Supra Telecom

1311 Executive Center Drive, Suite 200
Tallahassee, Fl 32301-5027

Telephone: (850) 402-0510
Fax: (850) 402-0522
www.supratelecom.com

February 13, 2002

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 323099-0850

RE: Docket No. 001305-TP - SUPRA'S MOTION TO DEFER AGENDA ITEM NO. 27 IN DOCKET NO. 001305-TP OR IN THE ALTERNATIVE REQUEST FOR ORAL ARGUMENTS

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra Telecom) Motion To Defer Agenda Item No. 27 in Docket No. 001305-TP Or, In the Alternative, Request For Oral Arguments in the above captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

Brian Chaiken /SWA

Brian Chaiken
General Counsel

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand-Delivery or by Federal Express on this 13th day of February 2002, to the following:

Wayne Knight, Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Nancy B. White and Michael P. Coggin
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301

SUPRA TELECOMMUNICATIONS AND
INFORMATION SYSTEMS, INC.
2620 S. W. Avenue
Miami, Florida 33133
Telephone (305) 476 – 4248
Facsimile (305) 443 - 1078

Brian Chaiken /SWS

BRIAN CHAIKEN

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information Systems, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 001305-TP
	)	Filed: February 13, 2002

SUPRA'S MOTION TO DEFER AGENDA ITEM NO. 27
DOCKET NO. 001305-TP
OR IN THE ALTERNATIVE REQUEST FOR ORAL ARGUMENTS

SUPRA TELECOMMUNICATIONS & INFORMATIONS SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, hereby files this MOTION TO DEFER AGENDA ITEM NO. 27, DOCKET NO. 001305-TP OR IN THE ALTERNATIVE REQUEST FOR ORAL ARGUMENTS, pursuant to Rule 25-22.058, Florida Administrative Code, in the above referenced matter and states the following in support thereof:

Request for Deferral

1. Supra requests a deferral of Agenda Item, Docket No. 001305-TP, for an appropriate amount of time so that the parties can have a meaningful opportunity to file legal briefs outlining the impact of the 11th Circuit's Opinion and to present oral arguments.

Request for Oral Arguments

2. In the alternative, Supra requests that the Commission grant oral arguments on Issue I of Docket No. 001305-TP, Agenda Item No. 27.

3. The pleading upon which argument is being requested is the Staff Recommendation, issued on February 7, 2002, in Docket No. 001305-TP.

4. Commission Order No. PSC-02-0159-PCO-TP stated that the 11th Circuit's decision "shall be properly considered." Given the incorrect assertions, included in the Staff's recommendation issued on February 7, 2002, with respect to the binding nature of the 11th Circuit's decision and the controlling impact of this decision on the Florida Commission, it is clear that the 11th Circuit's decision was not properly considered.

5. Accordingly, given the length of the 11th Circuit's Opinion issued on January 10, 2002, and the incorrect assertions with respect to the binding nature of the 11th Circuit's decision and the controlling impact of this decision on the Florida Commission, legal briefs and oral arguments would assist the Commission in understanding and analyzing the legal implications and the actual controlling nature of the 11th Circuit's decision.

6. The request for deferral and oral argument is not done to cause undue delay but to ensure that the parties have a meaningful opportunity to present the law to the Commission. BellSouth claimed in its response to Supra Motion For Supplemental Authority that it was done to cause undue delay in a proceeding that has been ongoing for two years. The Order establishing procedure in this matter was entered on June 28, 2001. So BellSouth's claim is disingenuous. This Motion is being filed simply to obtain fundamental fairness.

7. Finally, given the complexity of the Court decision Supra would prefer a deferral at this time, so that the parties can have a meaningful opportunity

to file legal briefs outlining the impact of the 11th Circuit's Opinion and to present oral arguments

WHEREFORE, Supra respectfully requests that this Commission grant a deferral of Agenda Item No. 27, Docket No. 001305-TP for an appropriate amount of time so that the parties can have a meaningful opportunity to file legal briefs outlining the impact of the 11th Circuit's Opinion and to present oral arguments; Or in the alternative Supra respectfully requests the opportunity to present oral arguments before the Commission at the Agenda on February 19, 2002. Supra's request is more fully set out in the attached Memorandum of Law.

