ORIGINAL

Timolyn Henry

From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Monday, August 29, 2005 2:34 PM
To: Filings@psc.state.fl.us
Subject: 041269-TP BellSouth's Response to Supra's Emergency Motion
Importance: High
Attachments: 041269-T.pdf; LEGAL-#599011-v1-041269-TP_BellSouth's_Response_in_Opposition_to_Supra's_Emergency_Motion_.DOC

A. Vicki Fatool
Legal Secretary to Nancy B. White and Manuel Gurdian
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5560
vicki.fatool@bellsouth.com

B. Docket No. 041269-TP

Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law

C. BellSouth Telecommunications, Inc.
on behalf of Meredith Mays

D. 14 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc.'s Response to Supra's Emergency Motion

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Legal Department

Meredith Mays
Senior Regulatory Counsel

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0750

August 29, 2005

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

Re: Docket No. 041269-TP

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response in Opposition to Supra's Emergency Motion, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Meredith Mays

cc: All Parties of Record
Jerry Hendrix
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
Docket No. 041269-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 29th day of August, 2005 to the following:

Adam Teitzman
Michael Barrett
Staff Counsels
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6199
ateitzma@psc.state.fl.us
mbarrett@psc.state.fl.us

Florida Cable Telecommunications Assoc., Inc.
Michael A. Gross
246 E. 6th Avenue
Suite 100
Tallahassee, FL 32303
Tel. No. (850) 681-1990
Fax No. (850) 681-9676
mgross@fcta.com

Vicki Gordon Kaufman
Moyle Flanigan Katz Raymond & Sheehan, PA
118 North Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 681-3828
Fax. No. (850) 681-8788
vkaufman@moylelaw.com
Atty. for FCCA/CompSouth

Norman H. Horton, Jr.
Meser, Caparello & Self, P.A.
215 South Monroe Street, Suite 701
P.O. Box 1876
Tallahassee, FL 32302-1876
Tel. No. (850) 222-0720
Fax No. (850) 224-4359
nhorton@lawfla.com
Represents NuVox/NewSouth/Xspedius

John Heitmann
Garret R. Hargrave
Kelley Drye & Warren, LLP
Suite 500
1200 19th Street, N.W.
Washington, D.C. 20036
jheitmann@kelleydrye.com
ghargrave@kelleydrye.com
Tel. No. (202) 887-1254
Represents NuVox/NewSouth/Xpedius

Kenneth A. Hoffman, Esq.
Martin P. McDonnell, Esq.
Rutledge, Ecenis, Purnell & Hoffman
P.O. Box 551
Tallahassee, FL 32302
Tel. No. (850) 681-6788
Fax. No. (850) 681-6515
Represents XO and US LEC
ken@reuphlaw.com
marty@reuphlaw.com

Dana Shaffer
XO Communications, Inc.
105 Molloy Street, Suite 300
Nashville, Tennessee 37201
Tel. No. (615) 777-7700
Fax. No. (615) 850-0343
dana.shaffer@xo.com

Wanda Montano
Terry Romine
US LEC Corp.
6801 Morrison Blvd.
Charlotte, N.C. 28211
Tel. No. (770) 319-1119
Fax. No. (770) 602-1119
wmontano@uslec.com

Tracy W. Hatch
Senior Attorney
AT&T
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
Tel. No. (850) 425-6360
thatch@att.com

Sonia Daniels
Docket Manager
1230 Peachtree Street, N.E.
4th Floor
Atlanta, Georgia 30309
Tel. No. (404) 810-8488
sdaniels@att.com

Donna Canzano McNulty, Esq.
MCI
1203 Governors Square Blvd.
Suite 201
Tallahassee, FL 32301
Telephone: 850 219-1008
donna.mcnulty@mci.com

De O'Roark, Esq.
MCI
6 Concourse Parkway
Suite 600
Atlanta, GA 30328
de.oroark@mci.com

Floyd Self, Esq.
Messer, Caparello & Self, P.A.
Hand: 215 South Monroe Street
Suite 701
Tallahassee, FL 32301
Mail: P.O. Box 1876
Tallahassee, FL 32302-1876
fself@lawfla.com

