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November 15, 2005

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

Re: <u>Docket No.: 050387-TP</u>
In re: Petition of Supra Telecommunications and Information Systems, Inc. to Review BellSouth Promotional Tariffs

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response to Supra's Motion to File Second Amended Complaint, Partial Motion to Dismiss and Answer, which we ask that you file in the captioned docket.

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

Sincerely,

James Meza III

Enclosures

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

CERTIFICATE OF SERVICE
Docket No.: 050387-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and FedEx this 15th day of November, 2005 to the following:

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James Meza, III

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Supra Telecommunications And Information Systems, Inc. to Review BellSouth's Promotional Tariffs	))))	Docket No. 050387-TP Filed: November 15, 2005

BELLSOUTH'S RESPONSE TO MOTION TO FILE SECOND AMENDED COMPLAINT, PARTIAL MOTION TO DISMISS AND ANSWER

BellSouth Telecommunications, Inc. ("BellSouth") hereby files a Response to the Motion to File Second Amended Complaint, a Partial Motion to Dismiss,[1] and an Answer to the Second Amended Petition filed by Supra Telecommunications and Information Systems, Inc. ("Supra") on November 3, 2005. As explained below, the Florida Public Service Commission ("Commission") should deny Supra's request for cancellation, suspension, postponement, and/or other modification of any of BellSouth's promotions and dismiss, as a matter of law, Supra's request that (1) the Commission find that BellSouth has an obligation to resell its promotional offerings; and (2) the Commission conduct a hearing in 45 days.

INTRODUCTION

Supra's Complaint is designed solely to insulate Supra from the rigors of a competitive marketplace. Supra attempts to achieve this competitive nirvana by suggesting that certain BellSouth promotional activities—offering potential customers cash back or a similar incentive to sign up for BellSouth's service--violate Florida and federal law. Supra's allegations are meritless, and Supra's attempt to prevent BellSouth from competing should be summarily rejected. Offering potential customers a monetary

[1] BellSouth has a pending Partial Motion to Dismiss Supra's First Amended Petition. The grounds alleged therein are essentially the same grounds asserted herein. Thus, to the extent the Commission grants Supra's request to file a Second Amended Petition, BellSouth's original Partial Motion to Dismiss should be consumed in the Motion to Dismiss filed here.

incentive to sign up for service is a legitimate and common form of competition, and consumers benefit from the competition. In this case, Supra's attempts to insulate itself from this competition are ironic given Supra's own similar promotional activities. Indeed, in the recent past and continuing today, Supra has competed against BellSouth and other carriers for Florida consumers by offering "free" service for a month, "200 minutes of free Long Distance", a waiver of connection fees, gifts that exceed $300 in value, as well as a chance to win a Mercedes. In fact, Supra's current promotions provide customers with an opportunity to receive the following prizes in its "Supra Rewards" promotions:

- (1) 2005 Mini Cooper or $15,000 cash;
- (6) Sandals Jamaican Resort vacations, including airfare;
- (3) Phillips 26" Plasma TVs;
- (12) Dell Inspiration 6000 Laptops;
- (12) Apple Mini Ipods;
- (3) Cannon Power Shot A510 Digital Cameras;
- (3) Sony PlayStation2, with games;
- (30) Macaroni Grill $25 gift cards;
- (193) $5 credit on your phone bill.

See Supra Rewards Webpage, attached hereto as Exhibit A.

Supra's Complaint also ignores the fact that, as illustrated below, promotional offerings are an established and effective method that virtually all carriers employ to compete for customers in the highly competitive communications market.

- MCI offers two months of "**free service**" to new customers that sign up for its Neighborhood Plan. In addition, new customers of the Neighborhood Plan receive "3,000" airline miles with Northwest Airlines;

- AT&T offered new customers who switch to AT&T local service a **$25 credit** on their long distance bill;

- Z-Tel (now Trinsic) offered one month of **free service** of its Z-Line Home Unlimited for new customers who switch to Z-Tel service (a value of $49.99). In addition, Trinsic provides customers with unlimited bill credits for referring customers;

- ClearTel is offering new residential customers one month of **free service**;

- Momentum Telecom offers its customers a **$20** credit for referring a customer and has previously offered a chance to win **$10,000** for referrals;

- Vonage offers new customers a "**Free First Month of Service!**", a value up to $24.99;

- AT&T's CallVantage offers the "**first month free**" upon signing up for its Service Plan. CallVantage previously offered new customers a **$120** credit for six months worth of service;

- Sprint offers a **$30** Target Gift Card upon signing up for one of its Solutions Packages.

