BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc., for Resolution of Billing Disputes | ) | Docket No. 001097-TP<br><br>Dated: August 15, 2001 |

**MOTION FOR RECONSIDERATION OF FINAL ORDER ON COMPLAINT**

NOW COMES Supra Telecommunications & Information Systems, Inc. ("Supra"), by and through its undersigned counsel, pursuant to Public Service Commission Rule 25-22.060, moves for reconsideration of the Commission's Final Order on Complaint, and in support hereof states as follows:

## I. BRIEF INTRODUCTION

On July 31, 2001, after a hearing on the merits in this matter, the Commission followed its Staff Recommendations, and found in favor of BellSouth Telecommunications, Inc. ("BellSouth"). The bases for Supra's Motion for Reconsideration are as follows: (1) the analysis found in the Final Order On Complaint is based upon an erroneous Staff Recommendation which failed to consider, or even make a single reference to, the arguments raised in Supra Telecom's post-hearing brief; and (2) since the conclusion of the hearing, [redacted]

[redacted] Amended Answer and Counterclaim in this proceeding, which stated, in part:

> Had BellSouth properly provided and billed Supra for UNE combos instead of for resale, BellSouth would not have been entitled to end user common line charges.

[redacted] Supra requests that this Commission reconsider its Final Order regarding the propriety of the bills submitted by and paid to BellSouth.

## II. PROCEDURAL BACKGROUND

1. On or about August 2000, BellSouth filed the instant complaint in this proceeding regarding a dispute over certain BellSouth bills. The complaint sought the resolution of a billing dispute arising from a May 1997 Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information Systems, Inc. Regarding The Sale of BST's Telecommunications Services to Reseller For The Purposes of Resale (hereafter referred to as "Resale Agreement") and an AT&T/BellSouth Interconnection Agreement adopted by Supra in October 1999 (hereafter referred to as "AT&T/BellSouth Agreement").

2. Supra, in its Amended Answer and Counterclaim filed on December 4, 2000, plead the following:

> Since January 1997, Supra has tried unsuccessfully to secure necessary and complete access to BellSouth's services and elements, including real-time access to operations support systems ("OSS"), in order to enter the local telephone market in Florida and compete with BellSouth. (¶ 3)
>
> Had BellSouth properly provided and billed Supra for UNE combos instead of for resale, BellSouth would not have been entitled to end user common line charges. (¶ 18).

3. [redacted]

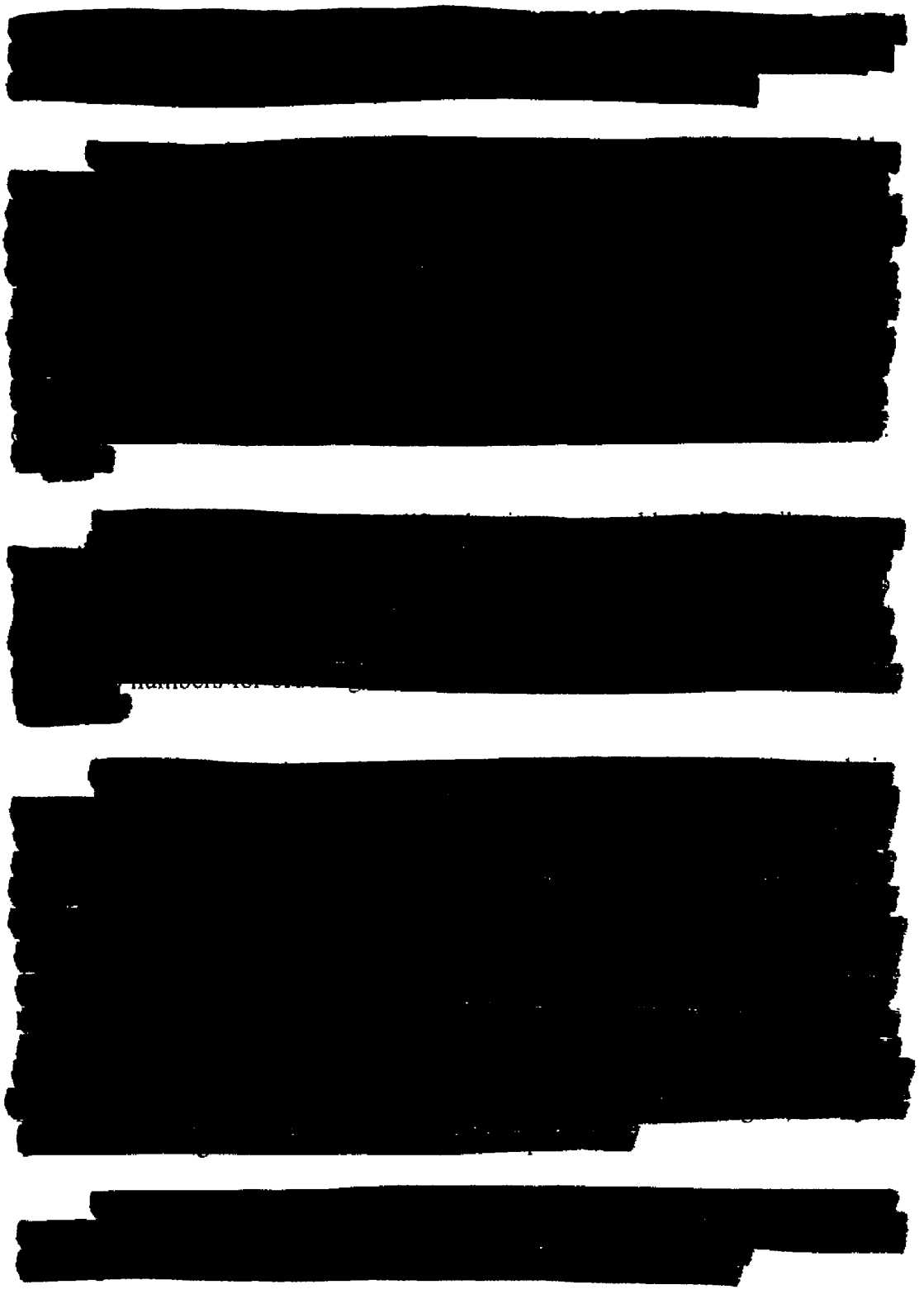
4. On or about April 9, 2001, this Commission entered a Prehearing Order in which the parties' preliminary positions were identified. The Prehearing Order set forth five preliminary positions of the parties; a basic position and positions on each of the four issues previously identified for this proceeding.

