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January 20, 2004

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

> **Re: Docket No. 030851-TP & Docket No. 030852-TP**

Dear Ms. Bayó:

Enclosed is two originals and fifteen copies of BellSouth Telecommunications, Inc.'s Response to Sprint's Motion to Compel, which we ask that you file in the above captioned dockets.

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

Sincerely,

Nancy B. White

Nancy B. White   CW

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

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Nancy B. White

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(+)signed Protective Agreement
(*) via Hand Delivery
(⊗) via FedEx

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising	)	
from Federal Communications Commission	)	Docket No. 030851-TP
triennial UNE review: Local Circuit Switching	)	
for Mass Market Customers.	)	
	)	

In re: Implementation of requirements arising from	)	
Federal Communications Commission Triennial	)	
UNE review: Location Specific-Review for DS1,	)	Docket No. 030852-TP
DS3 and Dark Fiver Loops and Route-Specific	)	
Review for DS1, DS3 and Dark Fiber Transport	)	
	)	Filed: January 20, 2004

BELLSOUTH'S RESPONSE TO SPRINT'S MOTION TO COMPEL

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response in opposition to the Motion to Compel filed by Sprint Communications Company Limited Partnership and Sprint-Florida, Incorporated (collectively "Sprint").

The Commission should deny Sprint's request that the Commission compel BellSouth to produce the source code to the BellSouth Analysis of Competitive Entry ("BACE") Model in a format that would allow Sprint to change the code. This Commission has ruled previously (in a docket in which Sprint participated actively) that a party is not required to produce the source code to a model in a format that allows the requesting party to alter the model. Sprint not only completely disregards the Commission's prior ruling on the exact issue that is the subject of its motion, Sprint also has the temerity, after sitting on the issue for weeks, to ask the Commission rule on its motion "expeditiously." Sprint waited six weeks after BellSouth filed the model with its direct testimony and three weeks after BellSouth told Sprint informally that it would not produce the source code to the BACE model in an alterable format to serve, contemporaneously with its "motion to compel," the only data request in which it asked BellSouth to produce the

code. While the Commission should not permit a party to avoid the procedural rules in this manner, especially under the circumstances here where Sprint failed to act in a timely manner, the fact remains that Sprint's motion is deficient substantively, and it could not be cured even if Sprint followed proper procedure. In further opposition to Sprint's motion to compel, BellSouth shows the Commission that:

1. **Background of the BACE model.** In its TRO, the FCC set forth two means for state commissions to determine whether CLECs are not impaired in their ability to serve mass market customers in a given market without obtaining unbundled local switching at TELRIC rates from the ILEC -- switching "triggers," and for markets where the triggers are not satisfied, a "potential deployment" analysis. As part of the potential deployment analysis, the FCC required that state commissions consider, among other things, potential economic barriers to a CLEC's self-provisioning switching in a given market. *See* TRO ¶ 507. The FCC specified that the economic analysis required should be conducted using a business cases analysis based on the most efficient business model for competitive entry and the most efficient network architecture available. *Id.* ¶ 517; n. 1579.

2. BellSouth retained CostQuest Associates, Inc., which previously developed the BSTLM, the loop model used by this Commission and other commissions in BellSouth's region to model BellSouth's forward looking network and calculate the costs of loops and loop-related UNEs, to develop a model capable of performing the business case economic analysis required by the FCC. BellSouth spent a significant amount of money developing the BACE model, and the model is BellSouth's intellectual property.

3. **BellSouth's demonstrations and filing of the BACE model in November and early December, 2003.** BellSouth filed its direct testimony in Docket No. 030851-TP on

December 4, 2003. As part of it direct case, BellSouth filed the BACE model, through which it demonstrated that CLECs are not impaired in their ability to provide service to mass market customers without unbundled local switching in certain geographic markets in Florida.

4.   The other parties to this docket, including Sprint, knew before December 4, 2003, however, that BellSouth would be filing a model that assessed economic impairment. BellSouth demonstrated the BACE model in workshops before some state commissions and at the NARUC meeting in Atlanta in November 2003.   While BellSouth does not know whether Sprint personnel attended the model demonstrations at the NARUC meeting, Sprint personnel were among those in attendance at the BACE model demonstration at the workshop convened by the South Carolina Public Service Commission on November 5, 2003.

5.   **BellSouth provides Sprint with the source code for the BACE model in a format that allows Sprint to review the code.** "Source code" is the code written to make an application execute the tasks that it performs. It is the "guts" of any computer application, and it has tremendous value to its owner and/or developer.

