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July 24, 2007

Honorable Eddie Roberson, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp., TRA Docket No. 07-00161

Dear Chairman Roberson:

Enclosed for filing please find an original and thirteen (13) copies of *Nextel South Corp.'s Response to AT&T Tennessee's Motion to Dismiss*. An additional copy of this filing is enclosed to be "file-stamped" for our records.

If you have any questions or require additional information, please let me know.

Respectfully submitted,

Melvin J. Malone

clw
Enclosures

c: Parties of Record

BEFORE THE

TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

In the Matter of Nextel South Corp.'s Petition Regarding Notice of Election of the Existing Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.	)))))	Docket No. 07-00161

NEXTEL SOUTH CORP.'s RESPONSE TO AT&T TENNESSEE's MOTION TO DISMISS

Nextel South Corp. ("Nextel"), by and through its undersigned counsel, hereby submits its Response to BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee's ("*AT&T*" or "*AT&T Tennessee*") Motion to Dismiss ("*Motion*" or "*AT&T's Motion*"), which was filed on July 17, 2007. For the reasons set forth below, Nextel respectfully requests that the Tennessee Regulatory Authority ("Authority" or "TRA") deny *AT&T's Motion*, issue an order acknowledging the adoption of the Sprint ICA[1] by Nextel, approve the adoption and make the Interconnection Agreement effective as of the date of the filing of the Petition Regarding Notice of Election of Interconnection Agreement by Nextel South Corp. (the "*Petition*"), and require AT&T to execute the adoption agreement previously tendered by Nextel to AT&T.

[1] As set forth in the *Petition*, the "Sprint ICA" is the Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., and Sprint Spectrum L.P. dated January 1, 2001. Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., and Sprint Spectrum L.P. are collectively referred to herein as "Sprint."

I. INTRODUCTION

On December 29, 2006, AT&T, Inc. and BellSouth Corporation voluntarily proposed "Merger Commitments" that became "Conditions" of approval of the AT&T/BellSouth merger when the Federal Communications Commission ("FCC") authorized the merger. The FCC ordered that as a Condition of its grant of authority to complete the merger, the merged entity and its ILEC affiliates, including AT&T Tennessee, are required to comply with their Merger Commitments.[2]

The interconnection-related Merger Commitment No. 1 granted Nextel a right, unqualified as to time, to adopt "*any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory.*"[3] In addition to AT&T Merger Commitment No. 1, since the Sprint ICA is an interconnection agreement previously approved by the Authority, AT&T is also required by Section 252(i) of the

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[2] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause, p. 112, ¶ 227, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*AT&T/BellSouth*" or "*FCC Order*") ("IT IS FURTHER ORDERED that as a condition of this grant AT&T and BellSouth shall comply with the conditions set forth in Appendix F of this Order."). *See In Re: Petition of Sprint Communications Company L. P. and Sprint Spectrum L. P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee d/b/a AT&T Southeast,* Petition for Arbitration of Sprint Communications Company L.P. and Sprint Spectrum L.P., TRA Docket No. 07-00132, Exhibit B (May 18, 2007) ("*Sprint Tennessee Arbitration Petition*" or "*Sprint Tennessee Arbitration*") (A copy of the Table of Contents and Appendix F to the *FCC Order* is attached to the *Sprint Tennessee Arbitration Petition*, TRA Docket No. 07-00132, as Exhibit B.).

[3] *See FCC Order*, p. 149, Appendix F, Merger Commitment No. 1 under "Reducing Transaction Costs Associated with Interconnection Agreements" (emphasis added), which provides:

> *The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory*, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made. (emphasis added).

Telecommunications Act of 1996 ("Act") to make the Sprint ICA available to Nextel for adoption.[4]

On June 22, 2007, Nextel filed its *Petition* with the Authority seeking, among other things, the Authority's acknowledgment of Nextel's adoption of the existing Sprint ICA. Nextel's *Petition* informed the TRA that:

1) Nextel had exercised its rights, effective immediately, to adopt in its entirety the same Sprint ICA, as amended, that has been filed and approved in each of the nine (9) legacy-BellSouth states, including Tennessee;[5]

2) Nextel exercised such adoption rights pursuant to both the FCC-approved Merger Commitment Nos. 1 and 2 under "Reducing Transaction Costs Associated with Interconnection Agreements[,]" as ordered in the AT&T/BellSouth merger, and 47 U.S.C. § 252(i);[6]

3) All relevant state-specific differences among the nine (9) legacy-BellSouth states are already contained within the Sprint ICA, including such Tennessee differences. Since the same state-specific terms are applicable to Nextel on a state-by-state basis, there are no "state-specific pricing and performance plans and technical feasibility" issues pursuant to Merger Commitment No. 1. Likewise, since the Sprint ICA is already

[4] 47 U.S.C. § 252(i) provides: "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

[5] *Petition*, pp. 1-3. *See also Petition*, Exhibit B. For the purposes of this Response, the nine (9) legacy-BellSouth states are Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

[6] *Petition*, pp. 1 and 4. *See also Petition*, Exhibit B. *FCC Order*, p. 149, Appendix F, Merger Commitment No. 2 provides:

> The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunications carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

Triennial Review Remand Order ("TRRO")-compliant and has an otherwise effective change of law provision, there is no issue preventing Nextel from adopting the Sprint ICA in each applicable state, including Tennessee, pursuant to Merger Commitment No. 2;[7]

4) The Sprint ICA is effective and has not expired, although Sprint and AT&T have a dispute regarding the term of the agreement. Sprint maintains that the term of the agreement ends March 19, 2010, while AT&T contends, among other things, that the term may not extend beyond December 31, 2007;[8]

5) Nextel contacted AT&T regarding the exercise of Nextel's adoption rights, but AT&T refused to voluntarily acknowledge and honor Nextel's adoption rights;[9] and,

6) The adopted Sprint ICA replaces in its entirety the existing interconnection agreement between Nextel and AT&T.[10]

On July 17, 2007, AT&T filed its *Motion* in this proceeding, contending as follows: (a) that the Authority has no jurisdiction to interpret or enforce AT&T Merger Commitments; (b) that the Sprint ICA has expired and, therefore, Nextel did not request adoption of the Sprint ICA in a timely fashion under the Act; and (c) that Nextel's *Petition* is premature because Nextel did not invoke a dispute resolution process within its existing interconnection agreement. In response to the *Motion*, it is Nextel's position that:

1) The Authority has repeatedly exercised jurisdiction under both the Act and state law to acknowledge a carrier's exercise of its adoption rights. The fact that such

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[7] *Petition*, p. 3.
[8] *Id. See also Petition,* Exhibit B; and *Sprint Tennessee Arbitration Petition*, TRA Docket No. 07-00132.
[9] *Petition*, pp. 3-4.
[10] *Id.* at 2.

rights have been enhanced by the Merger Commitments does not divest the TRA of its authority to continue to oversee the exercise of such adoption rights. Instead, there is a long history of FCC and state commission precedent that clearly establishes that the FCC and the Authority continue to have concurrent jurisdiction under the Act and state law over any enhanced adoption rights granted by the AT&T interconnection-related Merger Commitments. The Authority has jurisdiction pursuant to both the Act and Tennessee law to acknowledge Nextel's exercise of its right to adopt the Sprint ICA.

2) AT&T's contention that Nextel's adoption is untimely because the Sprint ICA has "expired" is based upon both factually[11] and legally erroneous premises. The Sprint ICA currently continues and is "deemed extended on a month-to-month basis[,]"[12] and AT&T has admitted without qualification that it acknowledged to Sprint that the Sprint ICA can be extended 3 years pursuant to Merger Commitment No. 4.[13] Accordingly, not

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[11] In its *Motion* (p. 1, n. 1), AT&T requests that the Authority take judicial notice of the existing interconnection agreements between AT&T Tennessee and Nextel. For the purpose of this Response, Nextel joins such request, and further asks, to ease the administrative burden upon the agency, that the Authority also take judicial notice of the record in the pending the *Sprint Tennessee Arbitration*, TRA Docket No. 07-00132.

[12] Sprint ICA, Section 2.1, p. 815.

[13] *See, e.g., BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee's Motion to Dismiss and Answer*, TRA Docket No. 07-00132, p. 8, ¶ 17 (June 12, 2007) ("*AT&T's Motion to Dismiss Arbitration*"). *See also Sprint Tennessee Arbitration Petition*, TRA Docket No. 07-00132, p.13, ¶ 13 ("AT&T Tennessee acknowledged that, pursuant to Interconnection Merger Commitment No. 4, Sprint can extend its current Interconnection Agreement for three years."). Finally, *FCC Order*, p. 150, Appendix F, Merger Commitment No. 4 states:

> The AT&T/BellSouth ILECs *shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period up to three years*, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's 'default' provisions." (emphasis added).

only does the Sprint ICA continue to be effective, there has yet to be a determination by the Authority regarding the commencement date of the Sprint ICA 3-year extension.[14]

AT&T's "timeliness" argument is legally deficient in two (2) respects. First, Merger Commitment No. 1 does not contain any "time" restriction upon when a requesting carrier may adopt another ICA. If the FCC intended Merger Commitment No. 1 to be qualified as to timing, it could easily have expressed as much, particularly given the material nature of Merger Commitment No. 1.[15] Second, on similar facts, and case law cited by Alltel ILEC (i.e., the two *Global NAPS* cases cited by AT&T in the *Motion*), the Florida Public Service Commission ("FPSC") denied Alltel's motion to dismiss a CLEC's 252(i) request to adopt an agreement that was set to expire within seventy-two (72) days after the adoption date, but was likely to remain in effect beyond the stated termination date.[16]

3) Likewise, AT&T's "dispute resolution process argument" is legally deficient, as also demonstrated by the FPSC's prior rejection of AT&T's argument that a carrier must "comply with the terms of its existing interconnection agreement concerning

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[14] *See Sprint Tennessee Arbitration*, TRA Docket No. 07-00132.

[15] *See, e.g., Consumer Advocate Division, Office of the Attorney General v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998) ("If the Legislature had intended to mandate a contested hearing upon the filing of a written complaint, *it easily could have utilized precise language to accomplish that* mandate.") (emphasis added); and *Order on Atmos Energy Corporation's Comments in Response to Motion to Take Official Notice*, TRA Docket No. 05-00258, p.7 (Sept. 29, 2006) ("In drafting this statute, the General Assembly could have easily included a requirement to disclose the purpose for or relevancy of the information to be noticed when such is not readily apparent[.]"). *See also, c.f., State of Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754 (Tenn. Ct. App. 2001) ("Judicial construction of a statute will more likely hew to the General Assembly's expressed intent if the court approaches the statutory text believing that the General Assembly chose its words deliberately, and that the General Assembly meant what is said."); and *Tennessee Mfr'd Housing Ass'n v. Metropolitan Gov't*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990) (Courts must take statutes as they find them.).

[16] *See In Re: Petition by Volo Communication of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. for Adoption of Existing Interconnection Agreement Between ALLTEL Florida, Inc. and Level 3 Communications, LLC,* Order Denying Motion to Dismiss and Holding Proceedings in Abeyance, FPSC Docket No. 040343-TP, Order No. PSC-04-1109-PCO-TP (Nov. 9, 2004) ("*Volo Florida Notice of Adoption*"). A copy of Order No. PSC-04-1109-PCO-TP is attached hereto as **Exhibit A.**

adoptions."[17] Thus, if, as the FPSC determined, a requesting carrier is not required to follow an "adoption process" contained in its prior agreement in order to adopt the Sprint ICA, there is no basis for requiring Nextel to engage in a dispute resolution process when AT&T fails to voluntarily acknowledge its obligation to make the Sprint ICA available to Nextel.[18]

For the reasons stated above, and explained in greater detail below, Nextel respectfully requests that the Authority deny *AT&T's Motion* and acknowledge that, effective June 22, 2007, Nextel adopted the existing Sprint ICA.

II. AT&T'S MOTION MUST BE DECIDED BASED UPON THE FACTS AS ALLEGED IN NEXTEL'S PETITION AND THE LIMITED UNDISPUTABLE FACTS OF WHICH THE TRA CAN TAKE APPROPRIATE JUDICIAL NOTICE.

As recognized by the TRA, under Tennessee law "a 'motion to dismiss for failure to state a claim upon which relief can be granted test only the legal sufficiency of the complaint, not the strength of a [petitioner's] proof.'"[19] Moreover, a motion to dismiss

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[17] *See In Re: Notice of Adoption of Existing Interconnection, Unbundling, Resale, and Collocation Agreement Between BellSouth Telecommunications, Inc. and Network Telephone Corporation by Z-Tel Communications, Inc.,* Notice of Proposed Agency Action Order Acknowledging Adoption of Interconnection Agreement, FPSC Docket No. 040779-TP, Order No. PSC-05-0158-PAA-TP (Feb. 9, 2005) ("*Z-Tel Florida Notice of Adoption*"). A copy of Order No. PSC-05-0158-PAA-TP is attached hereto as **Exhibit B.**

[18] Even assuming, for the sake of argument alone, that a dispute resolution process was considered applicable in this matter, AT&T neglects to mention the following significant and relevant facts: (1) Nextel initiated discussions with appropriate AT&T representatives regarding adoption of the Sprint ICA on January 3, 2007; (2) AT&T confirmed on February 21, 2007, that it would not allow such adoption; Nextel formally invoked its adoption rights under the Merger Commitments and 252(i) on May 18, 2007; and (3) by its May 30, 2007, response, AT&T again confirmed its refusal to recognize Nextel's adoption rights. Clearly, any 30-day dispute resolution process commenced and expired long ago and, in light of AT&T's consistently stated positions, any further effort by Nextel prior to filing its *Petition* would have been a futile act, the performance of which is not required under the law. Further, at the least, this issue is inextricably intertwined with questions of fact. *See, e.g., The Colonial Life Ins. Co. of America v. Electronic Data Systems Corp.*, 817 F. Supp. 235, 244-245 (D.N.H. 1993) (finding (1) that whether the contractual notice provisions were excused as futile or were substantially complied with is inextricably intertwined with questions of fact; and (2) that substantial compliance with dispute resolution clause was sufficient).

