief ("NuVox Petition") and on March 3, 2005, MCImetro Access Transmission Services, LLC ("MCI") filed a Motion for Expedited Relief Concerning UNE-P Orders ("MCI Motion"). By this filing, Supra hereby adopts the NuVox Petition and MCI Motion, and incorporates them by reference.

5. The Commission must act now to prevent BellSouth from taking unilateral action on March 11, 2005 that would effectively breach and/or unilaterally amend the Parties' existing interconnection agreement.

6. Supra will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the Parties' existing interconnection agreement by, *inter alia*, refusing to accept local service requests ("LSRs") for new orders for UNE-P.

7. Accordingly, Supra seeks expeditious consideration of this matter and an Order declaring *inter alia* that Supra shall have full and unfettered access to BellSouth UNEs provided for in its existing interconnection agreement on and after March 11, 2005, until such time that such agreement is amended or replaced by a new interconnection agreement.

JURISDICTION

8. BellSouth and Supra are subject to the jurisdiction of the Commission respecting matters raised in this Petition.

9. The Commission has jurisdiction over the matters raised in this Petition pursuant to Chapters 120 and 364, Florida Statutes and Chapters 25-22 and 28-106, Florida Administrative Code.

10. The Commission also has jurisdiction under §251(d) (3) of the Act (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) respecting matters raised in this Petition.

STATEMENT OF FACTS

11. On March 2, 2004, the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC* (*"USTA II"*) [1] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* (*"TRO"*), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[2] The D.C. Circuit initially stayed its *USTA II* mandate for 60 days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's *USTA II*

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1 359 F.3d 554 (D.C. Cir. 2004).

2 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)(*"Triennial Review Order"*) (*"TRO"*).

mandate issued. At that time, certain of the FCC's rules applicable to BellSouth's obligation to provide CLECs with UNEs were vacated.

12. On May 28, 2004, BellSouth sent a letter[3] to this Commission promising that "BellSouth will not 'unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.'"[4] BellSouth further promised:

> With respect to new or future orders, 'BellSouth will not unilaterally breach its interconnection agreements.' If the D.C. Circuit issues its mandate on June 15, 2004, BellSouth will continue to accept an process new orders for services (including switching, high capacity transport, and high capacity loops) and will bill for those services in accordance with the terms of existing interconnection agreements, until such time as those agreements have been amended, reformed, or modified consistent with the D.C. Circuit's decision pursuant to established legal processes.[5]

DISCUSSION

13. BellSouth cannot escape the FCC's clear and unambiguous language requiring parties to amend their interconnection agreement pursuant to change of law processes nor its previous promises to this Commission in its May 28, 2004 letter that it would not unilaterally breach its interconnection agreements. The Commission must not allow BellSouth to avail itself of its tortured interpretation of the *TRRO* with respect to "new adds." Accordingly, Supra seeks a declaration that the *TRRO*'s unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements and that they will not govern the Parties relationships until such time as – and only to the extent – that the agreements currently being arbitrated are modified to incorporate such unbundling decisions and transition plans.

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3 A copy of BellSouth's letter dated May 28, 2004 is attached hereto as **Exhibit A**.

4 *Id.* at paragraph 3.

5 *Id.* at paragraph 4.

14. The Parties have an existing interconnection agreement, the terms of which the Parties are required to abide by until such agreement/terms are modified by its change of law provision. Section 9.3 of the Parties' existing interconnection agreement provides:

> In the event that any final legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Supra Telecom or BellSouth to perform any material terms of this Agreement, Supra Telecom or BellSouth may, on ninety (90) days' written notice (delivered not later than ninety (90) days following the date on which such action has become legally binding and has otherwise become final without regard to, the Parties rights to appeal) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the dispute shall follow the dispute resolution procedures set forth in Section 16 of the General Terms and Conditions of this Agreement.[6].

15. In the Parties' negotiated interconnection agreement, BellSouth and Supra agreed to an orderly procedure for implementing whatever rule changes ultimately resulted from various regulatory proceedings (including *USTA II*).

16. Nonetheless, by self-proclaimed fiat, BellSouth now seeks to walk away from its commitments in the interconnection agreement and its May 28, 2004 letter[7]. By proclaiming that certain aspects of the *TRRO* are self-effectuating, and that BellSouth is entitled to unilaterally implement its disputed interpretation of those rule changes, BellSouth attempts to unilaterally amend the existing interconnection agreement that it previously promised would not be unilaterally changed. As a simple matter of contract law and regulatory procedure, the

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[6] See Section 9.3 of the Parties' interconnection agreement dated July 15, 2002.