- Most of these carriers do not charge any conversion or switching fees.

This Commission has already determined in In re: Petition for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Tariffs, Docket No. 020119-TP, Order No. PSC-03-0726-FOF-TP, June 19, 2003 (Key Customer Order) that winback efforts, like the promotions at issue herein, benefit Florida consumers.[2] Specifically, the Commission held the following in the Key Customer Order:

[2] See Key Customer Order at 40.

> We believe a win-back promotion such as the Key Customer offering is not, in and of itself, detrimental. In fact, win-back promotions can be very beneficial to Florida consumers by giving them a choice of providers with varied services at competitive prices.[3]

In support of this finding, the Commission cited In the Matter of Implementation of the Telecommunications Act of 1996, FCC Order 99-223 (Sept. 3, 1999), wherein the Federal Communications Commission ("FCC") held:

> Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs.
>
> Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILEC's 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. . . However, once a customer is no longer obtaining services 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 winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing they are truly predatory.

FCC Order 99-32 at ¶¶ 68-70 (emphasis added). Contrary to the FCC's express finding authorizing ILECs to compete for former customers, Supra's Complaint is a calculated

[3] Id.

effort to prohibit BellSouth from **competing and providing Florida consumers with choices and lower prices** and thus should be rejected.

RESPONSE TO MOTION TO FILE SECOND AMENDED COMPLAINT

Supra requests leave to file a Second Amended Complaint in this proceeding. In support, Supra argues that a Second Amended Complaint is necessary to (1) add tariffs and promotions to the Complaint that the United States Bankruptcy Court, Southern District of Florida ordered Supra to refrain from challenging until after September 18, 2005; and (2) "add additional state law to assist the Commission in resolving BellSouth's Partial Motion to Dismiss of Supra's First Amended Petition dated July 21, 2005 and in support of Supra's claim that BellSouth has an obligation to make its promotions available for resale." See Motion at 1-2. Supra also claims that BellSouth "has no objection to the relief requested." Id. at 2.

To be clear, BellSouth has no objection to Supra filing a Second Amended Complaint to add tariffs and promotions that the Bankruptcy Court ordered Supra to refrain from litigating until after September 18, 2005. BellSouth's rationale for providing its consent is simple – the September 18, 2005 deadline has expired. However, BellSouth never provided and Supra never asked for BellSouth's consent to add state law claims to bolster its deficient resale argument. Accordingly, BellSouth does not agree to Supra filing its Second Amended Complaint in this regard nor does BellSouth agree that Supra's attempted amendment cures or renders moot BellSouth's Partial Motion to Dismiss. In any event though, as explained more fully below, Supra's token reference to inapplicable state law in the Second Amended Complaint does not cure the defects with this count. Accordingly, BellSouth reasserts its Partial Motion to Dismiss.

PARTIAL MOTION TO DISMISS

Supra's Complaint essentially consists of two counts: (1) BellSouth's service offerings, when combined with the subject promotions, violate Sections 364.3381 and 364.051(5), Florida Statutes because they result in BellSouth providing service below its costs; and (2) BellSouth is violating its federal resale obligations contained in the Telecommunications Act of 1996 (the "Act") and its state resale obligation by not making these promotions available for resale ("Resale Count"). See Complaint at ¶¶ 26-34. For the following reasons, the Commission does not have authority to address the Resale Count.

A. Standard for Motion to Dismiss.

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, the Commission must assume all of the allegations of the complaint to be true. Heekin v. Florida Power & Light Co., Order No. PSC-99-10544-FOF-EI, 1999 WL 521480 *2 (citing to Varnes, 624 So. 2d at 350). In determining the sufficiency of a complaint, the 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).

B. The Commission Does Not Have Subject Matter Jurisdiction To Resolve the Resale Count.

Furthermore, 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). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). This Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant. See, e.g, Order Granting Motion to Dismiss (PSC-01-2178-FOF-TP) in Docket No. 010345-TP (Nov. 6, 2001) (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 Denying Complaint and Dismissing Petition (PSC-99-1054-FOF-EI) in Docket No. 981923-EI (May 24, 1999) (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved "a claim for monetary damages, an assertion of tortuous liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.").

The Commission, therefore, must determine whether the Legislature has granted it any authority to find that BellSouth is in violation of its federal resale obligations under the Act. In making these determinations, the Commission must keep in mind that the Legislature has never conferred upon the 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). 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 . . . .").

Moreover, 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). 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). As explained below, Supra cannot demonstrate that the Commission has the authority to grant the specific relief Supra requests.