Steven B. Chaiken
Supra Telecommunications and
Info. Systems, Inc.
General Counsel
2901 S.W. 149th Avenue
Suite 300
Miramar, FL 33027
Tel. No. (786) 455-4239
steve.chaiken@stis.com

Matthew Feil
FDN Communications
2301 Lucien Way
Suite 200
Maitland, FL 32751
Tel. No. (407) 835-0460
mfeil@mail.fdn.com

Nanette Edwards
ITC^DeltaCom Communications, Inc.
7037 Old Madison Pike
Suite 400
Huntsville, Alabama 35806
Tel. No.: (256) 382-3856
nedwards@itcdeltacom.com

Susan Masterton
Sprint Communications Company
Limited Partnership
P.O. Box 2214
Tallahassee, FL 32316-2214
Tel. No.: (850) 599-1560
Fax No.: (850) 878-0777
susan.masterton@mail.sprint.com

Alan C. Gold, Esq.
Gables One Tower
1320 South Dixie Highway
Suite 870
Coral Gables, FL 33146
Tel. No. (305) 667-0475
Fax. No. (305) 663-0799
agold@kcl.net

Raymond O. Manasco, Jr.
Gainesville Regional Utilities
Hand: 301 S.E. 4th Avenue
Gainesville, FL 32601
Mail: P.O. Box 147117, Station A-138
Gainesville, FL 32614-7117
Tel. No. (352) 393-1010
Fax No. (352) 334-2277
manascoro@gru.com

Charles A. Guyton
Steel Hector & Davis LLP
215 South Monroe Street
Suite 601
Tallahassee, FL 32301-1804
Tel. No. (850) 222-2300
Fax. No. (850) 222-8410
cguyton@steelhector.com
Atty. for City of Gainesville

Herb Bornack, CEO
Orlando Telephone Systems, Inc.
4558 S.W. 35th Street
Suite 100
Orlando, FL 32811
Tel. No. (407) 996-8900
Fax. No. (407) 996-8901

Adam Kupetsky
Regulatory Counsel
WilTel Communications, LLC
One Technology Center (TC-15)
100 South Cincinnati
Tulsa, Oklahoma 74103
Tel. No. (918) 547-2764
Fax. No. (918) 547-9446
adam.kupetsky@wiltel.com

Jonathan S. Marashlian, Esq.
The Helein Law Group, LLLP
8180 Greensboro Drive, Suite 700
McLean, VA 22102
Tel. No. (703) 714-1313
Fax. No. (703) 714-1330
jsm@thlglaw.com
Atty. for Azul Tel.

Charles (Gene) E. Watkins
Covad Communications Co.
1230 Peachtree Street, N.E.
Suite 1900
Atlanta, GA 30309
Tel. No. (404) 942-3492
gwatkins@covad.com

Meredith Mays/V.F.
Meredith E. Mays

ORIGINAL

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: August 29, 2005

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION TO SUPRA'S EMERGENCY MOTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response in Opposition to the Emergency Motion ("Motion") filed by Supra Telecommunications and Information Systems, Inc. ("Supra") on August 22, 2005.

I. INTRODUCTION

On February 4, 2005, the Federal Communications Commission ("FCC") released its permanent unbundling rules in the Triennial Review Remand Order ("TRRO"). The *TRRO* identified a number of former Unbundled Network Elements ("UNEs"), such as switching, for which there is no section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] In each instance, the FCC unequivocally stated that

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[1] *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." (footnote omitted).

[2] *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).

[3] *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).

[4] *TRRO*, ¶ 137 (entrance facilities).

[5] *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).

[6] *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).

the transition period for each of these former UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[7]

As this Commission is well aware, Order No. PSC-05-0492-FOF-TP ("Order") issued in Docket No. 041269-TP, properly gave effect to the FCC's *TRRO*[8] when it found that "as of March 11, 2005, requesting carriers may not obtain new local switching as an unbundled network element." The Commission issued its Order after voting unanimously on this issue during its April 5, 2005 agenda conference. During that agenda, this Commission rejected a plethora of CLEC emergency petitions that sought to expand the illegal UNE-P regime by adding new local switching unbundled network elements contrary to binding federal rules. Thereafter, on April 15, 2005, BellSouth provided all CLECs with notice that effective April 17, 2005, it would no longer accept new service requests for unbundled local switching and UNE-P in Florida.[9]

Despite ample notice that BellSouth would no longer accept new orders for unbundled local switching, Supra filed its purported "emergency" motion, blithely ignoring the events leading up to BellSouth refusing the orders about which Supra complains. Instead, Supra mistakenly asserts that the Order "does not clearly define how to treat a requesting carriers UNE orders on behalf of customers that are not new customers, but are already a part of a CLEC's 'embedded customer base'" (Motion, p. 1) while ignoring more recent communications on this issue.