[19] *In Re: Complaint of Citizens Telecommunications Company of Tennessee, LLC Against Ben Lomand Communications, Inc.*, Order Denying Motion to Dismiss, TRA Docket No. 03-00331, pp. 10-11 (Mar. 23, 2004) (quoting Bell v. Icard, 986 S.W.2d 550, 554 (Tenn. 1999)).

"'admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law.'"[20] In ruling upon such a motion, the decision maker "'should construe the complaint liberally in favor of the [petitioner], taking all allegations of fact as true.'"[21] Finally, "a motion to dismiss should be denied 'unless it appears that the [petitioner] can prove no set of facts in support of [its] claim that would entitle [it] to relief.'"[22] Thus, the question for the Authority is not whether it agrees or disagrees with Nextel as to whether it will prevail on the merits of this matter. Instead, the question for the Authority to consider with regard to *AT&T's Motion* is whether there is any theory at all under which Nextel might be able to prevail.[23] If so, *AT&T's Motion* must be denied.

Notwithstanding the foregoing, as previously indicated, Nextel does not object to the Authority taking judicial notice as requested by AT&T; provided, however, the TRA likewise takes judicial notice of the record in the pending *Sprint Tennessee Arbitration.*

The following are the essential operative facts that establish the existence of a matter within the jurisdiction of the Authority under Section 252(i) of the Act:

- The Sprint ICA is active and effective by virtue of its express terms under which it continues "on a month-to-month basis[,]"[24] and is "deemed extended on a month-to-month basis[;]"[25]

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[20] *Order Denying Motion to Dismiss*, TRA Docket No. 03-00331, p. 11 (*quoting Bell*, 986 S.W. 2d at 554).
[21] *Id.* (*quoting Bell*, 986 S.W. 2d at 554).
[22] *Id.* (*quoting Stein v. Davidson Hotel Co.,* 945 S.W. 2d 714, 716 (Tenn. 1997)).
[23] *See, e.g., Bain v. General Motors Corp.*, 467 F. Supp.2d 721, 725 (E.D. Mich. 2006) (Among other things, when deciding a motion to dismiss, the court must "determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.") (*citing Cline v. Rogers*, 87 F.3d 176, 179 (6th Cir. 1996)).
[24] Sprint ICA, Section 2.1, p. 815.
[25] *Id.*, Section 3.4, p. 816. *See also Sprint Tennessee Arbitration Petition*, Exhibit D (AT&T: "The Sprint Agreement, however, was entered into on January 1, 2001 and has already been in effect for a period of over six years. It initially expired on December 31, 2003, was amended twice to extend the term to December 31, 2004, and thereafter has been operating on a month-to-month basis[.]").

- AT&T acknowledged to Sprint that a 3-year extension of the Sprint ICA is available; but there is a dispute between AT&T and Sprint regarding when the 3-year extension commences;[26]

- Sprint has accepted a 3-year extension of the Sprint ICA and requested an amendment to implement its right to such 3-year extension;[27]

- Sprint maintains that the term of the agreement ends March 19, 2010, while AT&T contends, among other things, that the term may not extend beyond December 31, 2007;[28]

- The Authority has not yet made a determination in the *Sprint Tennessee Arbitration* as to when the 3-year extension of the Sprint ICA commences;

- Nextel has exercised its rights, effective immediately, to adopt in its entirety the same Sprint ICA, as amended, that has been filed and approved in each of the nine (9) legacy-BellSouth states, including Tennessee;[29]

- Nextel exercised such adoption rights pursuant to both the FCC-approved Merger Commitment Nos. 1 and 2 and 47 U.S.C. § 252(i);[30]

- All relevant state-specific differences among the nine (9) legacy-BellSouth states are already contained within the Sprint ICA, including such Tennessee differences. Since the same state-specific terms are applicable to Nextel on a state-by-state basis, there are no "state-specific pricing and performance plans and technical feasibility" issues pursuant to Merger Commitment No. 1. Likewise, since the Sprint ICA is already TRRO-compliant and has an otherwise effective change of law provision, there is no issue preventing Nextel from adopting the Sprint ICA in each applicable state, including Tennessee, pursuant to Merger Commitment No. 2;[31] and

- The adopted Sprint ICA replaces in its entirety the existing interconnection agreement between Nextel and AT&T.[32]

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[26] *Sprint Tennessee Arbitration Petition*, p. 6, ¶ 13. *See also AT&T's Motion to Dismiss Arbitration*, p. 8, ¶ 17.
[27] *Sprint Tennessee Arbitration Petition*, TRA Docket No. 07-00132, pp. 6-7, ¶ 14. *See also AT&T's Motion to Dismiss Arbitration*, TRA Docket No. 07-00132, p.8, ¶ 18.
[28] *Sprint Tennessee Arbitration Petition*, TRA Docket No. 07-00132, p. 7, ¶ 15.
[29] *Petition,* pp. 2-3. *See also Petition,* Exhibit B.
[30] *Petition*, p. 1.
[31] *Id.* at 3.
[32] *Id.* at 2.

III. THE TRA HAS AUTHORITY TO ACKNOWLEDGE NEXTEL'S EXERCISE OF ITS RIGHT TO ADOPT THE SPRINT ICA, AND SUCH AUTHORITY IS NOT ALTERED BY THE MERGER COMMITMENTS

Similar to its jurisdictional arguments in response to the *Sprint Tennessee Arbitration Petition*,[33] AT&T asserts in this matter that "the FCC alone possesses the jurisdiction to interpret and enforce the subject merger commitments,"[34] and thereby suggests that the Authority has no authority to acknowledge Nextel's exercise of its right to adopt the Sprint ICA. To the contrary, however, case law clearly establishes that the Authority has historically acknowledged carriers' exercise of their right to adopt existing interconnection agreements, and the *FCC Order* in the AT&T/BellSouth merger has not diminished the TRA's authority.

A. THE TRA HAS AUTHORITY TO ACKNOWLEDGE NEXTEL'S EXERCISE OF ITS RIGHT TO ADOPT THE SPRINT ICA

State commissions have previously determined that they have the authority, both pursuant to FCC merger conditions and Section 252(i) of the Act, to grant or otherwise review a carrier's request to adopt an interconnection agreement. For example, the Alabama Public Service Commission has declared as follows:

> We have reviewed the request set forth in DeltaCom's petition and find that formal approval of DeltaCom's election to adopt the terms and conditions of the aforementioned GTE/Time Warner Agreement is consistent with the public interest, convenience and necessity. The terms and conditions established by the FCC in its Bell Atlantic/GTE Merger Order indeed allow a carrier operating in any Bell Atlantic/GTE state to opt-in to an entire interconnection agreement in any other Bell Atlantic/GTE state so long as the agreement in question was voluntarily negotiated and meets the timing and location requirements established by the FCC. It appears that the North Carolina agreement between GTE and Time Warner submitted by DeltaCom with its Petition meets the requirements established by the FCC

[33] *See AT&T's Motion to Dismiss Arbitration*, TRA Docket No. 07-00132.
[34] *See Motion*, p. 10.

> in its Bell Atlantic/GTE Merger Order. . . . . DeltaCom is also correct in its assessment that the provisions of 47 U.S. C. Section 252(i) allow carriers wide latitude to adopt the terms and conditions of existing agreements that are approved pursuant to the provisions of 47 U.S.C. Section 252.[35]

Thus, the Alabama Commission, like others, has a prior history of granting precisely the kind of contested adoption request that Nextel makes by and through its *Petition*.

In its *Motion*, AT&T cites two (2) Florida Public Service Commission ("FPSC") proceedings, the *IDS* case,[36] and the *Sunrise* case,[37] in support of its jurisdictional arguments. The FPSC expressly relied upon the *Sunrise Order* in the *IDS* case. Ironically, both cases support Nextel's position in this proceeding - they stand for the proposition that state commissions can interpret and apply federal law in the course of exercising the authority that it is conferred under both the Act and state law.

In the *Sunrise* case, Supra Telecommunications and Information Systems, Inc. sought to have the Florida Commission provide a remedy for AT&T's alleged violation of the Section 222 Confidentiality of Carrier Information provision of the Act. The Florida Commission determined that, absent finding that AT&T's conduct constituted anticompetitive behavior prohibited under state law, it could not provide a remedy

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[35] Order, *In Re: Petition for Approval of Election to Adopt Terms and Conditions of Previously Approved Interconnection Agreement Pursuant to 47 U.S.C. Section 252(i) and the FCC's Bell Atlantic/GTE Merger Conditions,* APSC Informal Docket U-4320, pp. 2-3 (May 27, 2001) ("*DeltaCom Order*"). A copy of the *DeltaCom Order* is attached hereto as **Exhibit C**.

[36] *In Re: Complaint against BellSouth Telecommunications, Inc. for Alleged Overbilling and Discontinuance of Service, and Petition for Emergency Order Restoring Service, by IDS Telecom LLC,* Order Granting BellSouth's Partial Motion to Dismiss, p. 8, FPSC Docket No. 031125-TP, Order No. PSC-04-0423-FOF-TP (April 26, 2004) ("*IDS*" or "*IDS Order*"). A copy of the *IDS Order* is attached hereto as **Exhibit D**.

[37] *In Re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth, Inc. Regarding BellSouth's Alleged Use of Carrier-to-Carrier Information,* Final Order On BellSouth's Alleged Use of Carrier to Carrier Information, p. 4, n. 1, FPSC Docket No. 030349-TP, Order No. PSC-03-1392-FOF-TP (Dec. 11, 2003) ("*Sunrise" or "Sunrise Order*"). A copy of the *Sunrise Order* is attached hereto as **Exhibit E**.

because it had not otherwise been conferred jurisdiction under the Act with respect to Section 222. Similarly, in *IDS*, the two out of five counts of IDS's informal complaint that were dismissed were Count Three, which sought a finding that AT&T had violated a private settlement agreement, and Count Five, which alleged anticompetitive behavior in violation of the Telecommunications Act of 1996. Like the remedy sought in *Sunrise*, neither of the dismissed counts in *IDS* rested in an express grant of jurisdiction upon the states under the Act. Here, by contrast, the TRA has been granted authority to arbitrate issues between carriers relating to interconnection agreements and to approve negotiated or arbitrated agreements under 47 U.S.C. §§ 252(b) and 252(c), respectively.

While the Merger Commitments provide requesting carriers with expanded adoption rights in addition to Section 252(i), the fact that the Authority's acknowledgement of Nextel's exercise of any of its adoption rights may involve the Authority's interpretation and application of "federal law" provides no reason whatsoever to dismiss any aspect of Nextel's *Petition*.[38] Indeed, every time an ILEC interposes an objection to a carrier's exercise of any adoption right, of necessity, the Authority is called upon to construe the Act, FCC orders and federal court decisions related to both the Act and said orders.[39] While not binding on the FCC, it is too commonplace to be disputed

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[38] *See, e.g., In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and ITC^DeltaCom Communications, Inc.*, Order Granting Motion to Dismiss with Prejudice and Closing Docket, TRA Docket No. 02-01203, p. 2 (Feb. 21, 2007) ("BellSouth asserts that pursuant to the FCC's announced adoption of a Memorandum Opinion and Order approving the merger, BellSouth became obligated to cease all 'ongoing or threatened' EEL audits as of December 29, 2006."). *See also, e.g., c.f., In Re: Notice of Election by KMC Data LLC of the Interconnection Agreement between BellSouth and Level 3 Communications, LLC*, Petition of BellSouth Telecommunications, Inc. for Leave to Intervene, TRA Docket No. 05-00067 (Mar. 17, 2005) (In attacking KMC's Notice of Election, BellSouth asked – rather than challenging its jurisdiction to do so - the Authority to construe and apply federal law to thwart the election.).

[39] *See, e.g., In Re: Petition by Sprint Communications Company, L.P. for Arbitration of Interconnection with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Final Order of

that state commissions may interpret and apply federal law in the exercise of their jurisdiction under the Act.[40]

As recognized by the Florida Commission in the *Sunrise Order*, the Act expressly provides a jurisdictional scheme of "cooperative federalism" under which Congress and the FCC have specifically designated areas in which they anticipate that state commissions have a role,[41] which undeniably includes matters relating to approval of interconnection agreements consistent with the Act and orders of the FCC.

Arbitration Awards, TRA Docket No. 96-01411, pp. 4-8 (Mar. 26, 1997) ("Issue 1: Should BellSouth make available any interconnection, service or network element provided under an agreement approved under 47 U.S.C. Section 252, to which it is a party, to Sprint under the same terms and conditions provided in the agreement.").

[40] *See IDS Order*, p. 8 (The Florida Commission "find[s] BellSouth's argument is without merit to the extent that it argues that IDS's complaint fails to state a cause of action merely because the Complaint requires us to refer to a privately negotiated settlement agreement and federal law to settle the dispute ... Thus, the fact that a count of this Complaint asks this Commission to interpret and apply federal law is not in and of itself reason to dismiss that portion of the complaint."). *See also In Re: Petition by Sprint Communications Company, L.P. for Arbitration of Interconnection with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Final Order of Arbitration Awards, TRA Docket No. 96-01411, p. 2 ("After due consideration of the arguments made, the documents, testimony, and briefs filed, the partial agreements reached among the parties, the applicable federal and state laws, rules and regulations in effect . . . and the entire record of this proceeding, the Arbitrators deliberated and reached decisions with respect to the issues before them."); *In Re: Petition to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements*, Interim Order on Phase 1 of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements, TRA Docket No. 97-01262, pp. 2-3 (Jan. 25, 1999) (agency relied upon both federal and state law for its actions in this docket under the Act); and *In Re: Interconnection Agreement Negotiation Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, TRA Docket No. 96-1152 (Consolidated with Docket No. 96-01271), p. 7 (Jan. 23, 1997) ("After due consideration of . . . the applicable federal and state laws, rules and regulations . . . the Arbitrators deliberated and reached decisions with respect to the issues before them.").