5. On May 3, 2001, an evidentiary hearing was held in this proceeding in which oral and documentary evidence was presented by both parties.

6. Pursuant to Section IV of the Prehearing Order and Rule 28-106.215, Florida Administrative Code, each party was entitled to file a post-hearing statement of issues and positions together with a brief which set forth proposed findings of fact, conclusions of law and a relevant analysis of the same. Section IV of the Prehearing Order contemplates any party changing its position on the issues in that it specifically states that a party need not restate its position on the issues, if that position has not changed since the Prehearing Order.

7. On May 24, 2001, both Supra Telecom and BellSouth timely filed their statements of issues and positions and post-hearing briefs. In its post-hearing filing, Supra modified and/or otherwise changed its positions with respect to the issues as a result of facts adduced during the May 3, 2001 evidentiary hearing. Pursuant to the Prehearing Order and Rule 28-106.215, Florida Administrative Code, Supra Telecom set forth in its post-hearing brief, each of its revised positions on the issues, together with proposed findings of fact and conclusions of law which supported these revised positions.

8. [redacted]



9. On June 28, 2001, Commission Staff issued a Recommendation in which the positions of Supra Telecom were represented to be those previously set forth in the Prehearing Order. Following each statement of position, Commission Staff provided an

analysis of each position together with the Staff's recommendation. None of the positions identified by the Commission Staff represented either the revised positions taken by Supra Telecom in its post-hearing brief, or, importantly, the evidence brought forth at the hearing. Moreover, none of the analysis provided by the Commission Staff included any legal argument or factual support set forth in Supra Telecom's post-hearing brief. Based upon these facts, it is reasonable to conclude that Commission Staff never considered Supra Telecom's post-hearing brief.

10. On July 10, 2001, this Commission voted unanimously to adopt each of the recommendations set forth by the Commission Staff in its June 28, 2001 Recommendation.

11. On July 31, 2001, this Commission issued its Final Order On Complaint in which the arguments set forth in the Staff Recommendation were adopted almost word-for-word.

12. Based upon the above, it is apparent that the analysis found in the Final Order On Complaint is based upon a Staff Recommendation which undoubtedly failed to consider Supra Telecom's post-hearing brief. Although Supra Telecom does not necessarily fault the Commission for relying upon Commission Staff, under the circumstances due process requires a consideration of Supra Telecom's post-hearing positions, as well as the evidence in support thereof.

## III. MEMORANDUM OF LAW

The proper standard of review on a motion for reconsideration is whether or not the Commission overlooked or failed to consider a point of fact or law in rendering its order. In re: Complaint of Supra Telecom, 98 FPSC 10, 497, at 510 (October 28, 1998) (Docket No. 980119-TP, Order No. PSC-98-1467-FOF-TP). This standard necessarily includes any mistakes of either fact or law made by the Commission in its order. In re: Investigation of possible overearnings by Sanlando Utilities Corporation in Seminole County, 98 FPSC 9,

214, at 216 (September 1998) (Docket No. 980670-WS, Order No. PSC-98-1238-FOF-WS) ("It is well established in the law that the purpose of reconsideration is to bring to our attention some point that we overlooked or failed to consider or a mistake of fact or law"); see e.g. In re: Fuel and purchase power cost recovery clause and generating performance incentive factor, 98 FPSC 8, 146 at 147 (August 1998) (Docket No. 980001-EI, Order No. PSC-98-1080-FOF-EI) ("FPSC has met the standard for reconsideration by demonstrating that we may have made a mistake of fact or law when we rejected its request for jurisdiction separation of transmission revenues").