Supra's claim that the *TRRO* does not permit BellSouth to refuse Section 251 UNE orders

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[7] *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).

[8] Order on Remand (*"TRRO"*), *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2005 WL 289015 (2005), *petitions for review pending, Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095 et al. (D.C. Cir.).

[9] *See* BellSouth's April 15, 2005, Carrier Notification Letter SN91085089 *available at* http://www.interconnection.bellsouth.com.

submitted for the purpose of serving customers in a CLEC's "embedded customer base" ignores both the Commission's April 5, 2005 vote and its subsequent Order. Supra's disregard for the *TRRO* and this Commission's Order, both of which bar all new "UNE-P arrangements" and not just those used to serve new customers (*TRRO* ¶ 227), cannot stand. Beyond that, Supra's arguments are inconsistent with the core policy behind the *TRRO*. Instead of weaning carriers away from UNE-P arrangements and toward alternative methods of competition, as the FCC plainly intended, Supra would have the Commission *expand* the activities that the FCC has found to be anticompetitive. *See* Order at 17, *BellSouth Telecomms, Inc. v. Cinergy Communications Co.*, No. 3:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005) ("*Kentucky Injunction Order*") (noting that the CLECs have no valid interest "in a practice the FCC has stated is 'anti-competitive'").

II. ARGUMENT

A. Supra's Motion Is Contrary to the *TRRO*

Supra's Motion is inconsistent with the text of the *TRRO*. Contrary to Supra's contention, the FCC repeatedly stated that, during the ensuing transition period, CLECs, such as Supra, could not add new switching UNEs or new UNE Platform arrangements nor could they add new customers using the UNE Platform.

In particular, the FCC explained that its transition plan "does not permit competitive LECs to add *new UNE-P arrangements* using unbundled access to local circuit switching pursuant to section 251(c)(3)." *TRRO* ¶ 227 (emphasis added); *see also id.* ¶ 5 ("This transition plan applies only to the embedded base, and does not permit competitive LECs to add *new switching UNEs*") (emphasis added). The FCC's rules likewise provide that, without exception, "[r]equesting carriers may not obtain new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii). When a CLEC orders a new UNE-P line to serve an existing

customer, it is ordering new local switching (and a "new UNE-P arrangement"), which is prohibited under the plain language of the FCC's order and rules. *See Kentucky Injunction Order* at 7 ("The strong language in the Order on Remand that ILECs no longer have an obligation to provide UNE-P switching and the corresponding effective date of March 11, 2005, will likely lead the Court to conclude that [the] Order on Remand is self-effectuating for new *orders*.") (emphasis added); *BellSouth Telecomms., Inc v. Mississippi Pub. Serv. Comm'n*, 3:05CV173LN, 2005 WL 1076643, at *3, *6 (S.D. Miss. Apr. 13, 2005) (stating that "the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in the parties' interconnection agreements" and precluding, without reservation, the Mississippi PSC from "enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching"); *BellSouth Telecomms., Inc. v MCImetro Access Transmission Servs., LLC*, 1:05-CV-0674-CC, 2005 WL 807062, at *2 (N.D. Ga. Apr. 5, 2005) ("The FCC's decision to create a limited transition that applied only to the *embedded base* and required higher payments *even for those existing facilities* cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.") (emphasis added).

In urging a different conclusion, Supra disregards the federal district cases cited above, and relies, instead, on various state commission decisions, none of which binds this Commission. Notably, in *BellSouth Telecomms., Inc. v MCImetro Access Transmission Servs., LLC*, 1:05-CV-0674-CC, 2005 WL 807062, at *2 (N.D. Ga. Apr. 5, 2005), the court overturned a Georgia Commission Order requiring BellSouth to continue providing new UNE-Ps to all customers – both new and embedded base. Pursuant to this decision, BellSouth is rejecting all UNE-P orders

in Georgia.