6.   According to BellSouth's records, on Friday, December 19, 2003, Sprint's counsel asked counsel for BellSouth if BellSouth would provide Sprint with the source code for the BACE model. On Monday, December 22, 2003, BellSouth provided Sprint and AT&T, which had made an identical request, with .pdf copies of the BACE model source code. (see Attachment B to Sprint's motion to compel). This format allows one to review and test the model's logic, but not to change any of the code.

7.   **Sprint asks informally for the code in a format that would allow it to change the model.** Later on December 22, Sprint asked BellSouth to provide it with the source code in a format that would allow Sprint to "see the [model's] calculations and to *change them* if

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necessary." (*Id.*) (emphasis added) On December 23, 2003, BellSouth notified Sprint and AT&T that it would not give them the source code in a format that would allow them to change the model, and would object to any discovery requests seeking such information. (*Id.*) AT&T did not pursue the issue further. Neither did Sprint for three weeks until it filed a discovery request seeking the source code in changeable format *along with* its motion to compel the production of this information.

8. **Sprint's subsequent discovery requests regarding the BACE model did not include a request for source code.** On December 24, 2003, the day after BellSouth told Sprint it would not produce the code in a format that could be altered or changed, Sprint served its fourth set of interrogatories to BellSouth in Docket No. 030851. On December 31, 2003, Sprint served BellSouth with its fifth set of interrogatories. Both of these sets of discovery requested information about the BACE model. Sprint did not, however, ask for the BACE model source code in either of these sets of discovery requests. There is no reason why the discovery seeking the BACE model source code Sprint served on January 13, 2004, could not have been included with either of those earlier sets of discovery.

9. **Commission precedent is that the source code for a model developed by a party is not discoverable.** The Commission addressed this precise issue in its most recent docket to establish cost-based UNE rates for BellSouth, Docket No. 990649-TP. That was the first proceeding in which BellSouth filed its loop model, BSTLM. AT&T and WorldCom complained that BellSouth gave them only .pdf versions of the source code for the model and not source code in a format that would allow them to change the code. The Commission ruled that AT&T and WorldCom were not entitled to the source code in an alterable format: **"While we believe that BellSouth was obligated to provide parties with the ability to review and**

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critique the model, we do not believe it was required to provide the actual source code." Order No. PSC-01-1181-FOF-TP (May 25, 2001), at 130 (emphasis added). No state commission required BellSouth to produce the source code for the BSTLM.

10. **There is no legitimate reason to depart from that precedent here.** The determinations by this Commission and every other Commission that considered the issue to refuse to order BellSouth to provide other parties with source code in a format that would allow the parties to *change* the calculations made by the model makes sense. First, the source code is BellSouth's intellectual property, and it cannot simply be forced to hand it over to its competitors for them to change and attempt to use for their benefit. Second, just like in the UNE cost cases, every party to this docket knew that the FCC required a business case model to be used to assess economic impairment, and any party was free to develop and submit such a model to the Commission for its consideration. In fact, parties other than BellSouth have submitted so-called "models" in this case that they claim assess impairment in accordance with the principles required by the FCC. If Sprint wanted a model that suited its vision of how impairment should be tested, it should have developed one, instead of trying to just "piggyback" on another party's work. BellSouth devoted substantial financial and human resources to developing a model that assesses economic impairment. While the BACE model is easy to use, developing such a model is very complicated and requires specialized expertise. It would be wholly unjust if BellSouth was required to give Sprint the code to the model in a format that would permit Sprint to simply change the code and present what would in fact be a different model without Sprint having to incur the expense of developing the model. As the Commission recognized when it addressed this issue in the UNE case, Sprint is not entitled to have BellSouth's code so that it can alter it to create its own model.

11.   BellSouth has provided Sprint with the source code for the BACE model in a format (.pdf) that enables Sprint to review and test the BACE model's logic and to recommend changes. That is exactly the information that BellSouth provided in the UNE docket with respect to the BSTLM. In fact, review of the code in that format is what led other parties to the UNE case to recommend the changes to the BSTLM that Sprint witness Dickerson references in his testimony and which Sprint attaches as an exhibit to its motion to compel. Sprint does not need the model code in a format that would enable Sprint to change the model.