Furthermore, although Supra is not, as of yet, seeking relief from this Order, Rule 1.540(b) of the Florida Rules of Civil Procedure provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final . . . order . . . for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or reheaing.

In this instance it is clear that the Commission relied exclusively upon the Staff Recommendation in drafting the Final Order On Complaint. It is also quite apparent that the Commission Staff never considered Supra Telecom's post-hearing statement of issues and positions and the accompanying proposed findings of fact and conclusions of law. Thus it is clear that the Final Order On Complaint never considered Supra Telecom's revised positions on the issues, and the factual and legal support of those revised positions. A reconsideration of the Final Order On Complaint is not only warranted, but mandated by due process.

On a more specific note, at least three arguments presented by Supra Telecom in its post-hearing brief were completely ignored in the Final Order On Complaint. These arguments require a contrary decision and a finding in favor of Supra Telecom. The first argument ignored by this Commission is that the 1997 Resale Agreement specifically requires a corrective payment to Supra Telecom in order to comply with the parity

provisions of Section 251 of the Telecommunications Act. The second argument ignored is that BellSouth undisputedly refused to provide Supra Telecom unbundled network elements (UNEs) during the relevant time period and had such unbundled network elements been provided, the disputed amounts billed could not have been billed. [redacted] Finally, the Commission also failed to consider that BellSouth violated the provisions of the 1997 Resale Agreement by requiring proof of authorization for changes beyond that required by the 1997 Resale Agreement. Since the Commission failed to consider any of these arguments, this motion for reconsideration is appropriate.

*A. Contractual Requirement Of A Corrective Payment*

In the strictest sense and ignoring for now BellSouth's open refusal to provide Supra Telecom access to Unbundled Network Element Combinations, the Resale Agreement does govern the parties' resale relationship from 1997 until Supra's adoption of the AT&T/BellSouth Agreement on or about October 5, 1999. This is a point upon which BellSouth agrees. However, the fact that the Resale Agreement governs the parties' resale relationship, does not end the inquiry or resolve this billing dispute. This is because the Resale Agreement specifically has a provision which requires a corrective payment or refund, if Supra adopts another agreement between BellSouth and another ALEC, which provides that ALEC more favorable terms and/or conditions. The relevant time period for this corrective payment or refund, is the time period between when the third party and BellSouth entered the other agreement and the date Supra adopts that agreement. The reason for this corrective payment provision was obviously to prevent BellSouth from

violating the non-discriminatory provisions of Section 251 of the Telecommunications Act of 1996, thus ensuring that during any particular time period, every ALEC had the right to be charge the same for similar services and thus allowing refunds where agreements between BellSouth and other carriers may differ.

The terms and conditions of resale under the AT&T/BellSouth Agreement differed from those found in the Resale Agreement. Thus, under the Resale Agreement, a corrective payment or refund was due back to Supra upon adoption of the AT&T/BellSouth Agreement in an amount equal to the change in rates and other charges between the two agreements. The result of this corrective payment provision is that the rates and charges set forth in the AT&T/BellSouth Agreement retroactively apply to create a refund to Supra. Thus, although in a strictest sense, the Resale Agreement governs the resale relationship prior to October 5, 1999, under the corrective payment provisions of the Resale Agreement, the rates and other charges used in the AT&T/BellSouth Agreement actually apply in calculating the amount of the corrective payment or refund.

In May 1997, Supra and BellSouth entered into the Resale Agreement. See Composite Exhibit 3 (Exhibit 1) and Composite Exhibit 4 (PSC-1). Section XVI of the Resale Agreement provides in pertinent part as follows:

**XVI. More Favorable Provisions**

**A. The parties agree that if -**

**1. the Federal Communications Commission ("FCC") or the Commission finds that the terms of this Agreement are inconsistent in one or more material respects with any of its or their respect decisions, rules or regulations, or**

**2. the FCC or the Commission preempts the effect of this Agreement, then, in either case, upon such occurrence becoming final and no longer subject to administrative or judicial review, the parties shall immediately commence good faith negotiations to conform this Agreement to the requirements of any such**

decision, rule, regulation or preemption. The revised agreement shall have an effective date that coincides with the effective date of the original FCC or Commission action giving rise to such negotiations. The parties agree that the rates, terms and conditions of any new agreement shall not be applied retroactively to any period prior to such effective date except to the extent that such retroactive effect is expressly required by such FCC or Commission decision, rule, regulation or preemption.