[41] *See Sunrise Order,* p. 5, n. 1; and *In Re: Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth, Inc.*, Order, TRA Docket No. 01-00193, pp. 5-6 (June 28, 2002) ("To Implement the 1996 Act, Congress sought the assistance of state regulatory agencies. In what has been termed "cooperative federalism," Congress partially flooded the existing statutory landscape with specific preempting federal requirements, deliberately leaving numerous islands of State responsibility...No generalization can therefore be made about where, as between federal and State agencies, responsibility lies for decisions. The areas of responsibility are a patchwork and the dividing lines are sometimes murky. Certain provisions of the 1996 Act, such as those related to arbitrating and approving interconnection agreements mandate that State Commissions apply federal law within their existing State procedural structures."). *See also Verizon Corp. v. FCC*, 535 U.S. 467, 489, 122 S.Ct. 1646, 1661 (2002) (With respect to Congress' passage of the Act, the Supreme Court noted that "[t]he approach was deliberate, through a hybrid jurisdictional scheme[.]"); and *Lucre, Inc. v. Michigan Bell Telephone Co.*, No. 06-1144, 2007 WL 1580101, p. 1 (6th Cir. May 31, 2007) ("The Act has been called one of the most

Contrary to the relief sought by the carriers in the *Sunrise* and *IDS* cases – which the Florida Commission had no power under the Act to grant - through its *Petition* Nextel has sought the same relief that the Alabama Public Service Commission, and other state commissions have historically and repeatedly rendered to carriers that exercise their right to adopt another existing ILEC/Carrier interconnection agreement under either an FCC merger condition[42] or 252(i)[43] – Authority acknowledgment that Nextel has in fact exercised its right to adopt the existing Sprint ICA.

B. THE *FCC ORDER* DOES NOT RESTRICT, SUPERSEDE OR OTHERWISE ALTER THE TRA'S AUTHORITY TO ACKNOWLEDGE NEXTEL'S EXERCISE OF ITS RIGHT TO ADOPT THE SPRINT ICA

The fact that requesting carriers have been granted expanded adoption rights by virtue of the *FCC Order* does not *divest* state commissions of their existing authority to acknowledge a carrier adoption pursuant to Section 252(i) of the Act, or any alternative basis upon which state commissions have relied upon under state law, to acknowledge a

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ambitious regulatory programs operating under 'cooperative federalism,' and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets."). A copy of the *Lucre, Inc.* opinion is attached to the *Sprint Tennessee Arbitration Petition*, TRA Docket No. 07-00132.

[42] *See DeltaCom Order*, p. 2. *See also In Re: Petition for Acknowledgment of Adoption of Existing Agreement Between Verizon Maryland Inc. f/k/a Bell Atlantic-Maryland, Inc. and Business Telecom, Inc., by Winstar Communications, L.L.C.*, Order Approving Petition for Acknowledgment of Adoption of an Agreement Under FCC Approved Merger Conditions and Granting Staff Authority To Administratively Acknowledge Adoption of Agreements Under FCC Approved Merger Conditions and Order Amending Administrative Procedures Manual, FPSC Docket No. 020353-TP, Order No. PSC-02-1174-FOF-TP (August 28, 2002) ("*Verizon Florida Petition for Acknowledgement*").

[43] *See, e.g., In Re US LEC Corporation's Petition for Approval of Election to Adopt Terms and Conditions of Previously Approved Interconnection Agreement Pursuant to 47 U.S.C. Section 252(i),* Order, APSC Informal Docket No U-4321 (May 27, 2001). *See also In the Matter of Interconnection Agreement Between BellSouth Telecommunications, Inc. and Allegiance Telecom of North Carolina, Inc.,* Order Approving Interconnection Agreement, NCUC Docket No. P-55, Sub 1284 (May 31, 2001) (Order approving a non-contested 252(i) adoption agreement as a matter for review pursuant to Section 252(e) of the Act); *Z-Tel Florida Notice of Adoption*; and *Volo Florida Petition for Adoption.*

carrier adoption pursuant to an FCC merger Order.[44] The FCC has repeatedly and expressly recognized in its merger Orders that adoption of merger conditions does not limit the authority of the states to impose or enforce requirements, which can even go beyond FCC-required conditions.[45] The FCC not only expects the states to be involved in the ongoing administration of interconnection-related merger conditions, but recognizes the states' concurrent jurisdiction to resolve interconnection-related disputes pursuant to § 252. For example, in the *GTE/Bell Atlantic* merger the FCC declared as follows:

> Although the merged firm will offer to amend interconnection agreements or make certain other offers to state commissions in order to implement several of the conditions, nothing in the conditions obligates carriers or state commissions to accept any of Bell Atlantic/GTE's offers. The conditions, therefore, do not alter any rights that a telecommunications carrier has under an existing negotiated or arbitrated interconnection agreement. **Moreover, the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction.**[46]

Regarding implementation of the merged firm's interconnection-related "Most-Favored-Nation" and "Multi-State Interconnection and Resale Agreements" commitments, the FCC also made it clear that "[d]isputes regarding the availability of an interconnection

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[44] *See, e.g., Verizon Florida Petition for Acknowledgement* (To acknowledge an FCC merger commitment adoption by Winstar of a Verizon interconnection agreement that had been approved by the Maryland Commission, the Florida Commission stated that "we acknowledge this adopted agreement pursuant to . . . . *Florida Statutes,* wherein the Legislature requires us to encourage and promote competition").

[45] *See In the Matter of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, CC Docket No. 98-184, ¶ 254 (Adopted: June 16, 2000, Released: June 16, 2000) ("*GTE/Bell Atlantic*"); and *In the Applications of Ameritech Corp. and SBC Communications, Inc., For Consent to Transfer Control*, CC Docket No. 98-141, ¶ 358 (Adopted: October 6, 1999, Released: October 8, 1999) ("*Ameritech/SBC*").

[46] *GTE/Bell Atlantic* at ¶ 348 (emphasis added).

arrangement ... shall be resolved pursuant to negotiation between the parties or by the relevant state commission under 47 U.S.C. § 252 to the extent applicable."[47]

Case law subsequent to the *GTE/Bell Atlantic* and *Ameritech/SBC* merger also supports the position that state commissions have continuing, concurrent jurisdiction to enforce interconnection-related merger conditions pursuant to Section 252. In *Core Communications*,[48] CLECs filed a complaint action against SBC at the FCC over alleged violations of Ameritech/SBC merger conditions. SBC asserted that the FCC lacked jurisdiction to hear the complaint under Sections 206 and 208 of the Act on a theory that the state's authority under Section 251 and 252 overrode the FCC's Section 206 and 208 enforcement jurisdiction. The FCC determined that it also had 206 and 208 enforcement authority (as opposed to finding that only the FCC had enforcement authority) and, in her concurring opinion, then Commissioner Abernathy stated:

> This Order holds that the Commission has concurrent jurisdiction with the state commissions to adjudicate interconnection disputes. I agree that the plain language of the Act compels this conclusion. But I also believe that there are significant limitations on the circumstances in which complainants will actually be able to state a claim under section 208 for violations of section 251(c) and the Commission's implementing rules.
>
> ... as the Order acknowledges, the section 252 process of commercial negotiation and arbitration provides the primary means of resolving

[47] *See Ameritech/SBC* at "Appendix C CONDITIONS," Section XII. Most-Favored-Nation Provisions for Out-of-Region and In-Region Arrangements ¶¶ 42, 43, Section XII. Multi-State Interconnection and Resale Agreements ¶ 44, and XVIII. Alternative Dispute Resolution through Mediation ¶ 54 ("Participation in the ADR mediation process established by this Section is voluntary for both telecommunications carriers and state commissions. The process is not intended and shall not be used as a substitute for resolving disputes regarding the negotiation of interconnection agreements under Sections 251 and 252 of the Communications Act, or for resolving any disputes under Sections 332 of the Communications Act. The ADR mediation process shall be utilized to resolve local interconnection agreement disputes between SBC/Ameritech and unaffiliated telecommunications carriers at the unaffiliated carrier's request").

[48] *In the Matter of Core Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, et al.*, Memorandum Opinion and Order, 18 FCC Rcd 7568, 2003 FCC Lexis 2031 (2003) ("*Core Communications*"), *vacated and remanded on other grounds,* 407 F.3d 1223 (U.S.App.D.C. 2005) (vacated for further proceedings in which Commission may develop and apply its interpretation of the conditions under which CLECs may waive specified merger rights).

> disputes about what should be included in an interconnection agreement – its change of law provisions, for example – likely would foreclose any remedy under section 208.[49]

Similarly, in *Ameritech ADS*, in the context of granting "Alternative Telecommunications Utility" certification to a post-merger Ameritech/SBC affiliate, Commissioner Joe Mettner found it necessary to issue a concurring opinion to the Wisconsin Public Service Commission's ("WPSC") decision in order to address statements made by a dissenting Commissioner in light of the FCC's *Ameritech/SBC* merger Order:

> It is important that the public not be left with inaccurate statements concerning the extent, if any, to which FCC action in merger cases alters, modifies or preempts the federal statutory scheme of shared responsibility between the state commissions and the FCC over matters relating to opening local exchange markets to competition and the monitoring of the terms and conditions of interconnection agreements entered into by the ILEC's with competitors.
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> * * *
>
> It is fundamental to the scheme of shared regulation found in the Telecommunications Reform Act of 1996 that state commissions and the FCC preserve their respective spheres of authority to ensure that the general obligations of ILEC's to provide nondiscriminatory interconnection features to requesting entities, and that the states retain a particularly important role in the review and approval of interconnection agreements. 47 U.S.C. §§ 251(c) and (d), 252(e).
>
> * * *
>
> The Merger Order simply doesn't stand as any valid extra-jurisdictional reconfiguration of state v. federal authority in these matters, as the FCC has been careful to indicate in its own Merger Order.
>
> … it may well be true, as the dissent has noted, that the FCC in some sense has "final enforcement authority" over issues concerning SBC/Ameritech's OSS, to the extent that the FCC may preempt any state commission failing to fulfill its responsibilities under 47 U.S.C. 252 in reviewing interconnection agreements. It is not true, however, that the Merger Order

[49] *Core Communications*, p. 17.

> does anything (as indeed it may not) to alter the primary authority of state commissions in review of interconnection agreements, and the terms and conditions of same.[50]

Based on the foregoing, it is apparent that not only do the states continue to retain Section 251-252 authority over disputes regarding interconnection-related merger conditions in an FCC order, but also that the FCC itself has declared that even its complaint enforcement authority may be considered secondary to the states with respect to such disputes.

C. THE *FCC ORDER* EXPRESSLY RECOGNIZES THE STATES' CONCURRENT AUTHORITY OVER AT&T'S INTERCONNECTION-RELATED MERGER COMMITMENTS

Appendix F to the *FCC Order* contains the Merger Commitments that the FCC adopted in conjunction with its approval of the AT&T/BellSouth merger. AT&T asserts that "the FCC explicitly reserved jurisdiction over the merger commitments" by virtue of the following language in the *Order*: "[f]or the avoidance of doubt, unless otherwise stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC[.]"[51] Further, AT&T asserts that "[n]owhere in the Merger Order does the FCC provide that the interpretation of merger commitments is to occur outside the FCC."[52] As shown below, this is simply not an accurate statement with respect to Appendix F.

The FCC clearly recognized in Appendix F that it has no authority to alter the states' *concurrent* statutory jurisdiction under the Act over interconnection matters

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[50] *Petition of Ameritech Advanced Data Services of Wisconsin, Inc. for Authorization to Resell Frame Relay Switched Multimegabit Data, and Asynchronous Transfer Mode Services on an Intrastate Bases and to Operate as an Alternative Telecommunications Utility in Wisconsin; Investigation into the Digital Services and Facilities of Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin),* Final Decision and Certificate, 2000 Wisc. PUC Lexis 36 (Jan. 2000) *("Ameritech ADS").*

[51] *Motion*, pp. 10-11 (emphasis omitted).

[52] *Id.* at 11.

addressed in the Merger Commitments. The paragraph immediately preceding the language relied upon by AT&T provides:

> *It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.*[53]

It should be noted that the above language was not part of the proposed Merger Commitments as filed by AT&T with the FCC via Mr. Robert Quinn's December 28, 2006 letter. Rather, it was specifically added by the FCC. This language serves the obvious purpose of recognizing, similar to what the FCC has done in prior merger orders, that the Act is designed with dual authority for both the states and the FCC. The *FCC Order* reflects absolutely no attempt by the FCC, nor could it legitimately do so, to alter the states' primary responsibility for initial review and acknowledgement of the agreement to be in effect between two (2) parties. As recognized in the Act and as articulated by the Wisconsin Commission in *Ameritech ADS*, the FCC's role in this regard is secondary, unless the state fails to take action or, as stated by the FCC itself in *Core Communications,* a carrier elects to pursue a direct enforcement action with the FCC pursuant to Section 206 and 208.

Considering the former SBC's post-merger action in the *Core Communications* case (*i.e.*, contending the FCC lacked enforcement jurisdiction over a merger condition complaint), the language relied on by AT&T merely serves to make it clear that the FCC's enforcement authority remains an available avenue, as opposed to the exclusive

[53] *FCC Order* at 147, APPENDIX F (emphasis added).

avenue, to address any AT&T interconnection-related Merger Commitment violations. Appendix F does not contain, nor could it, any provision intended to divest the states of their jurisdiction over interconnection-related merger commitment matters and to vest exclusive jurisdiction over such matters in the FCC.