As can be seen by a cursory review of Chapter 364, Florida Statutes, the Legislature has not granted the Commission any authority to determine whether a carrier has violated federal law. In fact, even if the Florida Legislature had granted the Commission authority to determine whether a carrier was violating its resale obligation under federal law, the Florida Legislature would have no legal basis for granting that authority. While the 1996 Act provides that the Commission has authority under Section 252 arbitration proceedings to interpret and resolve issues of federal law, including whether or not the arbitrated issues comply with Section 251 and the FCC regulations

prescribed pursuant to Section 251, the Act does not grant the Commission with any general authority to resolve and enforce purported violations of federal law. See e.g., 47 U.S.C. § 251.

The Commission addressed this issue in Order No. PSC-03-1892-FOF-TP, issued on 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"). In the Sunrise Order, the 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 they are created." See Sunrise Order at 3 (citations omitted). The Commission further noted, however, it can construe and apply federal law "in order to make sure [its] decision under state law does not conflict" with federal law. Id. at 3-4. Accordingly, in the Sunrise Order, the Commission determined that it "cannot provide a remedy (federal or state) for a violation of" federal law but that the Commission can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. Id. at 5. The 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.

The Commission echoed these same principles in Order No. PSC-04-0423-FOF-TP (Docket No. 031125-TP), wherein it dismissed a request by a CLEC to find that BellSouth violated federal law. Based on the Sunrise Order, the Commission dismissed

the federal law count of the complaint, holding "[s]ince Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five." Id.

Here, Supra primarily asserts that BellSouth refuses to allow Supra to resell its promotions in violation of the 1996 Act. See Complaint at 32, 34-36. Supra makes this abundantly clear in paragraph 6 of the Amended Complaint, wherein Supra alleges: ". . . BellSouth refuses to allow Supra (and most likely all CLECs) to resell these promotional offerings (inclusive of the monetary inducements) in violation of 47 USCA § 251(c)(4)." *See* Second Amended Complaint at ¶ 6. In support of this alleged obligation, Supra cites generally to and relies upon the Act, 47 U.S.C. § 251(c)(4), and FCC rules and decisions, all of which are federal in nature. Id. Accordingly, consistent with Commission precedent cited above and Florida law, the Commission should dismiss Supra's request that it find that BellSouth is in violation of federal law by not allowing Supra to resell its promotions.

The fact that Supra attempts to cure this jurisdictional deficiency by adding a reference to Section 354.151(2), Florida Statutes, in paragraph 33 of the Second Amended Complaint is of no consequence. Indeed, paragraph 33 is the only section of the Resale Count that addresses state law, and this reference consists solely of quoting the statute with no discussion or analysis. The remainder of the Resale Count deals with BellSouth's federal resale obligations and includes discussions of the Act, the "intent of Congress" in establishing the federal resale obligations, and FCC rules and orders. *See* Second Amended Complaint at ¶¶ 32, 34-36, and 38. Consequently, it is clear that Supra raised Section 354.151(2) for the sole purpose of defeating BellSouth's Motion to Dismiss.

And, importantly, Section 354.151(2) is not even applicable to the instant dispute, because BellSouth and Supra have not executed an interconnection agreement pursuant to this statute or pursuant to Florida law. Accordingly, this statute cannot form the basis of Supra's Complaint, because Supra has no rights under it. For all these reasons, the Commission should dismiss Supra's Resale Count.[4]

C. Supra's Request for a Hearing in 45 Days Should Be Dismissed.

In addition, Supra's attempt to invoke Section 364.059(1)(a)'s 45 day hearing schedule should be summarily rejected because that statute is currently inapplicable to BellSouth. Specifically, Section 364.059 provides that only if a company has elected, pursuant to Section 364.051(6), "to have its local telecommunications services treated the same as its nonbasic service" does the 45 day hearing schedule apply. See Section 364.059(1). Section 364.051(6) provides that it is triggered only "[a]fter a local exchange telecommunications company that has more than 1 million access lines in service has reduced its intrastate switched network access rates to parity. . ." BellSouth is not operating under either of these statutes and thus the 45 day hearing schedule contained in 364.059(1)(a) does not apply.

Moreover, even if did apply to BellSouth, the 45 day hearing schedule is only applicable when a company is seeking a stay of a price reduction for basic service. Supra is not seeking a stay of any BellSouth basic service price reduction in its Complaint, and BellSouth, in fact, is not reducing prices for basic services. Thus, Supra's reliance on Section 364.059 is factually inapplicable as well. For these reasons, the

[4] Because Supra has no rights under Section 364.161, Florida Statutes, the Commission should also dismiss Supra's Complaint to the extent it seeks relief pursuant to this statute.

