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February 19, 2002

Mrs. Blanca S. Bayo
Director, Division of the Commission Clerk
And Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 001305-TP (Supra)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Supplemental Brief Addressing Issue 1, which we ask that you file in the captioned docket.

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 on the parties shown on the attached Certificate of Service.

Sincerely,

T. Michael Twomey

T. Michael Twomey (KA)

Enclosures

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

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, Facsimile and U.S. Mail this 19th day of February, 2002 to the following:

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(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information System, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996.	Docket No. 001305-TP Filed: February 19, 2002

BELLSOUTH'S SUPPLEMENTAL BRIEF ADDRESSING ISSUE 1

As directed by the Commission in its order dated February 15, 2002, BellSouth Telecommunications, Inc. ("BellSouth") submits this supplemental brief addressing Issue 1. Specifically, this brief addresses the recent decision in the case entitled BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., Case Nos. 00-12809, 00-12810, 2002 WL 27099 (11th Cir. Jan. 10, 2002) ("MCImetro"). The Eleventh Circuit's decision is not "controlling authority" for the issues that have been presented to this Commission for decision. Supra's claims to the contrary are ill-founded and designed solely to delay the Commission's decision in this case.

ARGUMENT

In what amounts to a preemptive motion for reconsideration of a decision that has not yet been made, Supra has asked the Commission to delay a vote on the Commission Staff Recommendation in this case because of the Eleventh Circuit's recent decision in MCImetro concerning the jurisdiction of the Georgia Public Service Commission ("GPSC"). According to Supra: (1) the Eleventh Circuit's decision has decided that this Commission lacks jurisdiction to enforce or interpret interconnection agreements; (2) based on the Eleventh Circuit's decision, the Commission cannot, as proposed by BellSouth, order the parties to include a clause in their agreement that requires the parties

to bring any disputes arising under that agreement to the Commission for resolution; and (3) because, according to Supra, the Commission cannot adopt BellSouth's proposed language on Issue 1, the Commission must resolve Issue 1 by adopting Supra's proposed language. Supra's "logic" is as tortured as it is unfounded.

At most, the Eleventh Circuit's decision in MCImetro stands for the proposition that, under that court's interpretation of federal law and Georgia law, the GPSC has no authority to interpret or enforce the terms of the agreement between BellSouth and MCImetro. Contrary to Supra's pejorative and dismissive rhetoric, neither the Eleventh Circuit nor any other court has considered the issue of whether this Commission has jurisdiction, under Florida law, to resolve disputes arising under an interconnection agreement. And, the Eleventh Circuit did not address, even indirectly, the issue of whether a state commission could compel parties to submit to binding arbitration. Moreover, even if the Commission were not persuaded that BellSouth's proposed language should be adopted, the Commission should nevertheless reject Supra's proposed language. Indeed, for the reasons set forth below, the Commission should adopt the Commission Staff's recommendation.

1. The MCImetro Case Does Not Address This Commission's Authority Under Florida Law To Resolve Contract Disputes.

In MCImetro, the Eleventh Circuit held that the GPSC did not have authority to resolve disputes between BellSouth and WorldCom and between BellSouth and MCImetro concerning the payment of reciprocal compensation under two interconnection agreements. The parties' agreements had been filed with and approved by the GPSC under 47 U.S.C. § 252. Upon petition by the parties, the GPSC resolved the disputes and its decision was appealed to federal district court, which affirmed the GPSC's decisions.

On appeal, the Eleventh Circuit concluded that the 1996 Act did not expressly provide for a state commission to resolve disputes arising after an interconnection agreement was approved and that no such authority should be implied:

> The plain meaning of [47 U.S.C. § 252(e)(1)], however, grants state commissions, like the GPSC, the power to *approve* or *reject* interconnection agreements, not to interpret or enforce them. It would seem, therefore, that the 1996 Act does not permit a State commission, like the GPSC, to revisit an interconnection agreement that it has already approved, like the ones in this case.

2002 WL 27099, slip op. at 6. In reaching its decision that the GPSC has no authority to interpret or enforce the terms of an interconnection agreement, the Eleventh Circuit rejected the decisions of the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals,[1] as well as the Federal Communications Commission's ("FCC") conclusion,[2] that the state commissions have such authority under the 1996 Act.

Nevertheless, to resolve Issue 1 in this case, it is not necessary for this Commission to delve into the Eleventh Circuit's analysis of the 1996 Act because the court expressly stated that the scope of a state commission's authority is not determined solely by reference to federal law, but instead requires an analysis of state law. 2002 WL 27099, slip op. at 9 ("Having determined that the GPSC has no power under federal law to interpret the interconnection agreements, we must now consider whether there is some other appropriate basis for the GPSC to interpret these agreements.").