Indeed, when the FCC's Wireline Competition Bureau was faced with an issue similar to the one raised by AT&T's *Motion*, it relied upon its authority pursuant to § 252(e)(5) to act in the stead of a state commission in arbitrating interconnection agreements, and not upon its authority as a Bureau of the FCC, in resolving the issue. In the *GTE/Bell Atlantic* merger Order, the merged firm was required to "offer telecommunications carriers, subject to the appropriate state commission's approval, an option of resolving interconnection agreement disputes through an alternative dispute resolution mediation process that may be state-supervised."[54] Subsequently, the Wireline Competition Bureau arbitrated the terms of interconnection agreements between Verizon and the former WorldCom, Inc. and former AT&T Corp. after the Virginia Corporation Commission declined to do so.[55]

In the *WorldCom Virginia Arbitration,* Verizon and WorldCom disagreed concerning the dispute resolution provision to be included in their arbitrated interconnection agreement. WorldCom contended that a sentence proposed by Verizon should be deleted in order to make clear that the alternative dispute resolution procedure required by the *GTE/Bell Atlantic* merger condition remained available to WorldCom. Verizon, on the other hand, maintained that the Bureau, acting as a Section 252(b)

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[54] *GTE/Bell Atlantic* at ¶ 317.

[55] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration,* DA-02-1731, CC Docket No. 00-218 *et al.,* (Adopted July 17, 2002; Released July 17, 2002) ("*WorldCom Virginia Arbitration*").

arbitrator, lacked the authority to require the inclusion of an arbitration provision in the interconnection agreement. The Bureau disagreed, ruling that "[t]he Act gives us broad authority, ***standing in the shoes of a state commission,*** to resolve issues raised in this proceeding."[56] Indeed, the Bureau found that failing to give effect to the merger condition when arbitrating an interconnection agreement "would essentially modify that Commission order, which we cannot do … ."[57] The Authority has no more authority to modify the AT&T/BellSouth adoption Merger Commitments than the Wireline Competition Bureau had to modify the *GTE/Bell Atlantic* merger Order. Like the Wireline Competition Bureau when it was arbitrating an interconnection agreement under § 252 on behalf of a state Commission, the Authority must interpret and apply the Merger Commitments consistent with the FCC Order in acknowledging Nextel's exercise of its right to adopt the Sprint ICA.

And finally, it is obvious from the express language of the *FCC Order* that the FCC understood that state Commissions would be involved in reviewing adoptions under Merger Commitment No. 1. Specifically, the last requirement of Merger Commitment No. 1 is that the adoption be "consistent with the laws and regulatory requirements of, the state for which the request is made." The TRA is, unquestionably, the forum with authority to review Nextel's *Petition* for adoption in order to ensure its consistency with the laws and regulatory requirements of Tennessee.

[56] *WorldCom Virginia Arbitration* at ¶ 703.
[57] *Id.* at ¶ 702.

IV. AT&T'S ARGUMENT THAT NEXTEL'S ADOPTION OF THE SPRINT ICA IS UNTIMELY IGNORES BOTH THE FACTS AND PRECEDENT TO THE CONTRARY

AT&T contends the Sprint ICA is "expired"[58] and, therefore, Nextel did not timely adopt the Sprint ICA within the "reasonable period of time" that AT&T was required to make the Sprint ICA available for adoption pursuant to 47 C.F.R. § 51.809(c).[59] AT&T's position on these points is factually and legally inadequate to support dismissal.

Factually, AT&T premises its conclusion that the Sprint ICA is "expired" upon its request that the Authority take judicial notice of the Sprint ICA, and its sole assertion that "the ICA was entered into on January 1, 2001, and was amended twice to extend the term to December 31, 2004."[60] AT&T, however, fails to recognize either: (a) the express provisions of the Sprint ICA that establish that it currently continues and is "deemed ***extended*** on a month-to-month basis[;]"[61] or (b) the fact that AT&T admits without qualification that it acknowledged to Sprint that the Sprint ICA can be extended 3 years pursuant to Merger Commitment No. 4.[62] Based on the foregoing additional undisputable facts, and contrary to AT&T's assertion, the Sprint ICA not only continues to be effective, but Sprint is persuaded in good faith that by its exercise of its right to a 3-year extension of the Sprint ICA, the Sprint ICA is not scheduled to expire until March 19, 2010.[63]

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[58] *Motion*, pp. 1, 5-8.
[59] *Motion*, pp. 7-8. *See also* 47 C.F.R. § 51.809(c) ("Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(h) of the Act.").
[60] *Motion*, p. 6, n. 11.
[61] Sprint ICA, Section 2.1, p. 815 (emphasis added).
[62] *See supra* nn. 13 and 25.
[63] *See Sprint Tennessee Arbitration Petition*, p. 8.

From a legal perspective, AT&T cannot overcome two (2) hurdles. First, Merger Commitment No. 1 does not contain any language to impose any time limitation as to when Nextel was required to exercise its right to adopt the Sprint ICA pursuant to Merger Commitment No. 1.[64] Thus, the "reasonable period of time" limitation that AT&T contends exists as to a non-merger 252(i) adoption by virtue of 47 C.F.R. § 51.809(c) is simply inapplicable to an adoption under Merger Commitment No. 1.

As to Nextel's additional reliance upon 252(i), AT&T cites two (2) *Global NAPs* cases under which the respective state commissions held that given the limited amount of time remaining in the interconnection agreements (10 and 7 months, respectively), allowing the requesting CLEC to opt-in would be unreasonable.[65] Alltel previously cited these exact same two (2) *Global NAPs* in requesting the Florida Commission to dismiss Volo's Notice of Adoption of an agreement that was set to expire within seventy-two (72) days after the adoption date, but was likely to remain in effect beyond the stated termination date.[66] Volo argued that the *Global NAPs'* adoptions were distinguishable from Volo's adoption in that Volo sought to adopt an interconnection in its entirety, whereas the carriers in *Global NAPs* sought to change the terms of the agreements being adopted. The FPSC recognized that there is "no definitive standard set forth by the FCC as to what constitutes a reasonable time[,]" and that Alltel's Motion to Dismiss failed because, on its face, Volo's Notice of Adoption stated a cause of action on which relief could be granted.[67]

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[64] *See supra* nn. 15 and 18.
[65] *Motion*, pp. 5-6 (citing *In Re: Global NAPS South, Inc.*, 15 FCC R'cd 23318 (August 5, 1999) and *In Re: Notice of Global NAPS South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999) (collectively "*Global NAPs* cases")).
[66] *See Volo Florida Notice of Adoption*, FPSC Docket No. 040343-TP, Order No. PSC-04-1109-PCO-TP.
[67] *Id.*

As in *Volo*, Nextel's *Petition* states a cause of action on its face, and AT&T has failed to establish as a matter of fact or law that Nextel's adoption is untimely.

V. NEXTEL WAS NOT REQUIRED TO INVOKE THE DISPUTE RESOLUTION PROVISIONS OF ITS PRIOR AGREEMENT BEFORE EXERCISING ITS RIGHT TO ADOPT THE SPRINT ICA

Without citation to supporting legal authority, AT&T contends that because the Nextel agreement had a provision regarding the adoption of agreements, and Nextel disagreed with AT&T regarding Nextel's adoption of the Sprint ICA, "Nextel was contractually bound to follow the dispute resolution process contained in the parties' agreement[.]"[68] This is not a new AT&T argument. In attempting to avoid a unilateral adoption by Z-Tel of a Florida AT&T/Network Telephone Corporation's ("Network") interconnection agreement, AT&T likewise claimed that "Z-Tel did not comply with the terms of its existing interconnection agreement concerning adoptions" and argued that Z-Tel's adoption of the Network agreement should be rejected.[69] The Florida Commission found that "Z-Tel's adoption [was] well within its statutory right under § 252(i) to opt-in to such an agreement in its entirety" and that "[b]y the very fact of the Network agreement being active and effective, Z-Tel [was] within its rights to adopt[,]" and accepted Z-Tel's Notice of Adoption.[70]

Nextel was clearly not required to follow an "adoption process" contained in its prior agreement in order to adopt the Sprint ICA. It logically follows, then, that there is no basis for requiring Nextel to engage in a dispute resolution process based upon

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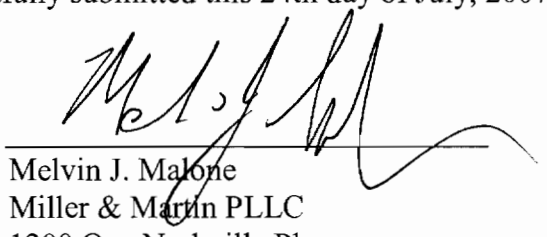
[68] *Motion*, p. 4.
[69] *Z-Tel Florida Notice of Adoption*, FPSC Docket No. 040779-TP, Order No. PSC-05-0158-PAA-TP.
[70] *Id.*

AT&T's failure to voluntarily honor and acknowledge its obligation to make the Sprint ICA available to Nextel.[71]

VI. CONCLUSION

For the foregoing reasons, AT&T has failed to demonstrate that it is entitled to dismissal as matter of fact or law. Accordingly, Nextel respectfully requests that the Authority deny AT&T's *Motion* in its entirety and acknowledge that, effective June 22, 2007, Nextel adopted the existing Sprint ICA.

Respectfully submitted this 24th day of July, 2007.



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[71] *See supra* n. 18.

EXHIBIT A

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by Volo Communications of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. for adoption of existing interconnection agreement between ALLTEL Florida, Inc. and Level 3 Communications, LLC.	DOCKET NO. 040343-TP ORDER NO. PSC-04-1109-PCO-TP ISSUED: November 8, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION TO DISMISS AND HOLDING PROCEEDINGS IN ABEYANCE

BY THE COMMISSION:

On April 19, 2004, Volo Communications of Florida, Inc. d/b/a Volo Communications Group of Florida, Inc. (Volo) filed a Petition to Adopt (Petition) the ALLTEL Florida, Inc. (ALLTEL) and Level 3 Communications, LLC (Level 3) Interconnection Agreement, which was effective through June 30, 2004. In its Petition, Volo requests that this Commission acknowledge Volo's immediate adoption of the ALLTEL and Level 3 Interconnection Agreement (Agreement), in its entirety, pursuant to §252(i) of the Telecommunications Act of 1996.

On May 7, 2004, ALLTEL filed its Motion to Dismiss (Motion) the Petition on the basis that it fails to state a cause of action and was not filed within a reasonable time as set forth in 47 C.F.R. §51.809(c).[1] Alternatively, ALLTEL requests that if this Commission decides not to grant the Motion, that this Commission set this matter for a hearing under §120.57(1), Florida Statutes.

On May 19, 2004, Volo filed its Response to ALLTEL's Motion in which it contends that the reasonable time argument as set forth by ALLTEL is not a valid basis for the Motion or to prevent Volo's adoption of the Agreement. Volo asserts that under the language of §252(i), a Competitive Local Exchange Carrier's (CLEC) ability to adopt an existing agreement with the exact same terms and conditions is absolute and unambiguous. Furthermore, Volo contends that the reasonable time standard proposed by ALLTEL is futile, absent any standards set forth by either the Federal Communications Commission (FCC) or this Commission. Additionally, Volo

[1] It is important to note that, up until now, this issue has not been contested before this Commission.

amends its earlier pleading to change it from a "Petition to Adopt" to a "Notice of Adoption" (Notice).

On June 30, 2004, ALLTEL filed a Notice of Supplemental Authority attached to which was an Order Denying Notice issued by the Georgia Public Service Commission (GPSC). The Order had not been issued as of the filing of ALLTEL's Motion or Volo's Response. Therein, the GPSC sets forth a standard whereby "a request to adopt an interconnection agreement with six months or more remaining in the term of the agreement constitutes a reasonable period of time under 47 C.F.R. 51.809(c)."

Standard of Review

In reviewing a motion to dismiss, this Commission shall take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

Furthermore, a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint, this Commission shall limit its consideration to the complaint and the grounds asserted in the motion to dismiss. Flye v. Jeffords, 106 So.2d 229 (Fla. 1st DCA 1958).

Volo's Notice of Adoption

In its Notice, Volo seeks to completely and fully adopt the rates, terms, and conditions of the Agreement, which was filed and approved in Docket No. 020517-TP. Volo acknowledges that the Agreement was set to terminate on June 30, 2004 pursuant to §4.1 of the Agreement. However, Volo asserts that §4.2 of the Agreement provides that the Agreement shall remain effective while ALLTEL and Level 3 are negotiating a successor interconnection agreement. Therefore, Volo contends that the underlying Agreement, and its adoption by Volo, would likely remain in effect beyond the June 30, 2004 termination date.

Volo further asserts that given its present business needs it is imperative that it proceed with an immediate adoption of an existing interconnection agreement. Pursuant to §252(i) of the Telecommunications Act of 1996, Volo requests an immediate acknowledgement of its adoption of the Agreement.

ALLTEL's Motion to Dismiss

ALLTEL's Motion asserts that Volo's Notice affects its substantial interests, because it seeks to require performance of an agreement set to expire within a short period of time, *i.e.* seventy-two days after the adoption date. ALLTEL contends that Volo's Notice fails to state a

cause of action as a matter of law and has not been filed within a reasonable period of time as required. ALLTEL asserts that 47 C.F.R. §51.809(c) requires an interconnection agreement be made available for adoption if the request is made within a reasonable period of time. ALLTEL claims that there is no guarantee that the Agreement will continue to be in effect past the termination date.[2]

47 C.F.R. §51.809(a) and (c) provide in part the following:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.
>
> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(h) of the Act.

ALLTEL cites to two cases, *In re: Global NAPs South, Inc.*, 15 FCC R'cd 23318 (Aug. 5, 1999) and *In re: Notice of Global NAPs South, Inc.*, Case No. 8731 (Md. PSC July 15, 1999), both of which were attached to its Motion. Each case involves a CLEC's request to adopt an interconnection agreement within approximately seven months and ten months, respectively, of each agreement's termination date. In each case the respective state commissions held that given the limited amount of time remaining in the interconnection agreements, allowing the CLECs to opt-in would be unreasonable.