Commission should dismiss Supra's request for a hearing in 45 days pursuant to Section 364.059, Florida Statutes.

ANSWER

1. BellSouth admits that Supra is a competitive local exchange carrier ("CLEC") certificated by the Commission. The remainder of Paragraph 1 of the Second Amended Complaint requires no response from BellSouth.

2. Paragraph 2 of the Second Amended Complaint requires no response from BellSouth.

3. BellSouth admits Paragraph 3 of the Second Amended Complaint.

4. BellSouth denies Paragraph 4 of the Second Amended Complaint, except to admit that the Commission's December 2004 Annual Report on Competition speaks for itself and is the best evidence of its terms and conditions.

5. BellSouth denies the allegations contained in Paragraph 5 of the Second Amended Complaint, except to admit that BellSouth, at one time, filed the tariffs represented in Exhibits A-G and I of the Second Amended Complaint. BellSouth's current tariffs speak for themselves and are the best evidence of their terms and conditions. BellSouth affirmatively states that it did not file the tariff referenced in Exhibit H, which is a tariff filing made by BellSouth Long Distance, Inc. BellSouth also denies any implication that the attached tariffs are BellSouth's current tariffs or that all of the subject tariffs are still in effect.

6. BellSouth denies the allegations contained in Paragraph 6 of the Second Amended Complaint, except to admit that BellSouth's promotions are not available for

resale under federal law. BellSouth further states that, as set forth above in the Motion to Dismiss, the Commission does not have jurisdiction to address this allegation.

7. BellSouth denies the allegations contained in Paragraph 7 of the Second Amended Complaint.

8. BellSouth denies the allegations contained in Paragraph 8 of the Second Amended Complaint, except to admit that BellSouth has two service offerings named Complete Choice and Preferred Pack. BellSouth denies Supra's description of these service plans, including the identified rate for each plan, but admits that the terms and conditions as well as the description of each service plan are contained in BellSouth's current tariffs, which speak for themselves and are the best evidence of their terms and conditions. BellSouth also admits that it does collect a $6.50 End User Common Line Charge from its end users who subscribe to the subject service plans.

9. BellSouth denies the allegations contained in Paragraph 9 of the Second Amended Complaint, except to admit that the FCC has determined that unbundled local switching is no longer a UNE.

10. BellSouth denies the allegations contained in Paragraph 10 of the Second Amended Complaint, except to admit that BellSouth uses several different promotions in an attempt to compete for Florida consumers. Some of the promotions may be combined with other promotions while other promotions, including a number of those identified by Supra, cannot. The terms and conditions associated with each promotion are contained in BellSouth's tariffs, which are the best evidence of their terms and conditions.

11. BellSouth denies the allegations contained in Paragraph 11 of the Second Amended Complaint, except to admit that the subject promotion exists and that its

description and conditions are contained in BellSouth's tariff, which is the best evidence of its terms and conditions.

12. BellSouth denies the allegations contained in Paragraph 12 of the Second Amended Complaint, except to admit that the subject promotions exist and that their description and conditions are contained in BellSouth's tariffs, which are the best evidence of their terms and conditions.

13. BellSouth denies the allegations contained in Paragraph 13 of the Second Amended Complaint, except to admit that the subject promotion exists and that its description and conditions are contained in BellSouth's tariff, which is the best evidence of its terms and conditions.

14. BellSouth denies the allegations contained in Paragraph 14 of the Second Amended Complaint, except to admit that the subject promotion exists and that its description and conditions are contained in BellSouth's tariff, which is the best evidence of its terms and conditions.

15. BellSouth denies the allegations contained in Paragraph 15 of the Second Amended Complaint, except to admit that the subject promotion exists and that its description and conditions are contained in BellSouth's tariff, which is the best evidence of its terms and conditions.

16. BellSouth denies the allegations contained in Paragraph 16 of the Second Amended Complaint, except to admit that some of the promotions may be combined with other promotions while other promotions, including some of those identified by Supra, cannot. The terms and conditions associated with each promotion are contained in BellSouth's tariffs, which are the best evidence of their terms and conditions.

17. BellSouth denies the allegations contained in Paragraph 17 of the Second Amended Complaint.

18. BellSouth denies the allegations contained in Paragraph 18 of the Second Amended Complaint, except to admit that Sections 364.01(4)(i), 364.3381, and 364.0519(1)(a) Florida Statutes speaks for themselves and are the best evidence of their terms and conditions. BellSouth denies that any of these statutes have been violated or that Section 364.059(1)(a) is applicable to the instant proceeding.

