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May 18, 2005

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

Re: Docket No. 050297-TP
In re: Dispute Regarding Embedded Base Between Saturn Telecommunications Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.

Dear Ms. Bayó:

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

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

Sincerely,

Meredith E. Mays

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
585866

CERTIFICATE OF SERVICE
DOCKET NO. 050297-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 18th day of May, 2005 to the following:

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Meredith E. Mays

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Dispute Regarding Embedded Base Between Saturn Telecommunication Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.	)	Docket No.: 050297-TP
	)	Filed: May 18, 2005

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION AND MOTION TO DISMISS

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response in Opposition and Motion to Dismiss the Emergency Petition ("Petition") filed by Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS") on April 28, 2005.

As this Commission is well aware, Order No. PSC-05-0492-FOF-TP ("Order") issued in Docket No. 041269-TP, properly gave effect to the FCC's *TRRO*[1] when it found that "as of March 11, 2005, requesting carriers may not obtain new local switching as an unbundled network element." The Commission issued its Order after voting unanimously on this issue during its April 5, 2005 agenda conference. During that agenda, this Commission rejected a plethora of CLEC emergency petitions that sought to expand the illegal UNE-P regime by adding new local switching unbundled network elements contrary to binding federal rules. Thereafter, on April 15, 2005, BellSouth provided all CLECs with notice that effective April 17, 2005, it would no longer accept new service requests for unbundled local switching and UNE-P in Florida.[2] Despite ample notice that BellSouth would no longer accept new orders for unbundled local switching, STS filed its purported "emergency" petition, blithely ignoring the events

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

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

leading up to BellSouth refusing the orders about which STS complains. Instead, STS baldly (and mistakenly) asserts that the Commission "has not yet ruled in any other docket on matters raised in this Petition" (¶ 21) and cites to BellSouth's April 12, 2005 Carrier Letter Notification (¶ 18), while ignoring more recent communications on this issue.

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

II. DISCUSSION

A. Legal Standard

Pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, a party may move to dismiss another party's request for relief on the ground that, on the facts and the law, the party seeking relief has not shown a right to relief. *See* ORDER NO. PSC-98-0702-FOF-TP. 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). To determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter -- all of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief; if they are not, the pleading should be dismissed. *Kislak v. Kredian*, 95 So.2d 510 (Fla. 1957); *also* ORDER NO. PSC-98-0702-FOF-TP (dismissing speculative concerns about possible economic harm). Applying these principles to the case at hand mandates that the Commission dismiss STS's Petition.

B. STS's Petition Is Contrary to the *TRRO*

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

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

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

In urging a different conclusion, STS disregards the federal district cases cited above, and relies, instead, on state commission decisions from North Carolina and Georgia, neither of which binds this Commission. Indeed, the Georgia Commission's Order requiring BellSouth to continue providing new UNE-Ps to all customers – both new and embedded base – has been overturned by a federal district court and BellSouth is rejecting all UNE-P orders in Georgia. And, despite what North Carolina ordered, STS's Petition is inconsistent with the over-arching

federal policy here.

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

STS also ignores decisions from other state commissions that have *not* required ILECs to keep providing new UNE arrangements for existing customers. For instance, the California commission decision is especially well-reasoned and persuasive. As that commission said,[3] "we note that the FCC has clearly stated that 'Incumbent LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching.'" *Id.* at 7 (quoting *TRRO* ¶ 5) (emphasis added by California commission). Moreover, "it is clear that the FCC desires an end to the UNE-P, for it states '. . . we exercise our "at a minimum" authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on*

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

such unbundling.'" *Id.* (quoting *TRRO* ¶ 200) (emphasis added by California commission)). As well, "[o]ther parts of the [*TRRO*] also support this interpretation. In particular, the FCC also states: '. . . we establish a transition plan to migrate *the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement.*' . . . Note that this last statement refers to 'the embedded base of unbundled local circuit switching;' it does *not* refer to an '*embedded base of customers.*'" *Id.* (emphasis in original). Thus, the California commission held that "since there is no obligation and a national bar on the provision of UNE-P, we conclude that 'new arrangements' refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The [*TRRO*] clearly bars both." *Id.*[4]

C. STS's Petition is Contrary to the Commission's Order

STS's Petition also ignores this Commission's Order. In prior filings made in Docket No. 041269-TL, BellSouth detailed its view and positions concerning the *TRRO*. To reiterate, BellSouth explained that the FCC's new local switching rule makes clear that the prohibition against new UNE-Ps applies to *new lines*. *See* BellSouth's March 4, 2005 Response in Opposition to Petition for Emergency Relief, n. 9; *also* BellSouth's March 15, 2005 Response in Opposition to Petitions for Emergency Relief, n. 12. BellSouth cited the *TRRO*, ¶ 199; and 47 C.F.R. § 51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). Also, BellSouth explained that federal law defines switching to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch. *TRRO,* ¶ 200. When a requesting carrier purchases the

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

unbundled local switching element, it obtains all switching features in a single element on a per-line basis. *TRO,* at 433; the TRRO retained this definition (TRRO, n. 529). *Thus, the switching UNE means the port and functionalities on a per-line basis and the prohibition against new adds applies to the element itself – consequently, the federal rule of no new adds applies to lines.* Since the federal no new adds rule applies to *lines,* it means that STS cannot add new UNE-P lines to an existing customer account, because to do so would result in a new UNE-P line. Nor can STS move an existing UNE-P line from an existing customer location to a different location, because that would result in a new UNE-P line at the different location.