ALLTEL asserts that the Agreement will terminate before this Commission could approve Volo's Notice. ALLTEL requests that Volo's Notice be dismissed on the basis that it was not filed within a reasonable amount of time as required by 47 C.F.R. §51.809(c) and that this Commission enter an order dismissing the Notice for failure to state a cause of action. In the alternative, ALLTEL requests that, in the event its Motion cannot be granted, this matter be set for a hearing under §120.57(1), Florida Statutes.

Volo's Response

In Volo's Response, it asserts that ALLTEL's sole basis for objecting to the Notice is not valid to support a Motion to Dismiss or any objection pursuant to §252(i) of the Telecommunications Act of 1996. Volo contends that there is no statutory basis to prevent it from adopting the existing Agreement. Volo further contends that 47 C.F.R. §51.809(c), upon which ALLTEL bases its Motion to Dismiss, does not limit its ability to fully and completely adopt the Agreement, because what constitutes a reasonable period of time has not been definitively ruled on by either the FCC or this Commission.

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[2] ALLTEL and Level 3 are currently negotiating a successor interconnection agreement. As such, the Agreement is presently in effect.

Furthermore, Volo asserts that ALLTEL bases its Motion on the erroneous assumption that there is a substantive review and approval process inherent in a §252(i) adoption. Volo contends that an interconnection agreement arrived at through negotiation or arbitration has a specific statutory review process under §252(c). Volo further contends that the only review process under §252(i) is to "ensure that the requested interconnection agreement is lawfully approved and effective and that the CLEC is adopting the agreement" without modifications. Volo contends that, under 47 C.F.R. §51.809(b), an ILEC's only possible objection to a §252(i) adoption is that it would not be cost effective or technically feasible. Volo points out that ALLTEL has asserted neither objection.

Volo distinguishes the two cases which ALLTEL cites to in its Motion. Volo contends that these two cases are distinguishable from Volo's attempts to adopt, because Global NAPs petitioned each state commission for arbitration to adopt existing interconnection agreements under changed terms and conditions. Unlike the situation in the Global NAPs cases, Volo asserts that it is complying with the same terms and conditions requirement of §252(i).

Volo further contends that if there is a reasonable time period standard in this jurisdiction, then ALLTEL has still acted in a discriminatory manner when it has permitted other CLECs to adopt the Agreement with less than six months remaining in the Agreement. Volo points to a specific instance where, on February 17, 2004, Sprint filed a notice of adoption for the same Agreement in dispute here, and ALLTEL signed a letter accepting such adoption. See FPSC Docket No. 040155-TP.

Finally, Volo requests that ALLTEL's alternative request for a §120.57(1) hearing be denied, because ALLTEL has not specified any disputed issues of material fact or complied with the pleading requirements under Rule 28-106.201, Florida Administrative Code, for such a hearing.

Analysis

Upon consideration, we find that Volo's Notice of Adoption does state a cause of action upon which relief may be granted. However, ALLTEL raises a valid argument as to what constitutes a reasonable period of time under 47 C.F.R. §51.809(c), which we find may involve legal and policy arguments that could implicate a dispute of material fact.

Although the FCC has adopted a regulation implementing §252(i) of the Act that requires an ILEC to make an interconnection agreement available for a reasonable period of time, there seems to be no definitive standard set forth by the FCC as to what constitutes a reasonable time. Whether such a limitation would apply to Volo's adoption of the Agreement would depend on this Commission's further analysis and interpretation of 47 C.F.R. §51.809(c) in this proceeding. Thus, ALLTEL's Motion fails because Volo's Notice, on its face, states a cause of action upon which relief could be granted; however, we find that ALLTEL's request for a hearing shall be granted. Whether a §120.57(1) or (2) hearing is appropriate requires further consideration, and shall be addressed through the issue identification process.

Decision

Based on the foregoing, we deny ALLTEL's Motion to Dismiss. Volo has stated a cause of action upon which relief may be granted under §252(i) of the Telecommunications Act of 1996. Because the parties are, however, currently negotiating a new agreement, proceedings in this matter shall be held in abeyance for a period of 60 days. Thereafter, if negotiations are not successful, this matter shall be set for hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that ALLTEL Florida, Inc.'s Motion to Dismiss is denied. It is further

ORDERED that proceedings in this matter shall be held in abeyance for a period of 60 days. It is further

ORDERED that, if negotiations are not successful, this matter shall be set for a hearing. It is further

ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 8th day of November, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: /s/ Kay Flynn
Kay Flynn, Chief
Bureau of Records

This is a facsimile copy. Go to the Commission's Web site, http://www.floridapsc.com or fax a request to 1-850-413-7118, for a copy of the order with signature.

(S E A L)

KS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and

time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

EXHIBIT B

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Notice of adoption of existing interconnection, unbundling, resale, and collocation agreement between BellSouth Telecommunications, Inc. and Network Telephone Corporation by Z-Tel Communications, Inc.	DOCKET NO. 040779-TP ORDER NO. PSC-05-0158-PAA-TP ISSUED: February 9, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

NOTICE OF PROPOSED AGENCY ACTION
ORDER ACKNOWLEDGING ADOPTION OF INTERCONNECTION AGREEMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

I. Case Background

Z-Tel Communications, Inc.'s (Z-Tel) existing interconnection agreement with BellSouth Telecommunications, Inc. (BellSouth) in Florida became effective on April 18, 2003 and expired on September 11, 2004. In the course of discussions between the parties for a successor agreement, Z-Tel opted to adopt a new agreement rather than to attempt to renegotiate terms of their existing agreement.

On July 23, 2004, Z-Tel filed its Notice of Adoption of the interconnection agreement between BellSouth and Network Telephone Corporation (Network). On August 5, 2004, BellSouth filed a letter in opposition to Z-Tel's Notice of Adoption. On August 25, 2004, Z-Tel filed a reply to BellSouth's letter in opposition in which they addressed the arguments raised by BellSouth. On September 2, 2004, BellSouth filed a letter accompanying a copy of the FCC's Interim Rules

Order. On September 7, 2004, Z-Tel filed a response letter to BellSouth's letter and filing of the FCC's Interim Rules Order.

II. Analysis and Decision

A. Unilateral Adoption versus Bilateral Agreement

BellSouth claims it never agreed to the Adoption nor did it execute any Adoption Language. BellSouth argues that on July 22, 2004, Z-Tel unilaterally noticed the Commission that it had adopted the interconnection agreement between BellSouth and Network in its entirety. Z-Tel argues that its adoption of the Network agreement in its entirety is fully consistent with §252(i) as well as the FCC's "All or Nothing" rule[1]

The primary purpose of §252(i) of the 1996 Telecommunications Act is to prevent the discrimination that would occur if one party were allowed to operate under an agreement that was not available to another, similarly situated party. Section 252(i) creates an obligation, that in this instance is unchanged by the current state of flux in the law. Section 252(i) obligates incumbents, such as BellSouth, to enable Z-Tel and other CLECs to operate upon the same terms and conditions as those provided in a valid existing interconnection agreement. We find that Z-Tel's adoption is well within its statutory right to opt-in to the Network Agreement in its entirety.

B. Compliance with Current Agreement

BellSouth claims Z-Tel did not comply with the terms of its existing interconnection agreement concerning adoptions. BellSouth argues that the Adoption by Z-Tel should be rejected because Z-Tel failed to follow the requirements of its interconnection agreement for such an adoption. Z-Tel argues that BellSouth, by virtue of providing interconnection and access to Network pursuant to the existing agreement between the two companies, has no choice but to offer nondiscriminatory access to Z-Tel pursuant to §252(i).

Again, we emphasize that §252(i) creates an obligation that, in this instance, is unchanged by the current state of flux in the law. The Interim Rules Order obligates incumbents, such as BellSouth, to continue providing unbundled access to mass market switching, enterprise market loops, and dedicated transport under the same rates, terms, and conditions that applied under their interconnection agreements as of June 15, 2004. We find that Z-Tel's adoption is well within its statutory right under §252(i) to opt-in to such an agreement in its entirety.

Furthermore, the decision of Z-Tel to choose to adopt an existing interconnection agreement at the expiration of their prior agreement, rather than to attempt to negotiate a successor agreement, is not precluded by the language in the parties' previous interconnection agreement. We find that public policy directs that Z-Tel is in the best position to target productive use of its resources in establishing terms of interconnection that have not been statutorily precluded.

C. Availability of Terms

[1] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order, CC Docket No. 01-338, FCC 04-164. (July 13, 2004) (All or Nothing Order)

BellSouth claims Section 252(i) of the Telecommunications Act of 1996 does not entitle a party to terms and conditions of interconnection or access to unbundled network elements that are not otherwise available to a party by negotiation or arbitration under §252(a) and (b). BellSouth argues that Z-Tel cannot use §252(i) to compel the execution of a new interconnection agreement that does not comply with §251 of the 1996 Act. BellSouth claims that the interconnection agreement Z-Tel seeks to adopt contains terms and conditions that, although compliant with the law in effect at the time the agreement was executed, are no longer compliant with existing law. Z-Tel argues that §252(i) and the FCC's implementing rules give Z-Tel the right to adopt an effective agreement in its entirety, taking all rates, terms and conditions of the adopted agreement. By the very fact of the Network agreement being active and effective, Z-Tel is within its rights to adopt. Furthermore, Z-Tel claims that it makes no attempt to avoid the impact of changes of law, and to the extent that they are ripe, BellSouth would be within its rights to initiate discussions under the appropriate change of law provisions in the contract.

We find that §252(i) and the FCC's implementing rules give Z-Tel an unequivocal right in this instance to adopt an effective agreement in its entirety, taking all rates, terms and conditions of the adopted agreement. The FCC supports this same position in the FCC's All or Nothing Order:

> [W]e reject BellSouth's argument that "an agreement in its entirety" does not include general terms and conditions, such as dispute resolution or escalation provisions. Under the all-or-nothing rule, all terms and conditions of an interconnection agreement will be subject to the give and take of negotiations, and therefore, all terms and conditions of an interconnection agreement, to the extent that they apply to interconnection, services or network elements, must be included within an agreement available for adoption in its entirety under §252(i).

As a general matter, the FCC has not limited the ability of competitive carriers to exercise §252(i) to adopt an existing interconnection agreement in its entirety, except to the extent that the FCC's Interim Rules Order affected a carrier's ability to adopt provisions pertaining to the provision of certain elements after June 15, 2004. Furthermore, we find that nothing in this agreement, or any portion thereof, triggers the grounds for rejection set forth in §252(e)(2). Thus, by virtue of the Network agreement being active and effective, Z-Tel is within its rights to adopt.

To the extent that BellSouth believes that the interconnection agreement Z-Tel seeks to adopt contains terms and conditions that are no longer compliant with existing law, this Commission would like to note that the underlying agreement contains BellSouth's standard change of law provisions. To the extent that BellSouth argues that it is unwilling to include outdated terms and conditions that it views as inconsistent with the parties' rights and obligations under current law, this Commission reiterates that §252(i) creates an obligation, unchanged by the current state of flux in the law, for incumbents, such as BellSouth, to enable competitive carriers to operate upon the same terms and conditions as those provided in a valid and existing interconnection agreement.

D. Adoption Time Frame

BellSouth claims that Z-Tel did not request adoption of certain terms of the subject agreement within a reasonable period of time, as required by 47 C.F.R. §51.809(c). BellSouth argues that a finding should be made that a "reasonable period of time" expired when the controlling law changed, specifically the Triennial Review Order (TRO) and the D.C. Circuit's vacatur of portions of the TRO. Z-Tel notes that the Network Agreement became effective on or about June 21, 2003 and is set to expire June 21, 2006. Z-Tel contends that an agreement with approximately two-thirds of its life remaining should be certainly and readily adoptable. Z-Tel agrees that the FCC limited the ability of competitors to adopt reciprocal compensation provisions. However, Z-Tel contends that the FCC did so in an express and specific manner and that the ISP Order is thus limited to its terms and does not establish any general principles.

47 C.F.R. §51.809(a) and (c) provide in part the following:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to Section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.
>
> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under Section 252(h) of the Act.

The FCC has adopted a regulation implementing §252(i) of the Act that requires an ILEC to make an interconnection agreement available for a reasonable period of time, yet there seems to be no definitive standard set forth by the FCC as to what constitutes a reasonable time. The Network agreement became effective on June 20, 2003 and is set to expire June 21, 2006. We find that since the underlying agreement does not expire for two years, it should be deemed timely for adoption. Therefore, this Commission rejects BellSouth's argument that a reasonable period of time has expired.

Furthermore, BellSouth concedes that the FCC did not reach the issue of §252(i) adoption of pre-existing agreements in their entirety in its TRO. In actuality, the FCC has issued no language limiting the adoption of agreements in their entirety in this context. We find it persuasive that the FCC did include explicit language limiting adoptions in the ISP Order, but declined to do so with regards to its rulings in the TRO. Additionally, in the underlying agreement, under the heading of Adoption of Agreements, BellSouth states all agreements are available for adoption provided there are at least six months remaining in the term. This language does not indicate whether roll-over agreements are included or excluded. This Commission rejects BellSouth's broad interpretation of the ISP Order and finds it necessary to look to the specific language included in the underlying agreement.

Therefore it is,

ORDERED by the Florida Public Service Commission that the Notice of Adoption of the interconnection agreement between BellSouth and Network Telephone Corporation by Z-Tel is hereby accepted. It is further

ORDERED that this docket should be closed upon the issuance of a Consummating Order, and Z-Tel's adoption of the Network Interconnection Agreement shall have an effective date of July 23, 2004, reflecting the date that the Notice of Adoption was filed with this Commission. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

By ORDER of the Florida Public Service Commission this 9th day of February, 2005.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

This is a facsimile copy. Go to the Commission's Web site, http://www.floridapsc.com or fax a request to 1-850-413-7118, for a copy of the order with signature.