B. In the event that BellSouth, either before or after the effective date of this Agreement, enters into an agreement with any other telecommunications carrier (an "Other Resale Agreement") which provides for the provision with the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee of any of the arrangements covered by this Agreement upon rates, terms or conditions that differ in any material respect from the rates, terms and conditions for such arrangements set forth in this Agreement ("Other Terms"), BellSouth shall be deemed thereby to have offered such other Resale Agreement to Reseller in its entirety. In the event that Réseller accepts such offer, such Other Terms shall be effective between BellSouth and Reseller as of the date on which Reseller accepts such offer.

* * * * * *

F. Corrective Payment. In the event that -

1. BellSouth and Reseller revise this Agreement pursuant to Section XVI.A, or

2. Reseller accepts a deemed offer of an Other Resale Agreement or Other Terms, then BellSouth or Reseller, as applicable, shall make a corrective payment to the other party to correct for the difference between the rates set forth herein and the rates in such revised agreement or Other Terms for substantially similar services for the period from the effective date of such revised agreement or Other Terms until the date that the parties execute such revised agreement or Reseller accepts such Other Terms, plus simple interest at a rate equal to the thirty (30) day commercial paper rate for high-grade, unsecured notes sold through dealers by major corporations in multiples of $1,000.00 as regularly published in *The Wall Street Journal.*

It is undisputed that the Resale Agreement was a BellSouth standard form agreement, and thus had been drafted by BellSouth. As a matter of contract construction, any ambiguity in an agreement is to be construed against the maker of that agreement. St. Charles Foods, Inc. v. America's Favorite Chicken Co., 198 F.3d 815 (11th Cir. 1999) (under Georgia law); Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association, 117 F.3d 1328 (11th Cir. 1997) (under Florida law). Supra submits that the unambiguous terms of the Resale Agreement provide for a corrective payment under two circumstances: (a) where the partics revise the Resale Agreement in response to an FCC or Commission action pursuant to paragraph XVI.A.; and (b) where pursuant to paragraph XVI.B., the reseller (Supra) subsequently adopts an agreement between BellSouth and another carrier which contains rates which differ from the Resale Agreement. In this proceeding, the relevant circumstance was Supra's subsequent adoption of the 1997 AT&T/BellSouth Agreement which contained more favorable provisions regarding the resale of telecommunications services.

On October 5, 1999, Supra adopted the AT&T/BellSouth Agreement. See Testimony of Patrick Finlen at page 30, lines 20-21 and Composite Exhibit 3 (Exhibit 2). As between BellSouth and AT&T, the effective date of the AT&T/BellSouth Agreement was June 10, 1997. See Testimony of Carol Bentley at page 212, lines 2-3 and Composite Exhibit 3 (Exhibit 2). The rates and terms of resale in the AT&T/BellSouth Agreement materially differed from those set forth in the Resale Agreement; and in particular, the AT&T/BellSouth Agreement did not authorize the charges disputed in this proceeding for: (a) Network Access Charges (or End-User Common Line Charges); (b) Service Order Charges; and (c) Unauthorized Service Change Charges. See Testimony of Carol Bentley at

page 212, lines 8-11 and Composite Exhibit 3 (Exhibit 2). Thus, pursuant to paragraph XVI.B. of the Resale Agreement, the AT&T/BellSouth Agreement was an "Other Resale Agreement" having "Other Terms" which differed from the Resale Agreement, which constituted a deemed offer which Supra could accept at anytime.

Since Supra and BellSouth did not revise the Resale Agreement pursuant to Section XVI.A. of the Resale Agreement, any reference to a "revised agreement" in Section XVI.F.2. is irrelevant. A restatement of the Section XVI.F. without reference to any "revised agreement" more clearly demonstrates the interplay between Section XVI.A. and Section XVI.B. of the Resale Agreement and would read as follows:

> **"Corrective Payment. In the event that ... Reseller accepts a deemed offer of an Other Resale Agreement or Other Terms, then BellSouth or Reseller, as applicable, shall make a corrective payment to the other party to correct for the difference between the rates set forth herein and the rates in such ... Other Terms for substantially similar services for the period from the effective date of such ... Other Terms until the date that ... Reseller accepts such Other Terms, plus simple interest at a rate equal to the thirty (30) day commercial paper rate for high-grade, unsecured notes sold through dealers by major corporations in multiples of $1,000.00 as regularly published in *The Wall Street Journal.*"**