19. BellSouth denies the allegations contained in Paragraph 19 of the Second Amended Complaint, except to admit that Sections 364.3381(3) and 364.01(4)(g), Florida Statutes speak for themselves and are the best evidence of their terms and conditions. BellSouth denies that any of these statutes have been violated.

20. BellSouth denies the allegations contained in Paragraph 20 of the Second Amended Complaint, except to admit the existence of Docket No. 990043-TP and that the Commission voted on matters filed in Docket No. 990043-TP. The documents filed in Docket No. 990043-TP and orders or findings of the Commission speak for themselves and are the best evidence of their terms and conditions. BellSouth states, however, that Docket No. 990043-TP is inapplicable to this proceeding.

21. BellSouth denies the allegations contained in Paragraph 21 of the Second Amended Complaint, except to admit that TELRIC rates, in general, require BellSouth to provide its services to CLECs below its costs.

22. BellSouth denies the allegations contained in Paragraph 22 of the Second Amended Complaint.

23. BellSouth denies the allegations contained in Paragraph 23 of the Second Amended Complaint.

24. BellSouth denies the allegations contained in Paragraph 24 of the Second Amended Complaint.

25. BellSouth denies the allegations contained in Paragraph 25 of the Second Amended Complaint.

26. BellSouth denies the allegations contained in Paragraph 26 of the Second Amended Complaint.

27. BellSouth denies the allegations contained in Paragraph 27 of the Second Amended Complaint, except to admit that Sections 364.3381 and 364.051(5)(c), Florida Statutes speak for themselves and are the best evidence of their terms and conditions. BellSouth denies that any of these statutes have been violated.

28. BellSouth denies the allegations contained in Paragraph 28 of the Second Amended Complaint.

29. BellSouth denies the allegations contained in Paragraph 29 of the Second Amended Complaint, except to admit that for some promotions there are no term requirements.

30. BellSouth denies the allegations contained in Paragraph 30 of the Second Amended Complaint.

31. BellSouth denies the allegations contained in Paragraph 31 of the Second Amended Complaint, except to admit that the quoted language from Order No. PSC-03-0726-FOF-TP is a partial quote from the Commission's Order. That Order speaks for itself and is the best evidence of its terms and conditions.

32. Paragraph 31 of the Second Amended Complaint contains Supra's description of what it believes BellSouth's obligations are under **federal law** to make its promotional offerings available for resale. The legal authority cited by Supra speaks for itself and thus do not require a response from BellSouth. To the extent one is required, the allegations are denied. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

33. BellSouth admits that the language quoted in Paragraph 33 of the Second Amended Complaint appears in Section 364.161(2), Florida Statutes. BellSouth denies that this statute is applicable to Supra or that the Commission has jurisdiction over the Resale Count simply because Supra adds this statute to its Complaint, for the reasons discussed more fully in the Motion to Dismiss.

34. BellSouth denies the allegations contained in Paragraph 34 of the Second Amended Complaint, except to admit that BellSouth's promotions are not available for resale under federal law. Again, however, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

35. BellSouth denies the allegations contained in Paragraph 35 of the Second Amended Complaint, except to admit that resale is an obligation under the Act. However, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

36. BellSouth denies the allegations contained in Paragraph 36 of the Second Amended Complaint, except to state that the FCC orders and rules cited therein speak

for themselves and are the best evidence of their terms and conditions. BellSouth denies that any of these orders and rules have been violated.

37. BellSouth denies the allegations contained in Paragraph 37 of the Second Amended Complaint, except to admit that Docket No. P-110, Sub 72b exists at the North Carolina Utilities Commission ("NCUC") and that the orders of that state commission speak for themselves. However, the United States District Court for the Western District of North Carolina has enjoined the NCUC's decision pending its review. See BellSouth Telecommunications, Inc. v. North Carolina Util. Comm'n., 3:05-CV-345-MU, Order Granting Preliminary Injunction (Aug. 12, 2005), attached hereto as Exhibit B. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

38. BellSouth denies the allegations contained in Paragraph 38 of the Second Amended Complaint, except to admit that quoted language is a partial quote from the NCUC's Order. That Order speaks for itself and is the best evidence of its terms and conditions. However, as stated above, the United States District Court for the Western District of North Carolina has enjoined the NCUC's decision pending its review. See Exhibit B. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

39. BellSouth denies the allegations contained in Paragraph 39 of the Second Amended Complaint, except to admit that quoted language is a partial quote from the NCUC's Order. That Order speaks for itself and is the best evidence of its terms and conditions. However, as stated above, the United States District Court for the Western

District of North Carolina has enjoined the NCUC's decision pending its review. See Exhibit B. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