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[1] Puerto Rico Tel. Co. v. Telecomm. Regulatory Bd. of Puerto Rico, 189 F.3d 1, 10-13 (1st Cir.1999); Bell Atlantic Maryland v. MCI Worldcom, 240 F.3d 279, 304-05 (4th Cir.2001); Southwestern Bell Tel. Co. v. Public Util. Comm'n, 208 F.3d 475, 479-480 (5th Cir.2000); Illinois Bell Tel. Co. v. Worldcom Techs., Inc., 179 F.3d 566, 571-72 (7th Cir.1999); Iowa Util. Bd. v. F.C.C., 120 F.3d 753, 804 (8th Cir.1997), rev'd on other grounds, AT & T v. Iowa Util. Bd., 522 U.S. 1089, 118 S.Ct. 879, 139 L.Ed.2d 867 (1998); Southwestern Bell Tel. Co. v. Brooks Fiber Optic Comm'n of Oklahoma, Inc., 235 F.3d 493, 497 (10th Cir.2000).

[2] *In re Starpower Communications*, 15 F.C.C.R. 11,277 (2000)

Under Florida law, this Commission has express authority to interpret and enforce interconnection agreements between ILECs and ALECs. Florida Stat. § 364.162 specifically grants the FPSC "the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." Fla. Stat. § 364.162(1).[3] Thus, unlike the Eleventh Circuit's characterization of the GPSC's authority under Georgia law, this Commission has specific and express authority to decide "any dispute regarding interpretation" of the terms and conditions of interconnection or resale. This grant of authority obviously includes the authority to interpret such terms and conditions when they are included within an interconnection agreement.[4]

Moreover, the Eleventh Circuit in MCImetro expressly based its decision on a finding that the GPSC was merely a "quasi-legislative body" unsuited to hear contract disputes. 2002 WL 27099, slip op. at 9-11. But, under Florida law, this Commission exercises quasi-judicial authority when such authority is delegated to it by the Florida legislature. Southern Bell Tel. and Tel. Co. v. Florida Pub. Serv. Comm'n, 453 So.2d 780, 781 (Fla. 1984)(statute authorizing Commission to adjudicate contract disputes concerning toll revenue was a "proper assignment of quasi-judicial authority" pursuant to Fla. Const. art. V, § 1). The express authority under Fla. Stat. § 364.162 to resolve "any

[3] While that section preceded the adoption of the 1996 Act, it was not preempted by that legislation and remains in full force and effect. 47 U.S.C. § 251(d)(3) recognized that certain states, including Florida, had already taken steps to introduce local exchange competition and left state laws in effect, except in limited circumstances.

[4] The Commission also has more general authority in Fla. Stat. § 364.01(4)(g) to "[e]nsure that all providers of telecommunications services are treated fairly . . .." Similarly, Fla. Stat. § 364.337 authorizes the Commission to exercise "continuing regulatory oversight over the provision of basic local exchange telecommunications service provided by a certificated alternative local exchange telecommunications company . . . for purposes of . . . ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace." Either of these general

dispute regarding interpretation" of the terms and conditions of interconnection or resale is also "a proper assignment of quasi-judicial authority" under the Florida Constitution. Therefore, the Commission would not be acting in a quasi-legislative capacity when resolving disputes between ALECs and ILECs arising out of interconnection disputes. Whatever the scope of the GPSC's authority, this Commission plainly has ample authority under state law to resolve disputes that may arise between Supra and BellSouth under the follow-on agreement.

2. The MCImetro Case Does Not Address Binding Arbitration.

Issue 1 raises the question of whether this Commission can compel BellSouth to agree to binding commercial arbitration if it does not voluntarily agree to do so. The Eleventh Circuit was not presented with that issue in MCImetro and, therefore, that case does not support Supra's position in this case. Indeed, Supra has absolutely no legal support for its position that BellSouth could be compelled to submit the binding arbitration. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT & T Technologies v. Communications Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986) (emph. added); accord Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241, 82 S. Ct. 1318, 1320 (1962) (a court cannot require a party to submit to arbitration any dispute which he did not agree to submit).[5] The Commission recently ruled on this very issue in the AT&T-BellSouth arbitration, (FPSC Docket No. 000731-TP) where it

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grants of authority could be considered broad enough to include the adjudication of disputes arising under an interconnection agreement.

[5] The rule that a party cannot be forced to submit to binding arbitration is based on the recognition that a party gives up important rights when he agrees to arbitrate disputes. For example, a district court decision is generally subject to appellate review while a commercial arbitration decision can only be set aside on very narrow grounds.

concluded that "nothing in the law gives [the Commission] explicit authority to require third party arbitration." Order No. PSC-01-1402-FOF-TP (June 28, 2001) at p. 111. Therefore, even if the Commission believes that the MCImetro decision precludes the adoption of BellSouth's proposed language, the Commission should reject Supra's proposed language because the Commission cannot order BellSouth to submit to binding commercial arbitration. That is, even if the Commission has doubts about its authority to hear disputes arising under an approved agreement, the Commission should have no doubt that it cannot force BellSouth to give up legal rights and submit to binding commercial arbitration.