When viewed without reference to Section XVI.A., Section XVI.F. clearly states that upon adoption of the "Other Resale Agreement" or "Other Terms", a corrective payment is due for the difference in rates and charges between the Resale Agreement and the AT&T/BellSouth Agreement. Moreover, that the corrective payment shall be for the time period of the effective date of the AT&T/BellSouth Agreement and the date Supra accepts the AT&T/BellSouth. Although this language is clumsily worded, it only makes sense that the time period should be the time period between when AT&T was offered the rates (i.e. June 10, 1997) and the date Supra adopted the AT&T/BellSouth Agreement (i.e. October 5, 1999). Any other interpretation of this language would render the language

meaningless, superfluous and repugnant; and thus in violation of the general rules of contract construction. Coleman v. Valley Forge Insurance Co., 432 So.2d 1368 (Fla. 2d DCA 1983) (contract provisions should be construed using a reasonable interpretation which does not render provisions meaningless or repugnant); Transport Rental Systems, Inc. v. Hertz Corp., 129 So.2d 454 (Fla. 3d DCA 1961) (contracts should be interpreted as to reconcile provisions, rather than render any provisions superfluous or repugnant). Moreover, ambiguous contract language is to be strictly construed against its maker. St. Charles Foods, supra, 198 F.3d 815 and Golden Door Jewelry, supra, 117 F.3d 1328.

Section 251(b)(1) of the Telecommunications Act of 1996 imposes a duty upon BellSouth to not discriminate against ALECs under the rates, terms and conditions of resale. Given the non-discriminatory mandate of § 251(b)(1) and the rules of contract construction, the only reasonable interpretation of Section XVI.F. of the Resale Agreement, is that when Supra adopts another agreement containing rates, terms and conditions of resale which differ from the Resale Agreement, a corrective payment (or refund) is due back to Supra for any difference in charges paid during the time period that the other ALEC was receiving the different rates and charges. Common sense dictates that if between June 10, 1997 (effective date of the AT&T/BellSouth Agreement) and October 5, 1999 (when Supra adopted the AT&T Agreement), Supra was charge differing rates and other charges than AT&T during that same time period, then BellSouth could have and would have been violating the non-discriminatory provisions of § 251(b)(1). It only makes sense that the corrective payment provisions of Section XVI.F. require a refund of the difference in rates and charges between the Resale Agreement and the AT&T/BellSouth Agreement.

Accordingly, although the provisions of the 1997 Resale Agreement govern the resale relationship between Supra and BellSouth from 1997 through October 5, 1999, the corrective payment provision of Section XVI.F. of the Resale Agreement, in conjunction with Section XVI.B. of the Resale Agreement, requires this Commission to determine a refund amount due back to Supra using the rates and charges found in the AT&T/BellSouth Agreement.

In this instance, BellSouth improperly billed Supra Telecom FCC Access Charges or End-User Common Line Charges because the Corrective Payment provision of Section XVI.F. of the Resale Agreement required BellSouth to make a corrective payment (or refund) to Supra of the amounts previously charged for End-User Common Line Charges. This is because Supra adopted the AT&T/BellSouth Agreement and that agreement did not allow for the assessment of these charges. Although the AT&T/BellSouth Agreement was adopted on October 5, 1999, pursuant to the Corrective Payment provision of Section XVI.F. in conjunction with Section XVI.B. of the Resale Agreement, these amounts previously paid under the Resale Agreement became due as a refund upon adoption of the AT&T/BellSouth Agreement. Although BellSouth had assessed these charges pursuant to the Resale Agreement, BellSouth has never provided Supra the corrective payment/refund required by the Resale Agreement. This request for a corrective payment/refund was made on a timely basis shortly after the corrective payment/refund had become due in October 1999.

The AT&T/BellSouth Agreement did not authorize BellSouth to impose an End-User Common Line Charge. See Testimony of Carol Bentley at page 212, lines 8-11 and Composite Exhibit 3 (Exhibit 2). Exhibit "D" of Composite Exhibit 10, contains a month by

month breakdown of BellSouth's billing of these End-User Common Line Charges, which total $224,287.79. See Testimony of Carol Bentley at page 211, lines 8-9 (inserted) and Composite Exhibit 10 (Exhibit "D"). Supra made a timely request upon BellSouth for this corrective payment shortly after adopting the AT&T/BellSouth Agreement. See Testimony of Carol Bentley at page 232, lines 2-5, page 246, lines 23-25 and page 247 Lines 1-11 and Composite Exhibit 3 (Exhibit 3) (12/20/99 Billing Adjustment Investigative Request). Since the AT&T/BellSouth Agreement did not authorize End-User Common Line charges, under Section XVI.F. of the Resale Agreement, a corrective payment or refund is due Supra for these amounts.

The AT&T/BellSouth Agreement also did not authorize BellSouth to impose charges for alleged Unauthorized Service Changes. See Testimony of Carol Bentley at page 212, lines 8-11 and Composite Exhibit 3 (Exhibit 2). Exhibit "D" of Composite Exhibit 10, contains a month by month breakdown of BellSouth's billing of these Unauthorized Service Change Charges, which total $48,917.69. See Testimony of Carol Bentley at page 211, lines 8-9 (inserted) and Composite Exhibit 10 (Exhibit "D"). Supra made a timely request upon BellSouth for this corrective payment shortly after adopting the AT&T/BellSouth Agreement. See Testimony of Carol Bentley at page 232, lines 2-5, page 246, lines 23-25 and page 247 Lines 1-11 and Composite Exhibit 3 (Exhibit 3) (12/20/99 Billing Adjustment Investigative Request). Since the AT&T/BellSouth Agreement did not authorize these charges, under Section XVI.F. of the Resale Agreement, a corrective payment or refund is due Supra for these amounts.