40. BellSouth denies the allegations contained in Paragraph 40 of the Second Amended Complaint, except to admit that quoted language is a partial quote from the NCUC's Order. That Order speaks for itself and is the best evidence of its terms and conditions. However, as stated above, the United States District Court for the Western District of North Carolina has enjoined the NCUC's decision pending its review. See Exhibit B. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

41. BellSouth denies the allegations contained in paragraph 41 of the Second Amended Complaint, except to admit that the quoted language is a partial quote from the NCUC's Order. That Order speaks for itself and is the best evidence of its terms and conditions. However, as stated above, the United States District Court for the Western District of North Carolina has enjoined the NCUC's decision pending its review. See Exhibit B. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

42. BellSouth denies the allegations contained in Paragraph 42 of the Amended Complaint, except to admit that quoted language is a partial quote from Order No. PSC 0-1-1769-FOF-TL. That Order speaks for itself and is the best evidence of its terms and

conditions. And, as set forth more fully in BellSouth's Motion to Dismiss, the Commission does not have the authority to find BellSouth in violation of its resale obligations under federal law.

43. BellSouth denies that Supra is entitled to any of the relief requested in the WHEREFORE clause.

44. Any allegation not expressly admitted herein (including any footnotes) is denied.

AFFIRMATIVE DEFENSES

1. Supra's' Second Amended Complaint fails to state a cause of action upon which relief can be granted, including but not limited to any violation of Section 364.161(2) because Supra and BellSouth are not operating pursuant to that statute.

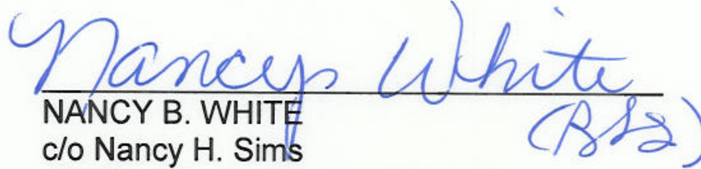
2. The Commission lacks subject matter jurisdiction to find that BellSouth is in violation of federal law.

3. Supra's Second Amended Complaint is barred by the doctrine of estoppel or unclean hands, because Supra is engaging in the very promotional activities that it challenges in the Complaint.

WHEREFORE, for the foregoing reasons, BellSouth requests that the Commission grant BellSouth's Partial Motion to Dismiss and enter judgment in BellSouth's favor on all other counts.

Respectfully submitted this 15th day of November, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.



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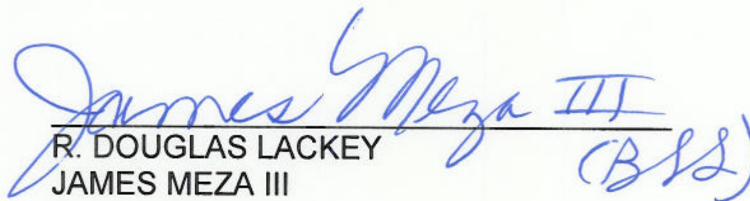

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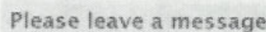

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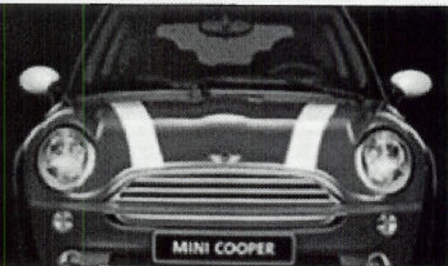

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
3:05-CV-345-MU

BELLSOUTH TELECOMMUNICATIONS, INC., **Plaintiff,** **v.** **NORTH CAROLINA UTILITIES COMMISSION; JO ANNE SANFORD, Chairman; ROBERT K. KOGER, Commissioner; ROBERT V. OWENS, JR., Commissioner; SAM J. ERVIN, IV, Commissioner; LORINZO L. JOYNER, Commissioner; JAMES Y. KERR, II, Commissioner; and HOWARD N. LEE, Commissioner (in their official capacities as Commissioners of the North Carolina Utilities Commission),** **Defendants.**	)	**ORDER**

THIS MATTER is before the Court on Plaintiff BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Temporary Restraining Order and Preliminary Injunction, [file doc. 10], and Memorandum in Support, both filed August 2, 2005. Also on August 2, 2005, this Court entered an Order granting BellSouth's Motion for a Temporary Restraining Order and setting a hearing for this matter which was held on August 11, 2005 at 2:00 p.m. While the North Carolina Utilities Commission (the "Commission") and the Commissioners (collectively referred to as "Defendants") named above did not file a written Response to the Motion for Preliminary Injunction, defense counsel for both did attend the hearing, although only in her

EXHIBIT B
050387-TP
BST RESPONSE

capacity as counsel to the Commissioners.[1] Having heard and considered the arguments of BellSouth and the Commissioners, this matter is ripe for ruling by the Court. For the reasons stated below, the Court hereby **GRANTS** BellSouth's Motion for Preliminary Injunction.