ARGUMENT
AND
MEMORANDUM OF LAW

Issue 1, in Docket No. 001305-TP, deals with the appropriate forum for adjudicating disputes arising out of previously approved interconnection agreements.

On Wednesday, January 30, 2002, Supra filed a Motion For Leave to File Supplemental Authority in Docket No. 001305-TP, in order to bring to the Commission's attention the Eleventh Circuit Court's decision in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.* (00-12809) and *BellSouth Telecommunications, Inc. v. Worldcom Technologies, Inc.* (00-12810) published on January 10, 2002. The 11th Circuit stated in its decision that there was no "explicit" statutory authority in either the 1996 Federal Telecommunications Act nor Georgia state law granting the GPSC the power to adjudicate disputes arising out of previously approved interconnection agreements. *See pgs.* 35-37, 43.

BellSouth filed a response stating that "Supra is incorrect in stating that the Eleventh Circuit's decision is "controlling." BellSouth's assertion was completely false as a matter of law.

Commission issued Order No. PSC-02-0159-PCO-TP, on February 1, 2002, granting in part and denying in part Supra's Motion to File Supplemental Authority. Commission Order No. PSC-02-0159-PCO-TP stated that the 11th Circuit's decision "shall be properly considered."

On January 10, 2002, the date the 11th Circuit's decision was published, all courts and/or judicial forums came under a duty to apply the new precedent as binding authority. The 11th Circuit has well established rules with respect to the precedential value of a published decision prior to the issuance of a mandate.

Under IOP (Internal Operating Procedure) NO. 2, found under FRAP No. 36, the 11th Circuit states the following:

> "Effect of Mandate on Precential Value of Opinion. **Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result.** *See Martin v. Singletary*, 965 F.2d 944, 945 n. 1 (11th Cir. 1992). . . . ." (Emphasis added).

The facts in this case surrounding the publishing of the opinion on January 10, 2002, is that the mandate is to be issued on March 4, 2002. The mandate is to be issued if no motions for reconsideration, whether panel or en banc, are filed on or before February 25, 2002. The language in the 11th Circuit's IOP No. 2 is clear: under the law of the 11th Circuit, published opinions are binding precedent. Furthermore, the issuance or non-issuance of the mandate does not affect this result.

The case cited by the 11th Circuit in IOP No. 2 clearly refutes the argument that the time allotted for the filing of reconsideration or rehearing some how tolls the binding nature of the Court's decision.

The date of the mandate is merely the official means of communicating with the district court. *See Martin v. Singletary*, 965 F.2d 944, 945 n. 1 (11th Cir. 1992). The date of the mandate does not in any way effect the duty of all courts and quasi-judicial forums, like the FPSC, in the 11th circuit to apply the new precedent established in the 11th Circuit's decision as of January 10, 2002. It short, the 11th Circuit's decision is controlling and binding as a matter of law.

BellSouth may attempt to argue that because Supra did not file for a Motion for Reconsideration of Order No. PSC-02-0159-PCO-TP, in which the Pre-Hearing Officer struck the word "controlling", that somehow Supra waived its right to bring this issue to the Commission's attention. This argument would be nonsense. The 11th Circuit's decision is binding – irrespective of the filing of a motion for reconsideration.

Notwithstanding the foregoing, on February 7, 2002, the Commission Staff issued its Recommendation in Docket No. 001305-TP. Under Issue 1 of Docket No. 001305-TP, the Staff addressed the precedential value of the 11th Circuit's decision by stating that: "The ruling is not as yet final, as the time for filing a motion for rehearing has not passed and a mandate has not been issued, **and so it does not presently have the force of law**." (Emphasis added).

It seems that the Staff simply accepted BellSouth's assertion that the 11th Circuit decision was not controlling. The Staff's legal conclusion was and is completely false as a matter of law. As such, the 11th Circuit' decision was not properly considered.