As the FCC stressed, the purpose of its transition plan is to encourage the CLECs to move away from unlawful unbundling rules. *TRRO* ¶ 227; *Kentucky Injunction Order* at 17 (noting that the FCC has deemed its previous policy to be "anti-competitive"). But under Supra's view of the law, CLECs would be free to add new UNE-Platform arrangements for existing customers right up until 11 months and 29 days after the *TRRO* went into effect, even though Supra and all other CLECs are supposed to be using the 12-month transition period to "perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions." *TRRO* ¶ 227. Supra's request would therefore frustrate the FCC's goal of moving away from the UNE Platform and encouraging carriers to negotiate alternative, commercially reasonable substitutes for that anticompetitive practice.

Supra also ignores decisions from other state commissions that have *not* required ILECs to keep providing new UNE arrangements for existing customers. Most recently, in BellSouth's serving territory the Tennessee Regulatory Authority ("TRA") ruled that "[e]ffective May 16, 2005, BellSouth . . . may reject any and all orders for the delisted UNEs, including new orders to serve the CLECs' embedded base."[10] On August 8, 2005, The TRA confirmed its ruling when it rejected a motion for clarification.

In addition, the California commission decision is especially well-reasoned and persuasive. As that commission said,[11] "we note that the FCC has clearly stated that 'Incumbent

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[10] Order Terminating Alternative Relief, Docket No. 04-00381, Tennessee Regulatory Authority, July 25, 2005.

[11] Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, *Petition of Verizon California Inc.*, App. No. 04-03-014 (Cal. PUC Mar. 11, 2005), *available at* http://www.cpuc.ca.gov/word_pdf/RULINGS/44496.pdf. On March 17, 2005, the California Public Utility Commission voted to adopt the Assigned Commissioner's ruling in its entirety.

LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching.'" *Id.* at 7 (quoting *TRRO* ¶ 5) (emphasis added by California commission). Moreover, "it is clear that the FCC desires an end to the UNE-P, for it states '. . . we exercise our "at a minimum" authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling.*'" *Id.* (quoting *TRRO* ¶ 200) (emphasis added by California commission)). As well, "[o]ther parts of the [*TRRO*] also support this interpretation. In particular, the FCC also states: '. . . we establish a transition plan to migrate *the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement.*' . . . Note that this last statement refers to 'the embedded base of unbundled local circuit switching;' it does *not* refer to an '*embedded base of customers.*'" *Id.* (emphasis in original). Thus, the California commission held that "since there is no obligation and a national bar on the provision of UNE-P, we conclude that 'new arrangements' refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The [*TRRO*] clearly bars both." *Id.*[12]

B. Supra's Motion is Contrary to the Commission's Order

Supra's Motion also ignores this Commission's Order. In prior filings made in Docket No. 041269-TL, BellSouth detailed its view and positions concerning the *TRRO*. To reiterate, BellSouth explained that the FCC's new local switching rule makes clear that the prohibition against new UNE-Ps applies to *new lines*. *See* BellSouth's March 4, 2005 Response in

[12] On the theory that the parties needed "additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base," the California commission did ask SBC to "continue processing CLEC orders involving additional UNE-Ps for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005." *Id.* at 9.

Opposition to Petition for Emergency Relief, n. 9; *also* BellSouth's March 15, 2005 Response in Opposition to Petitions for Emergency Relief, n. 12. BellSouth cited the *TRRO*, ¶ 199; and 47 C.F.R. § 51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). Also, BellSouth explained that federal law defines switching to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch. *TRRO,* ¶ 200. When a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. *TRO,* at 433; the TRRO retained this definition (TRRO, n. 529). *Thus, the switching UNE means the port and functionalities on a per-line basis and the prohibition against new adds applies to the element itself – consequently, the federal rule of no new adds applies to lines.* Since the federal no new adds rule applies to *lines,* it means that Supra cannot add new UNE-P lines to an existing customer account, because to do so would result in a new UNE-P line. Nor can Supra move an existing UNE-P line from an existing customer location to a different location, because that would result in a new UNE-P line at the different location.