Finally, the AT&T/BellSouth Agreement did not authorize BellSouth to impose Secondary Service charges. See Testimony of Carol Bentley at page 212, lines 8-11 and

Composite Exhibit 3 (Exhibit 2). Exhibit "D" of Composite Exhibit 10, contains a month by month breakdown of BellSouth's billing of these Secondary Charges, which total $33,352.97. See Testimony of Carol Bentley at page 211, lines 8-9 (inserted) and Composite Exhibit 10 (Exhibit "D"). Supra made a timely request upon BellSouth for this corrective payment shortly after adopting the AT&T/BellSouth Agreement. See Testimony of Carol Bentley at page 232, lines 2-5, page 246, lines 23-25 and page 247 Lines 1-11 and Composite Exhibit 3 (Exhibit 3) (12/20/99 Billing Adjustment Investigative Request). Since the AT&T/BellSouth Agreement did not authorize these charges, under Section XVI.F. of the Resale Agreement, a corrective payment or refund is due Supra for these amounts.

*B. BellSouth's Refusal To Provide UNE Combo Billing*

Notwithstanding the provisions of the Resale Agreement, it is undisputed that Supra and BellSouth had entered into an Interconnection Agreement in October 1997, that BellSouth filed an erroneous Interconnection Agreement with the Commission which was subsequently replaced by the parties; that under that Interconnection Agreement, Supra had the right to order loop and port combinations of UNEs which recreated BellSouth's resale service and that BellSouth had provided Supra such UNE Combinations, BellSouth could not have imposed an End-User Common Line Charge on Supra.

Apart from the 1997 Resale Agreement, on October 23, 1997, the parties executed an Interconnection Agreement. See Exhibits 5 and 6. Exhibit 5 is portions of the Interconnection Agreement filed by BellSouth. See Testimony of Pat Finlen at page 62, lines 6-13, page 90, lines 13-15. The parties then discovered a discrepancy between the agreement filed by BellSouth and the actual agreement, and as a result thereof executed the

corrected agreement, portions of which are found in Exhibit 6. See Testimony of Pat Finlen at pages 54-56, page 59, lines 5-13, page 90, lines 13-25; page 91, lines 1-7. The main difference in the two Interconnection Agreements was that the proper Interconnection Agreement eliminated an entire section in Attachment 2, entitled "Unbundled Service Combinations." See Testimony of Pat Finlen at page 93, lines 23-25 and pages 94-95; page 27, lines 23-25 and page 28. The omitted section, which was a part of the original Interconnection Agreement between the parties, provided the following language in Attachment 2:

**2. Unbundled Service Combinations (USC)**

**2.1.1. Where BellSouth offers to Supra Telecommunications and Information Systems, Inc., either through a negotiated arrangement or as a result of an effective Commission order, a combination of network elements priced as individual unbundled network elements, the following product combination will be made available. All other requests for unbundled element combinations will be evaluated via the Bona Fide Request Process, as set forth in Attachment 9.**

**2.1.2 2-Wire Analog Loop with 2-Wire Analog Port - Residence**

**2.1.3 2-Wire Analog Loop with 2-Wire Analog Port - Business**

**2.1.4 2-Wire Analog Loop with 2-Wire Analog Port - PBX**

**2.1.5 2-Wire Analog Loop with 2-Wire DID or 4-Wire DID**

See Testimony of Pat Finlen at page 27, lines 23-25 and page 28, lines 1-20; and Exhibit 6 (in attachment 2). In addition to the "Unbundled Service Combinations", Attachment 2 also provided in paragraphs 1.1.3 and 1.1.4 in pertinent part as follows:

**1.1.3 CLEC may purchase unbundled Network Elements for the purpose of combining Network Elements in any manner that is technically feasible, including recreating existing BellSouth services.**

**1.1.4 In all states of BellSouth's operation, when CLEC recombines unbundled Network Elements to create services identical to BellSouth's retail offerings, the prices charged to CLEC for the rebundled services**

**shall be computed at BellSouth's retail price less the wholesale discount ...**

See Exhibit 6 (in Attachment 2). Finally, it is undisputed that if Supra had been providing telecommunications service through UNE Combinations, including service that recreated resale service, BellSouth could not have billed Supra the End-User Common Line Charge. See Testimony of Pat Finlen at pages 78-80; page 98, lines 16-25 and page 99 lines 1-7; and Testimony of Carol Bentley at page 258, lines 16-25 and page 259, line 1.