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 2, 2005.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

EXHIBIT C

ITC^DELTACOM COMMUNICATIONS, INC., d/b/a ITC^DELTACOM (DeltaCom)
U4320
Alabama Public Service Commission
May 27, 2001

ORDER

BY THE COMMISSION:

IN RE: PETITION FOR APPROVAL OF ELECTION TO ADOPT TERMS AND CONDITIONS OF PREVIOUSLY APPROVED INTERCONNECTION AGREEMENT PURSUANT OT 47 U.S.C. §252(i) AND THE FCC'S BELL ATLANTIC/GTE MERGER CONDITIONS.

By filing received May 7, 2001, ITC^DeltaCom Communications, Inc., d/b/a ITC^ DeltaCom (DeltaCom) seeks formal approval of its election to adopt the terms and conditions of the GTE South, Inc. (GTE) and Time Warner Telecom (Time Warner) Interconnection, Resale and Unbundling Agreement (the GTE/Time Warner Agreement) filed with and approved by the North Carolina Utilities Commission in Docket No. P-19, Sub 381. DeltaCom's request is made pursuant to the terms of 47 U.S.C. §252(i) and the terms and conditions established by the Federal Communications Commission (FCC) in its order approving the merger between GTE Corporation (GTE) and Bell Atlantic Corporation (Bell Atlantic) (the FCC's Bell Atlantic/GTE Merger Order). [FN1]

FN1. *In re: Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations* and *Application to Transfer Control*, Memorandum and Order, CC Docket No. 98-184 (rel. June 16, 2000).

DeltaCom represents that the FCC's Bell Atlantic/GTE Merger Order requires that Verizon Communications, Inc. (Verizon), the named entity which resulted from the merger of GTE and Bell Atlantic, must make available to any requesting telecommunications carrier in the BellAtlantic/GTE service areas any Bell Atlantic/GTE state interconnection agreement that was voluntarily negotiated by a Bell Atlantic/GTE incumbent local exchange carrier (LEC) prior to the merger closing date. Such agreements must also be subject to 47 U.S.C. §251(c) and meet the conditions established at ¶39 of the FCC's Bell Atlantic/GTE Merger Order in order to be available to requesting carriers. DeltaCom represents that the GTE/Time Warner Agreement meets the aforementioned criteria since it was executed on June 26, 2000, and was voluntarily negotiated by a GTE incumbent LEC in North Carolina.

We have reviewed the request set forth in DeltaCom's petition and find that formal approval of DeltaCom's election to adopt the terms and conditions of the aforementioned GTE/Time Warner Agreement is consistent with the public interest, convenience and necessity. The terms and conditions established by the FCC in its Bell Atlantic/GTE Merger Order indeed allow a carrier operating in any Bell Atlantic/GTE state to opt-in to an entire interconnection agreement in any other Bell Atlantic/GTE state so long as the agreement in question was voluntarily negotiated and meets the timing and location requirements established by the FCC. It appears that the North Carolina agreement between GTE and Time Warner submitted by DeltaCom with its Petition meets the requirements established by the FCC in its Bell Atlantic/GTE Merger Order.

DeltaCom is also correct in its assessment that the provisions of 47 U.S.C. §252(i) allow carriers wide latitude to adopt the terms and conditions of existing agreements that are approved pursuant to the provisions of 47 U.S.C. §252. There are in fact few limitations on the ability of a carrier to invoke the provisions of 47 U.S.C. §252(i). The Federal Communications Commission (FCC) did, however, recently establish a limitation on §252(i) opt-ins that must be considered in this instance.

In its April 27, 2001, *ISP Remand Order*, [FN2] the FCC stated that upon the publication of said order in the Federal Register, carriers such as DeltaCom may no longer invoke 47 U.S.C. §252(i) to opt-in to an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. The FCC's *ISP Remand Order* was in fact published in the Federal Register

on May 15, 2001.

FN2. *In the Matter of Implementation of Local Competition Provisions in the Telecommunications Act of 1996 -- Inter carrier Compensation for ISP-bound Traffic*, CC Docket No. 96-98 (Rel. April 27, 2001) (the *ISP Remand Order), ¶82*.

In the present case, it appears that DeltaCom's election to invoke the provisions of 47 U.S.C. 252(i) to opt-in to the GTE/Time Warner Agreement from North Carolina occurred when DeltaCom filed the instant Petition with the Commission on May 7, 2001. DeltaCom's request was unanimously approved by the Commission at its May 14, 2001, public meeting. The fact that this Order is issued after the May 15, 2001, publication of the FCC's *ISP Remand Order* in the Federal Register is of little significance due to the fact that DeltaCom invoked its 47 U.S.C. 252(i) opt-in rights and had that election verbally approved by this Commission before the deadline established by the FCC. DeltaCom also notified GTE (Verizon) of its election to invoke 47 U.S.C. §252(i) with regard to the aforementioned agreement prior to the May 15, 2001 publication of the FCC's *ISP Remand Order*. It thus appears that DeltaCom's election to invoke 47 U.S.C. §252(i) to opt-in to the GTE/Time Warner agreement extends to all provisions of that agreement, including those provisions addressing reciprocal compensation for ISP-bound traffic.
IT IS, THEREFORE, ORDERED BY THE COMMISSION, That ITC^DeltaCom Communications, Inc., d/b/a ITC^DeltaCom's request for approval to adopt the provisions of the interconnection agreement between GTE South, Incorporated and Time Warner Telecom as approved by the North Carolina Utilities Commission In Docket No. P-19, Sub 381, is hereby approved subject to the terms and conditions established by the FCC in its Bell Atlantic/GTE Merger Order.
IT IS FURTHER ORDERED, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.
IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.
DONE at Montgomery, Alabama, this 27th day of May, 2001.
Jim Sullivan, President
Jan Cook, Commissioner
George C. Wallace, Jr., Commissioner
ATTEST: A True Copy
Walter L. Thomas, Jr., Secretary
END OF DOCUMENT

EXHIBIT D

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC.	DOCKET NO. 031125-TP ORDER NO. PSC-04-0423-FOF-TP ISSUED: April 26, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING BELLSOUTH'S PARTIAL MOTION TO DISMISS

BY THE COMMISSION:

I. Background

On November 3, 2003, IDS filed its informal complaint against BellSouth for alleged overbilling (CATS file 567409-T). Our staff sent a letter on December 16, 2003, closing out the complaint indicating the informal complaint process was not the appropriate forum in which to resolve this matter.

On December 19, 2003, BellSouth denied IDS access to "LENS."[1] On December 23, 2003, IDS Telecom LLC (IDS) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for Overbilling and Discontinuance of Service and a Petition for Emergency Order Restoring Service. On December 24, 2003, BellSouth restored "LENS" access to IDS. On December 30, 2003, IDS amended its Complaint (Amended Complaint) to consist of five counts upon which it requests relief. The five counts are:

(1) Count One - BellSouth improperly disconnected LENS service to IDS in violation of Rule 25-22.032(6), Florida Administrative Code;
(2) Count Two - BellSouth's action of disconnecting LENS service to IDS violates the current interconnection agreement;
(3) Count Three – BellSouth's improper charges to the Q account (settlement account) and termination of LENS service violates the Parties' Settlement Agreement;

[1] "LENS" is an acronym for Local Exchange Navigation System; "LENS" is a support platform that BellSouth developed for competitive local exchange carriers.

(4) Count Four - BellSouth's actions regarding the disconnection of LENS violates the anticompetitive provision of Section 364.01, Florida Statutes; and

(5) Count Five - BellSouth's actions regarding the disconnection of LENS violates the Telecommunications Act of 1996.

On December 31, 2003, our staff facilitated a conference call between the parties. As a result of the conference call, accounting teams from both parties met face-to-face in Miami. Our staff did not attend nor participate in this accounting meeting.

On January 9, 2004, BellSouth filed its Motion for Extension of Time to file its response to IDS' complaint. On January 16, 2004, BellSouth filed its Partial Motion to Dismiss and Answer regarding the Amended Complaint. On January 23, 2004, IDS filed its Unopposed Motion for Extension of Time which was granted by Order No. PSC-04-0184-PCO-TP, issued February 23, 2004. On February 6, 2004, IDS filed its response to BellSouth's Partial Motion to Dismiss and Answer.

II. Partial Motion to Dismiss

A. BellSouth's Motion to Dismiss

In support of its Motion, BellSouth states that in IDS' Amended Complaint, IDS asks this Commission to interpret the parties' current Interconnection Agreement (Current Agreement), the parties' settlement agreement (Settlement Agreement), and the parties' amended settlement agreement (Settlement Amendment). BellSouth contends that IDS' wants this Commission to find that (1) it violated the Settlement Agreement and the Current Agreement; and (2) its actions relating to the violation of the Settlement Agreement and Current Agreement also violate Florida and federal law. BellSouth asserts that this Commission does not have subject matter jurisdiction to do either.

BellSouth states that a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). BellSouth asserts that in disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be true.[2] In determining the sufficiency of a complaint, this Commission should confine its consideration to the complaint and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958).

BellSouth states that, additionally, in order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. See Keena v. Keena, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). BellSouth asserts that that subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by

[2] Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In the matter of Complaint and Petition of John Charles Heekin Against Florida Power & Light Company (citing to Varnes, 624 So.2d at 350).

waiver or acquiescence. Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). BellSouth contends that this Commission, therefore, must dismiss a complaint or a petition to the extent that it asks this Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that this Commission is not authorized to grant.[3]

BellSouth asserts that this Commission must determine whether the Legislature has granted it any authority to find that BellSouth is in violation of federal law or that BellSouth has violated a settlement agreement. BellSouth contends that in making these determinations, this Commission must keep in mind that the Legislature has never conferred upon this Commission any general authority to regulate public utilities, including telephone companies. See City of Cape Coral v. GAC Util., Inc., 281 So. 2d 493, 496 (Fla. 1973). BellSouth asserts that instead, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." See Deltona Corp. v. Mayo, 342 So. 2d 510, 512 n.4 (Fla. 1977): *accord* East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach, 659 So. 2d 402, 404 (Fla. 4th Dist. Ct. App. 1995) (noting that an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and that "as a creature of statue," an agency "has no common law jurisdiction or inherent power . . . . ")

BellSouth further contends that that any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917); State v. Louisville & N.R. Co., 49 So. 39 (Fla. 1909). BellSouth asserts that finally, ". . . any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977). BellSouth argues that IDS cannot demonstrate that this Commission has the authority to grant the specific relief IDS requests. Specifically, BellSouth claims that this Commission does not have subject matter jurisdiction over alleged violations of federal law. BellSouth asserts that a cursory review of Chapter 364, Florida Statutes, shows that the Legislature has not granted this Commission any authority to determine whether a carrier has violated federal law. BellSouth contends that while this Commission has authority under the Act in Section 252 arbitration proceedings to interpret and resolve issues of federal law, including whether or not the arbitrated issues comply with Section 251 and FCC regulations prescribed pursuant to Section 251, the Act does not grant this Commission any general authority to resolve and enforce purported violations of federal law. See, e.g., 47 U.S.C. §251.

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[3] See, e.g. Order No. PSC-01-2178-FOF-TP, issued November 6, 2001, in Docket No. 010345-TP, In the Matter of Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Inc. for Structural Separation of BellSouth Telecommunications, Inc. into Two Distinct Wholesale and Retail Corporate Subsidiaries, (granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation."); Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In Re: Complaint and petition of John Charles Heekin Against Florida Power & Light (dismissing a complaint because the complaint involved "a claim for monetary damages, an assertion of tortious liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.")

BellSouth asserts that this Commission recently addressed this exact issue in Order No. PSC-03-1892-FOF-TP[4], BellSouth contends that in the Sunrise Order, this Commission held that "[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes" and that "[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which that are created." See Sunrise Order at p. 3 (citations omitted). BellSouth continues to cite the Sunrise Order for the proposition that this Commission, however, can construe and apply federal law ". . . in order to make sure [its] decision under state law does not conflict" with federal law. Id. at pp. 3-4. BellSouth asserts that accordingly, in the Sunrise Order, this Commission determined that it ". . . cannot provide a remedy (federal or state) for a violation of . . ." federal law, but can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. Id. at p. 5. BellSouth contends that this Commission noted that any ". . . [f]indings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper jurisdiction . . . ." Id.

BellSouth contends that here, IDS is requesting that this Commission find, based on the same acts, that BellSouth violated Florida law as well as federal law. See Amended Complaint at pp. 12-13. BellSouth asserts that as set forth in the Sunrise Order, under Florida law, this Commission lacks jurisdiction to make such a finding based solely on federal law. Accordingly, BellSouth requests that this Commission dismiss IDS' Amended Complaint to the extent it seeks a finding that BellSouth has violated federal law.

Next, BellSouth claims that this Commission lacks subject matter jurisdiction to interpret and enforce the Settlement Agreement. BellSouth asserts that IDS nevertheless, requests that this Commission interpret the Settlement Agreement and Settlement Amendment and find that BellSouth is in violation of both. BellSouth acknowledges that this Commission does have authority under state and federal law to interpret and enforce agreements that it approves pursuant to the Act but contends that it is well-settled that this Commission does not have any authority to interpret and enforce general contracts. See Section 364.162, Florida Statutes (authorizing Commission to interpret and enforce agreements that it approves under state law); BST v. MCImetro Access Transmission Serv., 317 F. 3d 1270 (11th Cir. 2003) (finding the state commissions have the same authority under the Act); United Tel. Co. of Fla. v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986) (finding that this Commission did not have authority to modify rate contracts between telephone companies); and, Order No. PSC-95-0536-S-WS, issued April 28, 1995, in Docket No. 930256-WS, In Re: Petition for Limited Proceeding to Implement Water Conservation Plan in Seminole County by Sanlando Utilities Corporation (Sanlando Case), at p. 3 (finding that this Commission lacked authority to resolve certain disputes relating to a settlement and stipulation).