In light of BellSouth's previously filed pleadings, Supra cannot legitimately argue that this Commission has not yet ruled on the issues raised in its Motion. Rather, Supra must concede these matters were addressed when this Commission voted on April 5, 2005, and in the resulting written Order, which unambiguously stated that as of March 11, 2005, requesting carriers may not obtain new local switching as an unbundled network element. *See* Order, p. 8-9. The Order made no exceptions whatsoever. Indeed, concerning the *TRRO* at paragraph 233, this Commission ruled in BellSouth's favor, finding that "any other interpretation would render the TRRO-language regarding 'no new adds' a nullity, which would, consequently, render the prescribed 12-month transition period a confusing morass ripe for further dispute." Order, p. 6.

Thus, by the express terms of the Order, Supra cannot order new UNE-P lines for existing customers, nor can Supra order new UNE-P lines at different locations. By filing its "Emergency Motion" after the Commission has accepted numerous filings, heard from counsel on the issue of new adds, and issued its decision, Supra has wasted both the Commission's and BellSouth's resources, and its frivolous motion should be summarily dismissed.

C. SUPRA's Allegations Concerning Service Disruptions and Competition are Unfounded

In addition to ignoring the *TRRO* and this Commission's Order, Supra makes a number of unfounded allegations that cannot withstand scrutiny.

First, Supra claims that BellSouth has disrupted Supra's embedded customer base by denying Supra the ability to provide its customers with new UNE-P lines and/or service location changes. (Motion, p. 5). Supra's claim is meritless. The FCC has found that many CLECs have deployed their own switches and that others can do so also. *TRRO,* ¶ 199. Moreover, BellSouth has entered into over one hundred commercial agreements with CLECs, including AT&T and MCI. Supra can enter into a similar agreement and continue to serve its customers. Resale is another option that remains available to Supra.

Second, Supra claims that BellSouth is acting in an anti-competitive manner and in violation of the TRRO. (Motion, p. 5). This is simply untrue. BellSouth is in full compliance with the *TRRO* and this Commission's Order. Supra's claim is flatly contradicted by the FCC's determination that "the disincentives to investment posed by the availability of unbundled switching . . . justify a nationwide bar on such unbundling." *TRRO,* ¶ 204. Supra's claim is likewise unpersuasive in light of relevant federal district decisions, which, when addressing similar claims of purported harm by CLECs, stated:

> the court is persuaded that the competitors have alternative means of competing

> with BellSouth and that while some competitive LECs may suffer harm in the short-term . . . they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy.

BellSouth Telecomms., Inc v. Mississippi Pub. Serv. Comm'n, 3:05CV173LN, 2005 WL 1076643. And, "CLECs' interest in a practice the FCC has stated is 'anti-competitive' has very little weight, if any, in balancing the harms." *Kentucky Injunction Order,* p. 17.

D. BellSouth is Ready, Willing and Able to Switch UNE-P Customers to Alternative Arrangements

Supra claims that in order to avoid "disruption to CLECs and to their 'embedded customer base'" (Motion, p. 6) during the transition period, BellSouth should be ordered to process Section 251 UNE Orders. However, BellSouth has demonstrated that it can timely switch UNE-P customers to alternative arrangements and avoid "disruption" to CLECs and their customers. Moreover, BellSouth has repeatedly demonstrated that its hot cut processes, including its batch hot cut process, allows for large quantities of UNE-P arrangements to be converted to UNE loops in a short time frame. BellSouth's fully mechanized, electronic UNE-P to UNE-L batch migration ordering process has been available to CLECs since March 29, 2003. And, the FCC has determined that BellSouth's hot cut processes allow it "to perform larger volumes of hot cuts ('batch hot cuts') to the extent necessary." *TRRO,* ¶ 200, 210.

III. CONCLUSION

Supra's Motion lacks merit, disregards federal law, and ignores this Commission's Order. BellSouth respectfully requests the Commission summarily deny the Motion as frivolous.

Respectfully submitted, this 29th day of August 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White /V.F.

NANCY B. WHITE
MANUEL A. GURDIAN
c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
(305) 347-5558

R. Douglas Lackey /V.F.

R. DOUGLAS LACKEY
MEREDITH E. MAYS
BellSouth Center – Suite 4300
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
(404) 335-0750

599011