[7] After receiving BellSouth's February 11, 2005 Carrier Notice in which BellSouth sets forth that it will exercise "self-help" in its unilateral interpretation and effectuation of the *TRRO*, Supra contacted BellSouth in an attempt to learn whether BellSouth would honor its May 28, 2004 letter to the Commission. BellSouth made it clear at that time that it would not abide by its May 28, 2004 letter.

Commission cannot allow BellSouth to simply abrogate the parties' existing interconnection agreement or ignore the commitments made to the Commission in its May 28, 2004 letter.

17. The *TRRO* simply does not purport to abrogate the change of law provisions of carriers' interconnection agreements. To the contrary, the *TRRO* directs carriers to implement its rulings by negotiating changes to their interconnection agreements:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted.)

18. BellSouth cannot implement the *TRRO* changes in law without modifying its interconnection agreement to reflect such rule changes.

19. On March 1, 2005, the Georgia Public Service Commission ("GPSC") unanimously approved the staff's recommendation[8] on this very issue, based on a similar Motion of MCI, and ordered that BellSouth comply with the change of law provisions of their existing interconnection agreements. It should also be noted that the Parties' interconnection agreement is also governed by the laws of the state of Georgia.

20. Among the difficult issues that the parties must resolve through negotiation and arbitration are (i) whether BellSouth can use the *TRRO* to evade its independent UNE

[8] A copy of the GPSC's staff's recommendation is attached hereto as **Exhibit B**.

unbundling obligations and rates under state law and (ii) whether BellSouth can use the *TRRO* to evade its independent UNE unbundling obligations and rates under section 271 of the Federal Act. It was precisely because parties and state commissions must resolve these and other issues that the FCC mandated that the terms of the *TRRO* be implemented through changes to the Parties' interconnection agreements. And, they also serve as independent grounds for continuing to enforce the Agreement as written and approved.

21. Even if BellSouth were empowered by the *TRRO* unilaterally to change Supra's UNE-P rights that arise out of section 251(c)(3) (which it was not), BellSouth would not be entitled to change the unbundling and UNE rate sections of the agreement unilaterally if the Commission exercises its authority under Florida law to require BellSouth to continue to unbundled local switching in combination with other elements used to provide local service.

22. Even if BellSouth were empowered by the *TRRO* unilaterally to change Supra's UNE-P rights that arise out of section 251(c)(3) (which it was not), BellSouth would not be entitled to change the unbundling and UNE rate sections of their agreement unilaterally because section 271 of the Federal Act independently supports Supra's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in their agreement. Supra submits, therefore, that until this Commission or the FCC reaches some other conclusion, the rates in the Agreement should be determined to be "just and reasonable" under section 271.

CONCLUSION

23. BellSouth's recent Carrier Notices regarding the *TRRO* are baseless and thinly veiled attempts to breach and or unilaterally amend the Parties' existing interconnection agreement, in direct conflict of BellSouth's May 28, 2004 letter to this Commission. Supra will

be irreparably harmed and Florida consumers will suffer if BellSouth is permitted to breach the Parties' existing interconnection agreement. Such action would also contravene the FCC's express directive that the *TRRO* is to be effectuated via the section 252 process. As a matter of law, this Commission must ensure that Supra has full and unfettered access to UNEs provided for in its existing interconnection agreement until such time as the agreement is modified pursuant to its terms.

24. Supra will be seriously and permanently harmed if BellSouth is allowed to take this unilateral action and the Commission should direct that BellSouth not take any action as contemplated by its Carrier Notifications until the Commission has acted on this Petition.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Supra respectfully request that the Commission:

(1) declare that the transition provisions of the *TRRO* are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreement is modified pursuant to its change of law provisions.

(2) declare that the Parties' existing interconnection agreement requires BellSouth to continue to honor the rates, terms and condition of the Parties' existing interconnection agreement until such time as the Parties' existing interconnection agreement is modified pursuant to its change of law provisions;

(3) order BellSouth to continue accepting and processing Supra's UNE-P orders under the rates, terms and conditions of their interconnection agreement;

(4) order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the *TRRO*;

(5) grant Supra the same relief that this Commission provides with respect to the NuVox Petition;

(6) grant Supra the same relief that this Commission provides with respect to the MCI Motion; and

(7) order such further relief as the Commission deems just and appropriate.

Respectfully submitted this 4th day of March 2005.