BellSouth asserts that the laws of Florida do not provide this Commission with jurisdiction to interpret and enforce a private, negotiated settlement agreement. Thus, BellSouth requests that this Commission dismiss IDS' Amended Complaint to the extent it seeks a finding that BellSouth has breached the Settlement Agreement and/or the Settlement Amendment.

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[4] Order No. PSC-03-1892-FOF-TP, issued December 11, 2003, in Docket No. 030349-TP, In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth's Alleged Use of Carrier-to-Carrier Information (Sunrise Order)

B. IDS' Response

IDS asserts that it properly petitioned this Commission for resolution of certain disputes arising from its interconnection agreements with BellSouth as follows: (1) BellSouth's billings; (2) BellSouth's discontinuance of service to IDS for non-payment of disputed billing; (3) and BellSouth's discontinuance of LENS service to IDS for non-payment of disputed billings. IDS contends that these allegations must be taken as true for purpose of reviewing BellSouth's Motion to Dismiss. Varnes v. Dawkins; and Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000).

IDS argues that this Commission has clear authority to resolve this dispute. IDS contends that it petitioned this Commission to interpret and enforce its interconnection agreement with BellSouth, and BellSouth admits that Section 364.162, Florida Statutes, provides this Commission with subject matter jurisdiction to do so. IDS asserts that this dispute is grounded on the parties' interconnection agreements and could not have arisen in their absence. IDS contends that because BellSouth's actions violate Florida and federal law, as well as the parties' Settlement Agreement, IDS has asked this Commission to make appropriate findings regarding such violations.

IDS states that BellSouth's argument that this Commission lacks subject matter jurisdiction to resolve and enforce alleged violations of federal law, or to interpret or enforce a settlement agreement, misstates IDS' claims. IDS claims that it is not seeking enforcement of federal law or its Settlement Agreement. To the contrary, IDS asks this Commission to interpret and enforce its interconnection agreements, and seeks only findings that BellSouth's actions violate federal law as well as the Settlement Agreement. IDS states that importantly, its Amended Complaint seeks no relief specific to such findings, but merely reiterates its request that this Commission resolve the interconnection dispute in its favor, order BellSouth to restore LENS service to IDS as required by the interconnection agreement, and prohibit BellSouth from similarly violating its agreements with IDS in the future. IDS contends that it is axiomatic that this Commission may consider such issues and make any findings that may be necessary to the resolution of any complaint lawfully placed before it. IDS states that BellSouth has cited no authority that prevents this Commission from considering the issues raised by IDS or making the findings it seeks.

IDS argues that BellSouth's reliance on Order No. PSC-03-1392-FOF-TP for dismissal of the complaint is entirely misplaced. IDS states that unlike the present case, where IDS asks this Commission to interpret and enforce an interconnection agreement, Supra Telecommunications and Information Systems, Inc. (Supra) specifically asked this Commission to enforce a federal statute. IDS acknowledges that this Commission found it was not authorized to take administrative action based solely on federal statutes, and as such could not provide a remedy for a violation of 47 U.S.C. §222(b). IDS emphasizes, however, that this Commission noted that it could interpret a federal provision and apply it to the facts of a case (to the extent necessary to ensure its findings and conclusions under state law do not conflict with federal law.) Order No. PSC-03-1392-FOF-TP at page 5

IDS asserts that in order to make the finding requested by IDS, this Commission need only interpret a federal provision and apply it to the facts of this case, as it has previously found it has the authority to do. IDS contends that unlike Supra, it has not asked this Commission to take administrative action based solely on federal statutes or to provide a specific remedy for violation of a federal statute. IDS states that it seeks, enforcement of its interconnection agreements with BellSouth, and the particular relief sought is specific to the terms of those agreements. IDS argues that the fact it asserts that BellSouth's actions also constitute violations of federal law does not remove this Commission's authority to review those actions.

IDS contends that BellSouth's argument regarding this Commission's alleged lack of authority over the parties' Settlement Agreement is overly broad and therefore flawed, for at least two reasons. IDS argues that first, the Settlement Agreement forms the basis for billing disputes under the Current Agreement. IDS states that BellSouth has declared that IDS' failure to make payments under the Settlement Agreement constitutes a breach of the Current Agreement, thus allegedly justifying BellSouth's discontinuance of LENS service. IDS asserts that on the other hand, it has raised good faith disputes regarding BellSouth's billing pursuant to the Settlement Agreement. IDS contends that this Commission, therefore, must review and interpret the Settlement Agreement in order to resolve Counts One, Two, and Four of IDS' Amended Complaint.

IDS states that second, the Current Agreement incorporates the Settlement Agreement and makes it clear that a failure to make payment of prior obligations – including those obligations embodied in the Settlement Agreement – will constitute a breach of the Current Agreement:

> [T]his Agreement sets forth the entire understanding and except for Settlement Agreements that have been negotiated separate and apart from this Agreement, supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions between them. Any orders placed under prior agreements between the Parties shall be governed by the terms of this Agreement and IDS . . . acknowledges and agrees that *any and all amounts and obligations owed for services provisioned or orders placed under prior agreements between the Parties, related to the subject matter hereof, shall be due and owing under this Agreement and be governed by the terms and conditions of this Agreement* as if such services or orders were provisioned or placed under this Agreement. (emphasis in Response).

See, Section 31.1, General Terms and Conditions, Current Agreement. IDS argues that this Commission's review of the Settlement Agreement is an essential step in resolution of the instant interconnection dispute. IDS states that BellSouth can point to no case or statute that prohibits this Commission from reviewing and interpreting the Settlement Agreement. IDS acknowledges that if its Amended Complaint only alleged a breach of a Settlement Agreement, this Commission would lack subject matter jurisdiction over the complaint and even adds if BellSouth were only seeking to dismiss Count Three of the Amended Complaint, IDS might

agree with BellSouth's position. IDS emphasizes, however, that BellSouth has not directed its argument specifically to Count Three of the Amended Complaint, but instead attempts to prevent this Commission from any consideration of the Settlement Agreement.

Finally, IDS asserts that BellSouth's Motion is deficient in that it has not specified exactly what portion of IDS's Amended Complaint it seeks to dismiss. IDS states that its Amended Complaint details five separate counts against BellSouth, yet BellSouth failed to identify any of them in its Motion. IDS argues that it appears that BellSouth is improperly attempting to bar from this proceeding any evidence and argument relating to the Settlement Agreement or federal law. IDS asserts that this is an improper purpose for a Motion to Dismiss, and thus, BellSouth's Motion should be denied.

C. Decision

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

IDS's complaint sets forth five counts on which it is requesting relief, but the essence of the disputes involves whether monies paid or not paid to an account especially established under a settlement agreement justified disconnection proceedings under the current interconnection agreement. In Count One, IDS requests that we find BellSouth's actions in violation of Rule 25-032(6), Florida Statutes. IDS requests relief in Count Two based on BellSouth's alleged violation of its current interconnection which was approved by this Commission. In Count Three, IDS seeks a finding that BellSouth violated its Settlement Agreement. Count Four requests relief based on BellSouth's alleged anticompetitive behavior in violation of Chapter 364, Florida Statutes. Finally, Count Five seeks relief based on BellSouth's alleged anticompetitive behavior in violation of the Telecommunications Act of 1996.

We find BellSouth's argument is without merit to the extent that it argues that IDS's complaint fails to state a cause of action merely because the Complaint requires us to refer to a privately negotiated settlement agreement and federal law to settle the dispute. In the Sunrise Order, we found that

> In order to ensure that our decision under state law does not conflict with the federal provision, we may interpret the federal provision and apply it to the facts of this case. Findings made as a result of such federal law analysis would not, however, be considered binding on the FCC or any court having proper

jurisdiction to hear and remedy complaints regarding violations of Section 222 of the Act.

Order No. 03-1392-FOF-TP at p. 5. That analysis is equally applicable here. Thus, the fact that a count of this Complaint asks this Commission to interpret and apply federal law is not in and of itself reason to dismiss that portion of the complaint.

However, this Commission also noted in the Sunrise Order that it has never asserted jurisdiction to enforce an alleged violation of the Act in any situation in which this Commission did not also have state law authority for doing so. Id. at 4-5. In addition, this Commission found that state agencies, as well as federal agencies, are only empowered by the statutes pursuant to which those agencies were created. Id. (citing Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374, 375 (1986); Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1254-1255 (Fla. 1990); Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, 1082 (Fla. 1st DCA 1995). This Commission acknowledged that federal courts have found that a state agency is not authorized to take administrative action based solely on federal statutes. Id. at 3 (citing Curtis v. Taylor, 648 F. 2s 946 (5th Cir. 1989)). Since Count Five relies solely on a federal statute as the basis for relief, we find it is appropriate to dismiss Count Five.

Similarly, we find it is appropriate to dismiss Count Three. Even IDS acknowledged in its response that Count Three would be appropriately dismissed if its Amended Complaint had only alleged a breach of a Settlement Agreement (not approved by this Commission).[5] We agree that this Commission, in this instance, is not the appropriate forum to enforce this Settlement Agreement because we did not review and approve it. In the Sanlando Case, this Commission noted that in a typical contract dispute a party may always seek to enforce a provision or remedy a breach of contract in court. Order No. PSC-95-0536-S-WS at p. 4. We note that a settlement agreement is in essence a contract. Since Count Three solely relies upon the Settlement Agreement as the basis for resolving the dispute in IDS's favor, we also find it is appropriate to dismiss Count Three. We emphasize that dismissal of Count Three does not by itself prevent us from considering the Settlement Agreement as evidence in the current dispute. Nevertheless, we shall not decide here whether the Settlement Agreement should or should not be admitted into evidence, as it would be premature to do so. We will address that issue, should a party raise it, at an appropriate time in the future.

We note that even with the dismissal of Counts Three and Five, IDS has alleged three other counts which rely on other provisions of state and federal law under which this Commission has jurisdiction to proceed. Specifically, the allegations raised in Count Three appear to be addressed in Count Two and the allegations raised in Count Five are addressed in Count Four.

Thus, BellSouth's Partial Motion to Dismiss IDS' Amended Complaint shall be granted. Specifically, Counts

[5] In its Complaint, IDS notes that the Settlement Agreement was reached as a resolution to Docket No. 010740-TP. By Order No. PSC-01-2191-FOF-TP, issued November 8, 2001, this Commission acknowledged the withdrawal of the Complaint and closed the docket, but did not issue any order approving the Settlement Agreement.

Three and Five shall be dismissed for lack of subject matter jurisdiction.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Partial Motion to Dismiss, specifically addressing Counts Three and Five of IDS's Amended Complaint, is hereby granted. It is further

ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 26th day of April, 2004.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

This is a facsimile copy. Go to the Commission's Web site, http://www.floridapsc.com or fax a request to 1-850-413-7118, for a copy of the order with signature.

(S E A L)

PAC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

EXHIBIT E

In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information.	DOCKET NO. 030349-TP ORDER NO. PSC-03-1392-FOF-TP ISSUED: December 11, 2003

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

FINAL ORDER ON BELLSOUTH'S ALLEGED USE OF CARRIER TO CARRIER INFORMATION

APPEARANCES:

NANCY WHITE, ESQUIRE, AND JAMES MEZA, III, ESQUIRE, 150 West Flagler Street, Suite 1910, Miami, Florida 33130; NANCY H. SIMS, ESQUIRE, 150 North Monroe Street, Suite 400, Tallahassee, Florida 32301-1556
On behalf of BellSouth Telecommunications, Inc.

ADENET MEDACIER, ESQUIRE and JORGE CRUZ-BUSTILLO, ESQUIRE, Supra Telecommunications & Information Systems, Inc., 2620 S.W. 27th Avenue, Miami, Florida 33133-3005
On behalf of Supra Telecommunications & Information Systems, Inc.

LINDA H. DODSON, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

BY THE COMMISSION:

I. CASE BACKGROUND

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

On June 9, 2003, Supra filed for leave to amend its petition, attaching its Amended Emergency Petition alleging BellSouth's violation of 47 U.S.C. Section 222 and Florida Public Service Commission policies regarding the use of wholesale information in retail marketing. In its original petition, Supra alleged that BellSouth's $75 Cash Back Promotion violated Florida law and that BellSouth was allegedly using carrier-to-carrier information for marketing purposes in violation of 47 U.S.C. Section 222(b) and Section 364.01(4)(g), Florida Statutes. In its Amended complaint, Supra removed the allegations regarding the $75 Cash Back Promotion, stating that the purpose of the amendment is to narrow the focus of its petition to issues involving violations of 47 USC § 222, Section 364.01(4)(g), Florida Statutes, and Commission policy. This removed the anti-competitive elements of Supra's complaint.

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

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

0786-PCO-TP, issued July 2, 2003, Supra's Motion for Leave to file direct testimony one day late was granted.

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

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

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

II. JURISDICTION

Federal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes. Curtis v. Taylor, 648 F.2d 946 (5th Cir. 1986). State agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they were created. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374, 375 (1986); Florida Public Service Commission v. Bryson, 569 So.2d 1253, 1254-1255 (Fla. 1990); Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, 1082 (Fla. 1st DCA 1995).

However, the U.S. Supreme Court, in FERC v. Mississippi, 456 U.S. 742 (1982), also recognized that the effect of federal and state legislation is often intertwined and requires that state agencies act in accordance with laws mandated by Congress's vision when implementing similar state law. Thus, to the extent we need to construe and apply the federal provision

in order to make sure our decision under state law does not conflict, we can and should make such an analysis of federal law. See Testa v. Katt, 330 U.S. 386 (1947); see also Bernice Richard v. Rosenman Colin Freund Lewis & Cohen, 1985 U.S. Dist. LEXIS 15483 (S.D.N.Y. 1985) (interpretation of federal law does not invariably raise a substantial question of federal law); and Petersburg Cellular Partnership d/b/a 360° Communications v. Bd., 205 F.3d 688 (4th Cir. 2000) (state commission may not take action in an area where Congress has demonstrated a desire for the federal government to act, because it would promote conflicting patchwork of [state and federal] requirements "that the Act was designed to eliminate.")