I. FACTUAL AND PROCEDURAL HISTORY

This case is centered around the interpretation of several provisions of the Telecommunications Act of 1996 (the "Act"). In the spirit of fostering competition, the Act imposes several requirements on incumbent local exchange carriers ("ILECs"), like BellSouth, to make their retail telecommunications services available to competing local providers ("CLPs") at discounted wholesale rates. *See* 47 U.S.C. § 251(c)(4)(A). Pursuant to 47 U.S.C. § 252(d)(3), State commissions determine the wholesale rates on the basis of the ILEC's retail rates, excluding any portion attributable to marketing, among other things. In practical terms, it is both the Commission and the market which set the wholesale rates available to CLPs. ILECs propose a wholesale rate bearing in mind what the market will tolerate, but before they can sell these telecommunications services, the Commission must approve the rates.

As explained above, many factors influence the value of the wholesale rates. And, as would be expected, the Federal Communications Commission ("FCC") has weighed in on the issue of what should be considered when valuing wholesale rates. Specifically, and of importance to the outcome of this matter, the FCC has found that promotional offerings that are in effect for more than ninety days essentially become the retail rate from which the wholesale rate is determined. *In the Matter of Implementation of the Local Competition Provisions in the*

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[1] Defense counsel stated on the record that she was only appearing in her capacity as counsel to the Commissioners because the North Carolina Utilities Commission seeks to have this action dismissed against it without making an appearance in the matter.

Telecommunications Act of 1996, (CC Docket 96-98); First Report and Order, FCC No. 96-325, 11 FCC Rcd 15499 (rel. August 8, 1996), ¶ 948. This point is further clarified through the negative implication of 47 C.F.R. § 51.613(2)(I), which states that "promotions" lasting less than ninety days are not considered when determining the wholesale rate.

The dispute between BellSouth and the Defendants arose when the Defendants issued a December 22, 2004 Order Ruling on Motion Regarding Promotions and a June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay (collectively the "Resale Orders"). The Resale Orders found that incentives, such as gift cards, that are in effect for more than ninety days "are in fact promotional offers subject to the FCC's rules on promotions." On the other hand, BellSouth argued in oral argument that gift cards and other such giveaways are not telecommunications services, and as such are not regulated by the Act.

More specifically, BellSouth cites to the FCC's definition of "promotions" to make the argument that items such as gift cards are in fact *marketing* incentives, which are specifically excluded from the valuation of wholesale rates by 47 U.S.C. § 252(d)(3). (Pl.'s Mem. at 11.) The FCC has defined "promotions" to include "price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary price discounts." *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (CC Docket No. 96-98); First Report and Order, FCC No. 96-325, 11 FCC RCD 15499, (rel. Aug. 8, 1996), ¶ 948.

Pursuant to 47 U.S.C. § 252(e)(6), BellSouth has brought the matter to this Court to determine whether the Resale Orders are in fact contrary to the statutory provisions of the Act.

At this stage in the proceedings, BellSouth seeks a Preliminary Injunction prohibiting the Defendants from enforcing those provisions of the Resale Orders which would require ILECs to take into consideration the value of gift cards and other giveaways in the same manner that rate discounts which last for longer than ninety days are considered when arriving at the wholesale rate for telecommunications services for CLPs.

II. DISCUSSION

The "balance of hardships" test is used to determine the propriety of preliminary injunctive relief. *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977). This test weighs the following four factors: (1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied; (2) the likelihood of harm to the defendants if the requested relief is granted; (3) the likelihood that plaintiff will succeed on the merits; and (4) the public interest. *Id.* Further, the plaintiff bears the burden of establishing that each of the four elements supports granting the injunction. *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1992).

A. Irreparable Harm to BellSouth in the Absence of a Preliminary Injunction

The question of irreparable harm to the plaintiff is the first factor to be considered in a motion for preliminary injunction. *Id.* If a plaintiff cannot establish that irreparable harm is likely to occur in the absence of a preliminary injunction, that failure alone is sufficient to deny injunctive relief. *Manning v. Hunt*, 119 F.3d 254, 266 (4th Cir. 1997). "Moreover, the required 'irreparable harm' must be 'neither remote nor speculative, but actual and imminent.'" *Direx*, 952 F.2d at 812 (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 975 (2d Cir. 1989)). However, as the balance tips in favor of finding irreparable harm to plaintiff, there is a

lesser need for plaintiff to establish likelihood of success on the merits. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4th Cir. 1991).