By: Steven B. Chaiken /a/ NS

Steven B. Chaiken
Brian Chaiken
SUPRA TELECOMMUNICATIONS AND
INFORMATION SYSTEMS, INC.
2901 SW 149th Ave., Suite 300
Miramar, Florida 33027

ATTACHMENT A

Legal Department

NANCY B. WHITE
General Counsel-Florida

BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5558

May 28, 2004

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

Re: Docket No. 040489-TP; *Joint CLECs' Emergency Complaint Seeking an Order Requiring BellSouth and Verizon to Continue to Honor Existing Interconnection Agreements*

Dear Ms. Bayo:

On May 21, 2004, XO Florida, Inc. and Allegiance Telecom of Florida, Inc. ("Joint CLECs") filed an Emergency Complaint, which purports to require expedited action from this Commission due to the Joint CLECs' perception of an imminent service disruption. BellSouth will file its formal response to this Complaint on or before June 10, 2004; in the meantime this letter responds to the Joint CLECs' request for expedited relief. As set forth more fully herein, such emergency relief is not necessary.

During this Commission's May 11, 2004 teleconference in Docket Nos. 030851-TP and 030852-TP, BellSouth clarified its position concerning the D.C. Circuit Court of Appeals decision vacating portions of the *Triennial Review Order.* BellSouth also posted a Carrier Notification Letter on May 24, 2004 to set forth its position, which is attached hereto.

BellSouth intended to alleviate apparent uncertainty on the part of some carriers. Apparently, some carriers purport to remain confused. As provided in BellSouth's May 24, 2004 Carrier Letter Notification, BellSouth will not "unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement." Consequently, there will be no chaos as the Joint CLECs allege. BellSouth will effectuate changes to its interconnection agreements via established legal procedures.

With respect to new or future orders, "BellSouth will not unilaterally breach its interconnection agreements." If the D.C. Circuit issues its mandate on June 15, 2004, BellSouth will continue to accept and process new orders for services (including switching, high capacity transport, and high capacity loops) and will bill for those services in accordance with the terms of existing interconnection agreements, until such time as those agreements have been amended, reformed, or modified consistent with the D.C. Circuit's decision pursuant to established legal processes. As it is legally entitled to do, BellSouth reserves all rights, arguments, and remedies it has under the law with respect to the rates, terms, and conditions in the agreements.

I trust this information adequately addresses the Joint CLECs' concerns relating to service disruption and demonstrates that expedited action by this Commission is unnecessary. If I can be of further assistance, please let me know.

Sincerely,

Nancy B. White/vf

Nancy B. White

cc: Parties of Record
Beth Keating

539595

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084106

Date: May 24, 2004

To: Facility-Based Competitive Local Exchange Carriers (CLEC)

Subject: Facility-Based CLECs – (Business/Operations Process) - Provision of Service to CLECs Post-Vacatur

The District of Columbia Circuit Court of Appeals' March 2, 2004, Opinion vacating certain Federal Communications Commission (FCC) Unbundled Network Element (UNE) rules is scheduled to become effective on June 16, 2004. This letter is to affirm that BellSouth will not unilaterally breach its interconnection agreements. Upon vacatur of the rules, BellSouth does intend to pursue modification, reformation or amendment of existing Interconnection Agreements (with the exception of new commercial and transition agreements) to properly reflect the Court's mandate. Rumors have been circulating that, upon vacatur, services that BellSouth now provides to CLECs under their Interconnection Agreements will be disconnected. Contrary to such rumors, if the rules are vacated, BellSouth will not, as a result of the vacatur, unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.

If you have any questions, please contact your BellSouth contract manager.

Sincerely,

ORIGINAL SIGNED BY KRISTEN ROWE FOR JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

CERTIFICATE OF SERVICE
DOCKET NO. 040489-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 28th day of May, 2004 to the following:

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Nancy B. White/VF
Nancy B. White

R-1. DOCKET NO. 19341-U: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders. (Leon Bowles)

Summary of Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

2. Issues related to a possible true-up mechanism should be decided at a later time.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

Background

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth Telecommunications, Inc. filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth Telecommunications, Inc. ("BellSouth"). The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI

states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the Triennial Review Remand Order ("TRRO") it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . MCIm or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission, the D.C. Circuit Court of Appeals held that it is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using

unbundled access to local circuit switching." (BellSouth Response, p. 4, quoting TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth cites to no language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the

transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Staff's recommendation is consistent with the Commission's decision in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket. The Staff believes that it would be consistent to apply that reasoning in this instance as well.

2. Issues related to a possible true-up mechanism should be decided at a later time.

Staff recommends that the Commission defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter is being brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. Prior to voting on this issue, it may be of assistance for the Commission to confirm that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved. Staff intends to bring this issue back before the Commission in a timely manner.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Staff recommends that the Commission decide those issues in the regular course of this docket.

CERTIFICATE OF SERVICE
Docket No. 041269-TP

I HEREBY CERTIFY that a true and correct copy of Supra's Petition and Request was served by US. Mail this 4th day of March 2005 to the following:

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