3. The Commission Is Not Limited To Choosing Between The Parties' Proposals.

Supra claims, without citation, that "the Commission has no choice but to order that the parties must submit to commercial arbitration." In addition to relying on an incorrect premise (i.e., the false assertion that the Commission cannot resolve contract disputes), this claim presents a false dichotomy. Contrary to Supra's suggestion, the Commission is not obligated to select among options presented to it by the parties. Rather, "the Florida Public Service Commission is required by [Florida's] statutes and case law to reach its own independent findings and conclusions based upon the record before it." International Minerals & Chemical Corp. v. Mayo, 217 So.2d 563, 566 (Fla. 1969); see also Kimball v. Hawkins, 264 So.2d 463, 465 (Fla. 1978) (noting "legislative intent to extend broad discretion to the Public Service Commission in making its decision"); Insurance Co. of North America v. Morgan, 406 So.2d 1227, 1229 (Fla. Ct. App. 5th Dist. 1981) (same).

Indeed, under circumstances similar to those present here, the Florida Supreme Court recently upheld the Commission's exercise of its independent judgment to enter a ruling that did not conform to the parties' suggestion. In Gulf Electric Cooperative, Inc. v. Johnson, 727 So.2d 259 (Fla. 1999), the court reviewed a Commission decision not to impose territorial boundaries for the exclusive provision of electrical service. The court noted that the applicable statute granted the Commission jurisdiction to approve territorial agreements and to resolve any territorial dispute among rural electric cooperatives. And, the court observed that the statute did not expressly require the Commission to set boundaries in order to resolve a territorial dispute. Under those circumstances, the court specifically affirmed the Commission's exercise of its independent judgment to refrain from imposing any territorial boundaries and concluded that the Commission "is not required as a matter of law to establish territorial boundaries in order to resolve a territorial dispute." Gulf Electric, 727 So.2d at 264. See also Fort Pierce Utilities Authority v. Beard, 626 So.2d 1356 (Fla. 1993) (FPSC properly exercised its independent judgment to reject parties' joint petition for approval of a territorial agreement).

In resolving Issue 1 in this case, the Commission is entitled to take into consideration all of the evidence and applicable law and decide the manner as it sees fit, as long as the Commission's decision is neither arbitrary nor capricious. Indeed, while Supra has cited MCI Telecom. Corp. v. BellSouth Telecom., Inc., 112 F. Supp. 2d 1286 (N.D. Fla. 2000), for the proposition that the Commission must adopt Supra's proposed language, that case actually leads to the opposite conclusion. In MCI, the court held that the Commission cannot refuse to consider an issue it has agreed to resolve by acting as

arbitrator. The court specifically noted, however, that consideration of the issue did not mean that the Commission was required to adopt the proposals of either party: "Had the Florida Commission decided, as a matter of discretion, not to adopt such a provision, MCI would bear a substantial burden in attempting to demonstrate that that determination was contrary to the Telecommunications Act or arbitrary and capricious." 112 F. Supp. 2d at 1297. In this case, even if the Commission is unwilling to adopt language proposed by BellSouth, the Commission could also reject the language proposed by Supra.

The Commission did just that in its decision in the recent MCI-BellSouth arbitration (Docket No. 000649-TP). In Order No. PSC-01-824-FOF-TP (March 30, 2001), the Commission acknowledged that, although it was obligated to arbitrate open issues, "[the Commission] may only impose a condition or term required to ensure that such resolutions and conditions meet the requirements of Section 251." Order at 174. The Commission went on to find that it was not appropriate to "impose adoption of any disputed terms contained in the limited liability provision whereby the parties would be liable in damages, without a liability cap, to one another for their failure to honor in one or more material respects any one or more of the material provisions of the Agreement." Id. at 175. Based on that conclusion, the Commission refused to adopt the language proposed by either BellSouth or MCI. In this case, the Commission can resolve the "open issue" presented by Issue 1 by deciding that the new interconnection agreement between BellSouth and Supra should not include the forum selection clause proposed by either party.

CONCLUSION

The Commission should view Supra's recent filing for what it is: an attempt to delay these proceedings. When one strips away the self-serving and conclusory rhetoric, what is left is nothing more than a superficial misinterpretation of a recent court decision. The Commission Staff properly analyzed the potential effect of the Eleventh Circuit on this case. The Commission should approve the Staff Recommendation on Issue 1 (as well as the other issues) and proceed toward a final decision in this case.

Respectfully submitted, this 19th day of February, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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