In the instant case, BellSouth has established that it will suffer actual, imminent, and irreparable harm if the Court does not enter the requested preliminary injunction. BellSouth represented to the Court that implementation of the Resale Orders would require them to create significant changes in their marketing structure. The marketing efforts in North Carolina would be carried out in a substantially different manner than efforts in other states where BellSouth does business. Putting aside the large financial burden of this effort, the lasting impact that this two-tiered marketing could have on customer loyalty and BellSouth's goodwill in North Carolina cannot be understated. A North Carolina customer visiting Georgia would understandably become rather disgruntled to learn that the same benefits were not offered to him as were offered to BellSouth customers in Georgia.

Further, there would be the same loss of customer loyalty when North Carolina residents learn that many of the CLPs are able to offer much better incentives than BellSouth. Customer loyalty is not the type of loss that can be made whole with a court order at the end of a lawsuit. Additionally, there is the direct financial loss which will occur if the wholesale rates are suddenly decreased to comply with the Resale Orders. The beneficiaries of this decrease, the CLPs, are not even a party to this action.

In sum, if the Court does not enter a preliminary injunction, Defendants' ruling will result in irreparable harm to BellSouth.

B. Likelihood of Harm to Defendants if Preliminary Injunction is Granted

The Court finds that if the Resale Orders are implemented, the harm to BellSouth

certainly outweighs any harm to Defendants. In fact, the Defendants were unable to name any harm that they would incur as a result of a Preliminary Injunction. Defendants pointed out that the fourth factor, the public interest, should be considered in this step as well due to the fact that Defendants represent the public interest. However, there is no clear argument that the public interest would not be best served by granting this Preliminary Injunction. The Court has not been convinced that the Resale Orders will actually promote competition. At this point in the proceedings, there appears to be a valid argument that the Resale Orders are actually going to hinder competition in North Carolina. It is precisely the intent of the Act to foster competition for the public good.

Therefore, the likelihood of harm to BellSouth if the injunction is not granted significantly outweighs any possible harm to Defendants resulting from the imposition of the injunction.

C. BellSouth's Likelihood of Success on the Merits of its Claims

Since the Court finds that BellSouth would suffer irreparable harm in the absence of a preliminary injunction, the Court will not discuss in detail whether BellSouth has a likelihood of success on the merits of its claims. The Court notes, however, that BellSouth has sufficiently convinced the Court that this novel issue of law merits further review.

D. Public Interest

As discussed above, the Court further finds that the public interest is served by the issuance of the requested injunction. The impact of the Resale Orders would result in North Carolina residents being treated differently than similarly situated residents of other states through the interpretation of a federal law.

In conclusion, the Court finds that the entry of a preliminary injunction is necessary to protect BellSouth from actual, imminent and irreparable harm. Such harm to BellSouth significantly outweighs any harm that Defendants may incur as a result of the entry of the injunction.

E. Rule 65(c) of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure state that "[n]o . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). As noted in Rule 65, the amount of bond is within the discretion of the Court. *Maryland Dept. of Human Resources v. U.S. Dept. of Agriculture*, 976 F.2d 1462, 1483 (4th Cir. 1992). The Court here finds that a bond of $100 is sufficient to cover Defendant's costs or damages should it later be determined that Defendant was wrongfully enjoined.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Preliminary Injunction is hereby **GRANTED**. Pending a trial on the merits, Defendants are enjoined and restrained from enforcing Conclusion No. 5 of the Commission's December 22, 2004 Order Ruling on Motion Regarding Promotions, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify the Law Regarding Competitive and Deregulated Offerings of Telecommunications Services*," Docket No. P-100, Sub-72b as well as the Commission's Conclusions regarding Resale Obligations and One-Time Gift Promotions in its June 3, 2005 Order Clarifying Ruling on Promotions and Denying Motions for Reconsideration and Stay, *In the Matter of Implementation of Session Law 2003-91, Senate Bill 814 Titled "An Act to Clarify*

The Law Regarding Competitive and Deregulated Offerings of Telecommunications Services,"
Docket No. P-100, Sub-72b (pp. 5-7, therein).

IT IS FURTHER ORDERED that BellSouth shall post a bond of $100.00.

Signed: August 12, 2005

Graham C. Mullen
Chief United States District Judge