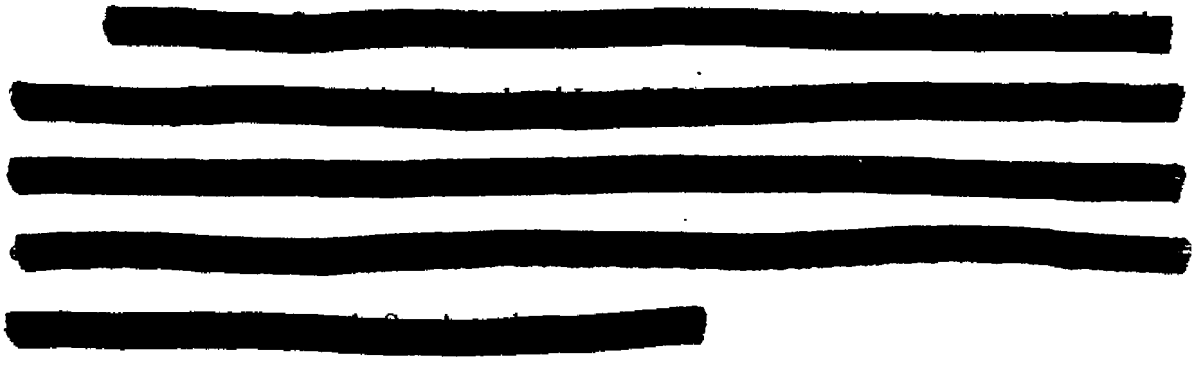
Based upon any reasonable interpretation of the above reference provisions of the Interconnection Agreement, as of October 1997 through October 5, 1999, Supra had the right to provide telecommunications service through the use of UNE Combinations, including service which recreated resale service. See Testimony of Pat Finlen, page 99, lines 16-21. Moreover, if Supra had been providing the equivalent of resale service using UNE Combinations, the cost would have been the same as the resale cost less the wholesale discount; however, BellSouth could not have charged Supra the End-User Common Line Charge.

However, notwithstanding the provisions of the Interconnection Agreement, BellSouth refused to provide Supra service through UNE Combinations. See Testimony of Pat Finlen at page 85, lines 12-24; page 97, lines 5-18. BellSouth's position in 1998 was that it want not providing UNE Combinations to anyone. See Testimony of Pat Finlen at page 111, lines 16-24; and page 132, lines 2-11. BellSouth's position was that it was un-combining the loop and port elements and was under no obligation to combine them to recreate resale service. See Testimony of Pat Finlen at page 132, lines 2-11. This position was contrary to the expressed terms of the Interconnection Agreement, which allowed Supra to obtain telecommunications service using UNE Combinations, which recreated existing

resale service. BellSouth concedes that in 1999, the United States Supreme Court rejected BellSouth's argument that it would un-combine port and loop combinations which were already previously combined. See Testimony of Pat Finlen at pages 112-115. Thus BellSouth concedes that after the Supreme Court's ruling in AT&T v. Iowa Utilities Board, 119 S.Ct. 721 (Jan. 25, 1999), that Supra had the right to convert over to UNE Combinations, all resale customers who had existing resale lines. See Testimony of Pat Finlen at pages 112-115.

Notwithstanding the above, Supra has been attempting to obtain UNE Combinations from BellSouth since mid-1997 in order to provide telecommunications services, including services which recreate resale service. See Testimony of Carol Bentley at page 254, lines 4-14; and page 258, lines 1-15. Pat Finlen of BellSouth concedes that as of the summer of 1998, Supra had been requesting UNE Combinations but was turned down. See Testimony of Pat Finlen at page 97, lines 8-17. Claude Morton testified that Supra was first allowed to open UNE accounts in February 2000 and began to order UNE Combinations in March 2000. See Testimony of Claude Morton at page 170, lines 12-15; page 172, lines 9-15. However, Morton also testified that Supra could not order UNE Combinations until a Master Account Application had been filled out and accepted by the BellSouth Account Manager and that he did not know if the BellSouth Account Manager had been delaying or refusing to accept a Master Account Application for UNE Combinations. See Testimony of Claude Morton at page 179, lines 21-25; page 180. Moreover, Supra could not obtain UNE Combinations until such time as the Master Account Application for UNEs had been approved by various BellSouth departments. See Testimony of Claude Morton at pages 183-185. Finally, to date, Supra has only been allow to obtain three test UNE Combinations

and has still been denied the right to provide the equivalent of resale service through UNE Combinations. See Testimony of Claude Morton at page 187, lines 18-25; and Testimony of Carol Bentley, page 255 and pages 259-260. Finally, Supra has been forced into resale service and has been billed for resale service because it only had a Master Account set up for resale. See Testimony of Carol Bentley at page 252 at lines 14-23; and Testimony of Claude Morton at page 189, lines 6-12.