12.   **Sprint's claim that it needs the alterable form of the source code to view certain files in the BACE model is incorrect.** Mr. Dickerson seemingly claims in the testimony he filed on January 7, 2004, and which Sprint attached to its motion to compel, that Sprint's failure to obtain the source code to the model in an alterable format prohibits Sprint from reviewing data contained in four categories of tables contained in the filed BACE model. That is not correct. It is true that those categories of tables are password protected in the filed model in order to protect from disclosure certain highly proprietary data. It is also a fact, however, that in response to discovery requests, BellSouth provided Sprint with the complete data for two of the four categories on January 5, 2004, *before* Mr. Dickerson filed his testimony. Even giving Mr. Dickerson the benefit of the doubt that he did not review that data prior to finalizing his testimony, it is certainly misleading for Sprint to continue to claim in its motion to compel filed more than one week after BellSouth provided the information that it has been prohibited from reviewing all of the data referenced in Mr. Dickerson's testimony. As for the other two categories of information Mr. Dickerson references, BellSouth is working to provide that information to all of the parties to this proceeding, including Sprint, in a manner that protects its proprietary data. Significantly, however, none of that information has anything to do with an

alterable form of the BACE model source code. Consequently, it is not relevant to Sprint's motion, which addresses only the source code.

13. **Sprint's motion is procedurally deficient.** In addition to being without merit substantively, Sprint's motion is also procedurally deficient. The Procedural Orders in these dockets state that discovery shall be in accordance with the Commission Rules and the Florida Rules of Civil Procedure. Sprint states in its motion that the motion is pursuant to Rules 1.350 and 1.380 of the Florida Rules of Civil Procedure, but it does not in fact comply with those discovery rules. Rule 1.380 governs motions to compel. It states that a party may move for an order compelling discovery if a party fails to respond that inspection of data will be permitted in accordance with Rule 1.350. Here, Sprint served its requests asking BellSouth to produce the BACE model source code in alterable format *at the same time* that it moved to compel production. Pursuant to the Commission's Procedural Orders, BellSouth's objections to Sprint's requests are not due for seven days following the requests.

14. **Sprint's purported reasons for its failure to request the information it seeks sooner are bogus and do not justify the "expeditious" resolution Sprint seeks.** Even if Sprint's request had substantive merit (which it does not) and was not premature procedurally (which it is), Sprint's failure to act on a timely basis in pursuing production of the BACE model source code in a format that would allow Sprint to change the code does not justify the "expeditious" resolution and alteration to the procedural schedule to allow Sprint to file supplemental testimony that Sprint requests in its motion. Sprint claims that it did not serve discovery seeking the BACE model source code until January 13, 2004, because it had been attempting to work informally with BellSouth to obtain the source code, because of the "time constraints of the formal discovery process," and because BellSouth had informed Sprint that it

would object to any request seeking the source code in a format that would allow Sprint to make changes to the code. Sprint Motion, ¶ 9. Sprint's alleged excuses for its failure to act on a timely basis are contrived and do not justify the relief Sprint seeks. Sprint never explains why it waited until December 19, 2003, to request the source code even informally when BellSouth filed the BACE model on December 4, and Sprint knew at least a month earlier that BellSouth had a model that might be used in these proceedings. If this information were actually as critical as Sprint now claims, then Sprint should have asked for it through discovery immediately upon BellSouth's filing of the model, which would have joined this issue a month ago. Sprint also ignores the fact that the parties ceased discussing the issue informally on December 23, 2003, *20 days* before Sprint resurrected the issue with a discovery request and simultaneously filed motion to compel. Sprint likewise fails to explain the purported but unspecified "time constraints of the formal discovery process" that prevented it from requesting the source code formally. The fact is that "formal discovery" is the only type of requests to which parties are required to respond. Sprint served two separate sets of discovery on BellSouth, on December 24 and 31, 2003, seeking information about the BACE model. What would have made it so difficult to add the three requests seeking production of the source code in alterable format that Sprint served on January 13 to either of those discovery requests? Sprint does not offer any explanation because there is none.

15. Finally, Sprint's claim that it did not serve discovery asking for the source code earlier because BellSouth had told it that it would object to such a request makes no sense at all. To be certain, if a party knows that it will need to ask the Commission to resolve a dispute, it should take all appropriate and procedurally required steps to bring that matter before the Commission as expeditiously as possible. In this case, that means that Sprint should have served
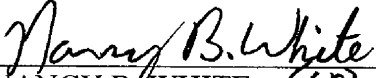
discovery asking for the source code and filed a motion to compel promptly after BellSouth objected. A party's obligation to act in a timely basis is particularly acute in a proceeding such as this which is required by the FCC to be conducted on an accelerated timeframe. Sprint's attempt to justify its failure to act on a timely basis by citing the fact that BellSouth advised Sprint that it would object to providing the source code to the BACE model in a format such that Sprint could change the model is contrary to common sense. It is particularly brazen here, where Sprint sat on its hands and now asks this Commission to act "expeditiously."
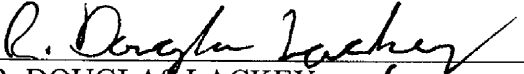
Conclusion

For the reasons set forth above, the Commission should deny Sprint's motion to compel.

Respectfully submitted this 20th day of January, 2004.

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