Section 222 of the Act, which was included as part of the 1996 Federal Telecommunications Act, does not recognize a role for state commissions in the enforcement of the provision, unlike other provisions of the Act[1]. 47 U.S.C. Section 222(b) reads as follows:

> CONFIDENTIALITY OF CARRIER INFORMATION. - A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.[2]

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

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

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

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

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

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

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

having proper jurisdiction to hear and remedy complaints regarding violations of Section 222 of the Act.

III. Sharing of wholesale information with retail operations

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

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

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

We believe it is important to distinguish customer proprietary network information (CPNI), from wholesale or

carrier-to-carrier information. BellSouth witness Ruscilli differentiates the two in his rebuttal testimony, stating:

> Customer Proprietary Network Information or CPNI as defined in Section 222(f)(1) of the Telecommunications Act of 1996, means "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." Therefore, the phone number and address information of a customer is not CPNI. However, information pertaining to the features the customer has on their line is CPNI.
>
> Wholesale information, on the other hand, is information that BellSouth has in its possession because it provides services to other carriers that provide services to end user customers.

The FCC has addressed the use of CPNI and wholesale information when winback activities are initiated and explains that winback marketing can involve two types of marketing. In Order FCC 99-223, released September 3, 1999, at ¶ 64, the FCC stated:

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

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

The FCC has addressed win-back marketing promotions to regain customers in a number of orders. In Order FCC 99-223, released September 3, 1999, at ¶ 69, the FCC states:

> Some commenters argue that ILECs should be restricted from engaging in "win-back" campaigns, as a matter of policy, because of the ILECs' unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation at Part V.C.3, *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice. Because "win-back" campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory.

The FCC again addressed "win-back" campaigns in Order No. FCC 02-147[3], released May 15, 2002. In answer to commenters remarks about BellSouth's marketing tactics, the FCC acknowledged state commission actions and stated:

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

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

It should be noted that the interim measure discussed in the above paragraph, which the Georgia Commission issued to prohibit BellSouth from engaging in any winback activities once a customer has switched to another service provider, was a 7-day waiting period. The FCC also addressed retention marketing and the use of CPNI and wholesale information in FCC Order 03-42, issued March 17, 2003, at ¶ 27-28, stating:

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

> Second Report and Order that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier. Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations.
>
> We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

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

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

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

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

We believe that these findings, in these Orders, are supported by both federal and state law. Not only is sharing of information prohibited by Section 222 of the federal Act, it also appears to present a barrier to competition as prohibited by state law.

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

IV. BellSouth cannot share wholesale information with in-house or third-party marketers.

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

> BellSouth's wholesale operations do not provide leads to its retail operations. Any information used by BellSouth's retail operations to develop lists of former customers that are potentially eligible for promotional offerings are obtained from retail information sources - not wholesale sources.

Both parties agree on how the information regarding a customer change of provider from BellSouth to Supra is provided through BellSouth's OSS system for purposes of winback marketing to regain a customer. The remaining question, which is addressed here, is whether the information that is relayed to BellSouth in-house marketing, or outside third-party marketers, is wholesale or retail information. In this section we will limit the scope of its discussion to the question as to whether BellSouth can share wholesale information with in-house or third-party marketers.

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

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

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

As noted above, both parties agree that BellSouth cannot use wholesale information to furnish leads to its in-house and/or third-party marketers. We believe this position conforms with paragraph 28 of Order FCC 03-42, and Commission Orders PSC-02-0875-PAA-TP, and PSC-03-0726-FOF-TP. Therefore, we find that BellSouth shall not be allowed to use carrier-to-carrier

information, acquired from its wholesale OSS and/or wholesale operations, to furnish leads and/or marketing data to its in-house and third party marketers.

V. BellSouth's Use of Wholesale Information

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

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

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

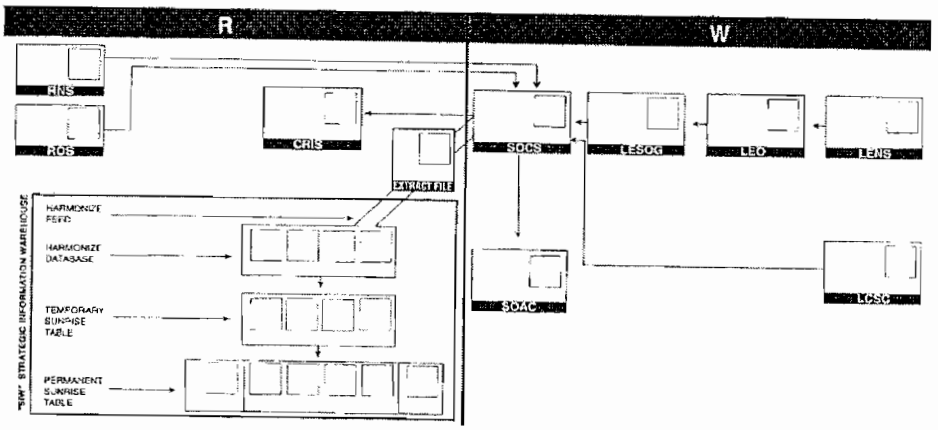
a. BellSouth's CLEC Ordering System

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

making a claim of discriminatory or nondiscriminatory access or parity or anything
of that nature."

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

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



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

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

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

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

If an LSR is "passed" by LESOG, LESOG will mechanically transform the LSR into the service order format that can be accepted by the SOCS and by the other downstream BellSouth systems through which BellSouth's own service orders, as well as CLEC orders, are processed. From LESOG, the CLEC service order flows to and is accepted by SOCS without any manual intervention.

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

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

Service requests submitted via RNS and ROS are handled similarly to the way CLEC requests are handled. In both systems, pre-order transactions are performed to validate addresses, calculated due dates, determine available products and services, reserve telephone numbers or circuit IDS, and perform loop qualification. For its own business needs, BellSouth also obtains end user credit information and customer profile information so that the service representative can determine the best product mix to offer the end user. A CLEC can, likewise, perform similar functions with its end user customer. Upon completion of

gathering all the necessary information for submission of a service request and basic edit validations are "passed", ROS/RNS mechanically transforms the request into the service order format that can be accepted by SOCS and by the other downstream BellSouth systems for provisioning. At the time SOCS accepts the request, whether it be from a CLEC or BellSouth retail, the request is considered to be a completed order and the provisioning process begins.

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

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

b. OPERATION SUNRISE

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

BellSouth's marketing information systems organization (MKIS), through Operation Sunrise, provides marketing support in terms of list management and distribution for target marketing. MKIS is an organization within BellSouth that supports the marketing organization by providing various statistics and information about the sales performance of various BellSouth retail products and services. MKIS tracks information such as

retail line loss, the ordering and cancellation by BellSouth retail customers of various products and services, and numerous other retail data that assist the Marketing organization in creating products and services that appeal to customers.

When an end user's local service is disconnected from BellSouth for any reason, a disconnect or change order is generated. In the case of a CLEC converting a BellSouth retail customer to the CLEC, the disconnect or change order originates from the CLEC's LSR, which is sent to BellSouth either manually or electronically. In the case of a BellSouth retail customer calling to disconnect his or her service, an abandoned station, a retail customer's nonpayment of his account, or numerous other reasons, the disconnect order originates from BellSouth's retail operations. In either case, a specialized reason code is assigned to each order.

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

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

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

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

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

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

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

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

Once the above process is complete, Operation Sunrise conducts a second sweep of the Harmonize Database to identify D orders containing certain retail noncompetitive disconnect reasons codes, such as NF (No Further Activity), CO (Competition), and AS (Abandoned Station), which were previously excluded in the first sweep addressing competitive disconnects. Once identified, Operation Sunrise extracts the selected D order information into the empty temporary table. From the temporary table, Operation Sunrise then extracts the following service order information and places it in the permanent candidate table: retail noncompetitive disconnect reason code, NPA, NXX, line, customer code, and the order completion date. The temporary table is purged again and the information in the permanent candidate table is matched against the CRIS snapshot of retail customer data, and leads are generated.

c. Supra Complaint

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

1. Operation Sunrise Information vs Line Loss Reports

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

The Line Loss Notification reports post daily, except Sunday, to the CLECs' individual Internet web pages and contain only the individual CLEC's accounts. BellSouth asserts that the PMAP line loss report actually provides more information than Sunrise provides, since it provides the name of the customer and

specifically notifies Supra that they lost a customer to another carrier.

Supra agrees that the PMAP line loss report provides it with a list of customers that have disconnected service from Supra, but it stated that, although it could, it does not use the PMAP line loss report to identify potential winback targets. Supra believes that when it comes to form, the information that is available to them in PMAP is not substantially different on a technical basis than what BellSouth has available to it in its Sunrise table. Under Supra's interpretation of FCC rules and orders, it believes it could use the fact that it received notice through PMAP that it lost a customer for winback purposes, but BellSouth can't use the notice it receives from Operation Sunrise for winback purposes.

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

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

> information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

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

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

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

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

The first mailing is a notice from BellSouth Advertising and Publishing Corporation (BAPCO) stating that BAPCO's records

indicate that a change in telephone service has occurred, and states that if the customer needs a directory, to contact them through a special 800 number. A pin number is provided to identify the customer needing the directory. Witness Nilson states that this mailing was received on two occasions this year, once when his Supra line was converted from resale to UNE, and once when his number was placed in a list of lines scheduled for disconnection for non-payment.

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

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

The third mailing is a BellSouth winback letter which includes a $75.00 cash back offer for signing up for the Complete Choice plan, along with a waiver of the local service connection fee. Supra states that the customer that received this letter has not had a single change to his service, and nothing regarding his service flowed through SOCS for 619 days.

Supra believes that the only way for BellSouth to know which lines are in service is to broach the retail/wholesale barrier and exchange information.

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

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

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

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

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

3. Local Toll Reacquisition

Supra alleges that BellSouth's use of the Customer Account Record Exchange (CARE) as its source to generate targeted marketing leads is a violation of section 222(b) and our previous Orders.

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

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

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

4. Business Customer Reacquisition

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

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

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

5. Wholesale vs Retail Information

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

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

customer's service was disconnected as the result of a carrier change order. The FCC clarified its position regarding WorldCom's request by stating in FCC 03-42, at ¶ 27:

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

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

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

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

d. The Second Sweep Incident of Sharing Wholesale Information

On August 27, 2003, BellSouth advised the Commission (via letter), and Supra (via e-mail) that beginning on July 18, 2003, the second sweep of the Harmonize data base extracted disconnect orders associated with at least two wholesale disconnect codes because of a coding error. The two wholesale codes were CC and RT. CC is UNE CLEC to reseller, UNE CLEC to UNE CLEC, or

reseller to UNE CLEC. RT is reseller to reseller. This resulted in a sharing of BellSouth wholesale information with its retail division in violation of Commission Order No. PSC-02-0875-PAA-TP which states:

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

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

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

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

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

to be shared with its retail winback operations in violation of a Commission Order.

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

1. $25K for each day that violation has been occurring until now. (Statutory option)

2. Suspension of certificate. (Statutory option)

3. Dismantle the harmonize feed/or order that BST provide direct access to the harmonize feed for when a customer switches away from the CLEC, the CLEC can send a Letter of Acknowledgment.

4. Require BST to print a date on the letter at the same time they personalize the customer name/address showing "when" the letter was mailed. This date must not be preprinted, or postdated. It must be the actual date the letter is printed.

5. Prohibit a Letter of any sort from being sent to the customers for 90 days - presently Commission policy is 10 days. The - feed takes 7 days for the letter to be generated so 10 days is right on target for when a customer could receive the letter at the earliest. 90 day ban would ensure that if BST continues to use - in the future, the customer is with the competitor for at least three billing cycles.

6. Order that BST shall be required to allow a OSS expert to examine BST's system, twice a year at random. The expert shall be chosen by Supra, but paid for by BellSouth. This expert will report back to see if BellSouth is still utilizing this feed or some other similar system.

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

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

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

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

Section 364.285(1), Florida Statutes, however, does not define what it is to "willfully violate" a rule or order. Nevertheless, it appears plain that the intent of the statutory language is to penalize those who affirmatively act in opposition to a Commission order or rule. See, Florida State Racing Commission v. Ponce de Leon Trotting Association, 151 So.2d 633, 634 & n.4 (Fla. 1963); c.f., McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1st DCA 1982) (there must be an intentional commission of an act violative of a statute with knowledge that such an act is likely to result in serious injury) [citing Smit v. Geyer Detective Agency, Inc., 130 So.2d 882, 884 (Fla. 1961)]. Thus, a "willful violation of law" at least covers an act of purposefulness.

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

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

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

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

Therefore, we find that BellSouth, due to a manual coding error, did, between July 18, 2003, and August 27, 2003, share and/or use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail division, with its in-house marketers and/or third party marketers for marketing purposes. However, this was an isolated incident immediately corrected by BellSouth. Since the mistake was minor, no harm was caused to Supra, and the error was corrected immediately by BellSouth, BellSouth shall not be penalized or fined for this coding error, but BellSouth is put

on notice that future non-compliance of Order No. PSC-02-0875-PAA-TP, or any other order or rule of this Commission, will not be tolerated.

Based on the foregoing, it is,

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that this docket shall remain open for 32 days after issuance of this Order, to allow the time for filing an appeal to run.

By ORDER of the Florida Public Service Commission this 11th Day of December, 2003.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

This is a facsimile copy. Go to the Commission's Web site, http://www.floridapsc.com or fax a request to 1-850-413-7118, for a copy of the order with signature.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by

the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2007, a true and correct copy of the foregoing has been served on the parties set forth below, via the method(s) indicated below:

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