Based upon the above it is clear that since 1997, Supra has been requesting the right to provide service through UNE Combinations, but that BellSouth has refused to allow Supra to obtain those UNE Combinations, particularly combinations which recreate resale service. BellSouth's claim that it was appealing the FCC rules on UNE Combinations is not relevant. An appeal of a final order does not eliminate a parties' right to enforcement of the order or the right to be compensated for damages accruing to the appeal process. See BASF Corp. v. Old World Trading Co., 979 F.2d 615 (7th Cir. 1992); J. Perez & CIA., Inc. v. United States, 747 F.2d 813 (1st Cir. 1984). BellSouth admits that its refusal to provided Supra with UNE Combinations was rejected by United States Supreme Court. Yet at the same time BellSouth contends that its appeal should immunize it from billing disputes such as this one, wherein BellSouth concedes that had it allowed Supra the UNE Combinations, BellSouth could not have bill for the End-User Common Line Charges. This position is

untenable and contrary to law. Accordingly, Supra should be provide a refund of the End-User Common Line Charges set forth in Exhibit 10 (Exhibit "D").

With respect to charges for changes in service and alleged unauthorized local service changes, had BellSouth billed Supra Telecom for Unbundled Network Combinations, these charges could not have been billed. Under the Interconnection Agreement, no written authorization requests are necessary. See Testimony of Carol Bentley at page 263, lines 7-10, 23-25 and page 264, lines 1-5. Moreover, no such charges are present in the Interconnection Agreement. Accordingly, Supra should be provide a refund of the alleged Unauthorized Service Change Charges set forth in Exhibit 10 (Exhibit "D").

Finally, with respect to Secondary Service Charges, these charges were for switching customers from BellSouth to Supra. See Testimony of Pat Finlen at page 138, lines 10-21. Under this Commission's Order No. PSC-98-0810-FOF-TP in Docket No. 971140-TP, BellSouth could only charge $1.4596 for the first installation and $0.9335 for each addition installation when converting resale customers over to UNE Combinations. If this Commission rules that BellSouth should have been providing Supra with service through UNE Combinations, then BellSouth's charges should be reduced to reflect the rates set forth in Order No. PSC-98-0810-FOF-TP. Accordingly, Supra should be provide a refund of the Change In Service Charges set forth in Exhibit 10 (Exhibit "D").

*C. BellSouth Breach Of The 1997 Resale Agreement On Proof Of Authorization*

The undisputed testimony regarding the alleged Unauthorized Service Change Charges is that BellSouth imposed this charge on every customer who switched back from Supra Telecom to BellSouth. See Testimony of Carol Bentley at page 253, lines 19-25 and page 254, lines 1-3. BellSouth refused to remove the charges unless Supra could provide a

written letter of authorization from each customer. See March 30, 200 Letter from Lynn Smith to Carol Bentley which is part of Exhibit 3 to Exhibit 3. However, the Resale Agreement does not require written letters of authorization and thus BellSouth was imposing more restrictive conditions on providing customer authorization. See Testimony of Carole Bentley at page 264, lines 10-24; page 267, lines 4-17; and Composite Exhibit 3 (Exhibit 1) and Composite Exhibit 4 (PSC-1) at paragraph 6-d. Since BellSouth undisputedly refuse to credit these charges unless proof was presented beyond that required by the 1997 Resale Agreement, BellSouth acted improperly and thus should have provided a credit for these charges.

## III. CONCLUSION

From the above it is clear that in the Final Order On Complaint, this Commission simply relied upon a faulty analysis present by the Commission Staff in the Recommendation of June 28, 2001. The Recommendation failed to consider any of the arguments raised by Supra Telecom in its post-hearing brief and appeared to rely solely upon the parties' prior positions as set forth in the Prehearing Order. Thus it is clear that both the Commission Staff and this Commission failed to consider the three arguments set forth above in this motion for reconsideration. The failure to consider Supra Telecom's arguments is violative of due process and provides a basis for filing this motion for reconsideration. Finally, the arguments which this Commission failed to consider (as set forth above) require a reversal of the Final Order On Complaint and a finding that Supra Telecom is entitled to a refund of $224,287.79 for End-User Common Line Charges, $48,917.69 for alleged Unauthorized Service Change Charges, and $33,352.97 for Secondary Service Charges.

## Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been served via facsimile and/or U.S. Mail upon Nancy White, Esq. and Michael Goggin, Esq., BellSouth, 150 West Flagler Street, Suite 1910, Miami, Florida 33130; R. Douglas Lackey and J. Philip Carver, BellSouth, Suite 4300, 675 W. Peachtree St., NE, Atlanta, GA 30375; and Staff Counsel, Florida Public Service Commission, Division of Legal Services, 2450 Shumard Oak Boulevard, Tallahassee, Florida; this 15th day of August, 2001.

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