No explicit authority

The 11th Circuit held that the Georgia Public Service Commission (GPSC) lacked authority to hear disputes arising out of previously approved interconnection agreements under either federal or Georgia state law. The 11th Circuit stated that there was no "explicit" statutory authority in either the 1996 Federal Telecommunications Act nor Georgia state law granting the GPSC the power to adjudicate disputes arising out of previously approved interconnection agreements. *See pgs.* 35-37, 43.

Notwithstanding the Court's findings, the Staff states in its recommendation that: "that ruling [11th Circuit] was based in part on the Court's review of Georgia law, the applicable provisions of which appear to be significantly more restrictive than Florida law regarding the Commission's jurisdiction to enforce interconnection agreements." (Emphasis added). The Staff's conclusion is of course mere speculation. The Staff does not cite to any specific provision in Chapter 364, Florida Statutes, to justify its assertion. Nor does the Staff acknowledge the 11th Circuit's findings with respect to the lack of explicit statutory authority as the basis for the 11th Circuit's decision that the GPSC had no subject matter jurisdiction.

The Commission in Georgia argued, like the Staff seeks to imply here, that the Commission has "general authority" over "all telecommunications providers in the State" and it is that authority that permits the Commission to adjudicate disputes involving interconnection agreements. The 11th Circuit rejected this argument:

> "Nothing in the Georgia Act gives the GPSC the right to interpret a contract between two parties, just because the two parties happen to be certified telecommunications carriers." *Id.* at pg. 42.

The Court noted that while it is true that the GPSC does have a "general supervision of all" telecommunications companies in the State of Georgia, "there are limits to this power." *Id.*, at pg. 44. First, there is no explicit statutory authority for adjudicating such disputes. And, second, as a functional matter judicial forums – and not quasi-legislative regulatory bodies – are better suited for the purely legal exercise of construing the terms of interconnection agreements.

Accordingly, it is fundamentally unfair to issue a Commission Order stating that an important decision of the 11th Circuit will be "properly considered," and then have the Staff dismiss the case without any substantive legal justification for the conclusion that the decision is not applicable in this docket.

The Staff's recommendation raises serious and legitimate questions. As such, this Commission cannot make a proper examination and evaluation of the impact and import of the 11th Circuit's decision without input from a party that views the 11th Circuit's decision in a different light, than as it is viewed by BellSouth and as presented in Staff's recommendation.

Change of law provision as an answer cannot be justified

Notwithstanding the foregoing, Staff suggests, in its Recommendation, that the "change of law" provision will be applicable if Supra is correct regarding the controlling nature of the 11th Circuit's decision. This statement simply cannot be justified.

The controlling nature of the 11th Circuit's decision means that the Florida Commission lacks subject matter jurisdiction, under either federal or Florida law, to adjudicate disputes arising out of previously approved interconnection agreements. As such, any evidence offered by BellSouth with respect to Issue 1 may not be considered as

a matter of law. Accordingly, the only legally relevant testimony remaining in the record with respect to the question addressing the proper forum for adjudicating disputes is Supra's testimony. Therefore, the Commission has no choice but to order that the parties must submit to commercial arbitration.

Voting in favor of the Staff's recommendation, on this issue, would be the equivalent of choosing not to vote. Simply put, if the Commission chose not to vote, then the contract would in theory remain silent on this issue. Presumably, the parties would avail themselves of state or federal court, as applicable. This of course would be contrary to federal law which requires the Commission to decide all "open issues." Also it would preclude Supra, and other CLECs, from having the Federal District Court review whether arbitration is in fact not inconsistent with the 1996 Act.

The Staff, in its Recommendation, states that Order No. PSC-01-1402-FOF-TP, issued on June 28, 2001, observed that "nothing in the law gives us the explicit authority to require third party arbitration."