In light of BellSouth's pleadings, STS cannot legitimately argue that this Commission "has not yet ruled" on the issues raised in its Petition. Rather, STS must concede these matters were addressed when this Commission voted on April 5, 2005, and in the resulting written Order, which unambiguously stated that as of March 11, 2005, requesting carriers may not obtain new local switching as an unbundled network element. *See* Order, p. 8-9. The Order made no exceptions whatsoever. Indeed, concerning the *TRRO* at paragraph 233 (to which STS cites), this Commission ruled in BellSouth's favor, finding that "any other interpretation would render the TRRO-language regarding 'no new adds' a nullity, which would, consequently, render the prescribed 12-month transition period a confusing morass ripe for further dispute." Order, p. 6. Thus, by the express terms of the Order, STS cannot order new UNE-P lines for existing customers, nor can STS order new UNE-P lines at different locations. By filing its "Emergency Petition" after the Commission has accepted numerous filings, heard from counsel on the issue of new adds, and issued its decision, STS has wasted both the Commission's and BellSouth's resources, and its frivolous petition should be summarily dismissed.

D. STS's Allegations Concerning Service Alternatives, Competition, and BellSouth's Hot Cut Process Lack Credibility

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

First, STS claims that without the ability to place new UNE-P orders after April 17, 2005 its customers will have no alternative than to switch their services to BellSouth. (Petition ¶¶ 6, 27). STS's claim cannot be taken seriously. The FCC has found that many CLECs have deployed their own switches and that others can do so also. *TRRO,* ¶ 199. Moreover, BellSouth has entered into over one hundred commercial agreements with CLECs, including AT&T and MCI. STS can enter into a similar agreement and continue to serve its customers. Resale is another option that remains available to STS.

Second, STS incorrectly states that BellSouth's compliance with the *TRRO* and this Commission's Order is anticompetitive and that it will be harmed without the ability to add additional UNE-Ps. (Petition ¶¶ 6, 27, 29) STS's claim is flatly contradicted by the FCC's determination that "the disincentives to investment posed by the availability of unbundled switching . . . justify a nationwide bar on such unbundling." *TRRO,* ¶ 204. STS's claim is likewise unpersuasive in light of relevant federal district decisions, which, when addressing similar claims of purported harm by CLECs, stated:

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

BellSouth Telecomms., Inc v. Mississippi Pub. Serv. Comm'n, 3:05CV173LN, 2005 WL 1076643. And, "CLECs' interest in a practice the FCC has stated is 'anti-competitive' has very

little weight, if any, in balancing the harms." *Kentucky Injunction Order,* p. 17.[5]

Third and finally, STS erroneously claims that BellSouth has not demonstrated that it can timely switch UNE-P customers to alternative arrangements. (Petition, ¶ 30). This claim cannot withstand scrutiny. BellSouth has repeatedly demonstrated that its hot cut processes, including its batch hot cut process, allows for large quantities of UNE-P arrangements to be converted to UNE loops in a short time frame. BellSouth's fully mechanized, electronic UNE-P to UNE-L batch migration ordering process has been available to CLECs since March 29, 2003. And, the FCC has determined that BellSouth's hot cut processes allow it "to perform larger volumes of hot cuts ('batch hot cuts') to the extent necessary." *TRRO,* ¶ 200, 210.

III. CONCLUSION

STS's Petition lacks merit, disregards federal law, and ignores this Commission's Order. BellSouth requests the Commission summarily dismiss the Petition as frivolous.

[5] With respect to STS's claims that BellSouth is engaging in unfair winback or marketing practices, BellSouth takes these allegations very seriously. BellSouth has established a formal process for investigating CLEC complaints regarding winback marketing and sale practices, and will review all complaints that include information necessary and sufficient to conduct such a review. At a minimum, BellSouth requires the customer name, telephone number, and location, the date of the claimed action, the names of any BellSouth employees involved, and a description of the claimed action. If any review reveals deficiencies or improprieties BellSouth will take corrective action, if necessary. If STS provides this information to counsel for BellSouth, it will be investigated, and a summary of BellSouth's findings will be provided to STS. STS's emergency petition, however, contained only vague and unsubstantiated claims and failed to include the information necessary to conduct such a review.

Respectfully submitted, this 18th day of May 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

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