The Staff's citation of Order No. PSC-01-1402-FOF-TP is not applicable to the factual circumstances of this arbitration. In *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, 112 F.Supp.2d 1286, 1298 (N.D. Fla. 2000), the Florida Commission argued that "it was precluded by state law from adopting a compensation mechanism of the type sought by MCI, because any such mechanism would require the Florida Commission in effect to make an award of damages . . ." *Id.*

In rejecting the Florida Commission's position, the Federal District Court stated that: "when the Florida Commission undertook to arbitrate the dispute between BellSouth

and MCI, it became obligated under the Telecommunications Act to arbitrate all "open issues," including MCI's request for a compensation provision."

Accordingly, the Florida Commission has **"explicit"** federal authority to "decide" the question regarding appropriate forum for adjudicating disputes. Issue 1, in Docket No. 001305-TP is obviously "an open issue." Given that BellSouth's testimony is legally irrelevant and cannot be relied upon, the only remaining substantive evidence in the record is Supra's testimony. As such, it would be entirely and legally appropriate for the Florida Commission to rely upon *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, as authority for choosing to accept Supra'a testimony and ordering arbitration.

The Staff also claims that "the Commission should not prescribe that the parties enter into a provision outside the scope of the Act, and for which they have not duly bargained."

First, the 11th Circuit decision is clear that state commissions, like the Florida Commission, cannot rely upon section 252 of the 1996 Act as authority for adjudicating disputes involving interconnection agreements. As such, adopting the Staff's Recommendation would be approving a position that is "outside the scope of the Act."

Next, there is no federal determination with respect to whether arbitration is in fact outside the scope of the 1996 Telecommunications Act. The Staff's claim that arbitration is outside the scope of the Act cannot be substantiated with any authority.

It is absolutely clear that the Florida Commission is obligated to decide "all open issues" pursuant to the 1996 Telecommunications Act. It is absolutely clear that the Florida Commission cannot rely upon either federal law or Florida law as authority to

order that all disputes arising out of previously approved interconnections agreements be brought before the Commission. Accordingly, the Commission is well within its discretion to order arbitration, as supported by Supra's testimony and the Federal District Court's opinion in *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, 112 F.Supp.2d 1286, 1298 (N.D. Fla. 2000).

If BellSouth believes that arbitration is not consistent with the Federal Telecommunication Act, BellSouth can file a petition pursuant to Section 252(6)(e) in the Northern District of Florida requesting review of the Commission's decision. The Federal District Court will provide all Competitive Local Exchange Carriers (CLECs) in Florida with legal precedent. If the District Court rules in favor of the Commission and Supra, BellSouth can seek review with the 11th Circuit. If BellSouth is rejected there, CLECs operating in the 11th Circuit will again be afforded solid legal precedent with respect to commercial arbitration.

Staff states in its Recommendation in 001305-TP that "it is critical that interconnection agreements be interpreted consistently." Supra can think of no greater method of determining consistency than the establishment of federal precedent – as opposed to mere speculation of what is in or outside the scope of the 1996 Act.

Finally, given the length of the 11th Circuit's Opinion issued on January 10, 2002, and the incorrect assertions with respect to the binding nature of the law and the controlling impact on the Florida Commission, legal briefs and oral arguments would assist the Commission in understanding and analyzing the legal implications and controlling nature of the 11th Circuit's decision.

For these reasons, as well as the foregoing, Supra believes that the Commission should grant a deferral for an appropriate amount of time so that the parties can have a meaningful opportunity to file legal briefs outlining the impact of the 11th Circuit's Opinion and to present oral arguments.

WHEREFORE, Supra respectfully requests that this Commission move to defer Item No. 27 on the February 19th Agenda Conference.

RESPECTFULLY SUBMITTED this 13th day of February, 2002.

SUPRA TELCOMMUNICATIONS &
INFORMATION SYSTEMS, INC.
2620 S.W. 27th Ave.
Miami, Florida 33133
Telephone: 305.476.4246
Facsimile: 305.443.9516

By: _____
BRIAN CHAIKEN, ESQ.
Florida Bar No. 0118060
KIRK DAHLKE, ESQ.
Florida Bar No. 0060811