DECLASSIFIED CONFIDENTIAL

MDR 2.5.03 See DN 01218-03

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications and Information Systems, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996	Docket No. 001305-TP
Complaint of Supra Telecommunications and Information Systems Regarding BellSouth's Bad Faith Negotiation Tactics	Filed: November 14, 2001

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel, hereby files a Motion For Leave to File Supplemental Authority. In support thereof, Supra states as follows:

1. Pursuant to the requirements of the Telecommunications Act of 1996, on June 10, 1997, Supra entered into a voluntarily negotiated interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). The three-year interconnection agreement expired on June 9, 2000.

2. On September 1, 2000, BellSouth filed a petition for arbitration of certain issues in an interconnection agreement with Supra. Supra filed its response, and this matter was set for hearing for September 26-27, 2001.

3. On July 31, 2001, Supra filed a Motion to confirm the Arbitration Award of June 5, 2001 issued by the Arbitral Tribunal. On August 27, 2001, BellSouth filed a response to oppose the confirmation of the Arbitration Award and a Motion to Vacate. Supra filed a response to BellSouth's Motions to Stay and to Vacate on

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September 7, 2001. BellSouth in turn filed a Reply Memorandum in Support of its Motion to Vacate and Reply Memorandum in Support of its Motion to Stay on October 2, 2001. (see Attachment – A, page 2) In the June 5, 2001 Award, (filed as Exhibit OAR-3 to Olukayode Ramos' Direct Testimony) the Arbitral Tribunal found, inter alia, that:

> " . . . BellSouth breached the Interconnection Agreement in material ways and did so with the tortious intent to harm Supra, . . . The evidence of such tortious intent was extensive, including BellSouth's deliberate delay and lack of cooperation regarding UNE Combos, switching , . . ., denying access to BellSouth's OSS and related databases, refusals to collocate any Supra equipment, and deliberately cutting-off LENS for three days in May 2000.

4. Several of the issues in the instant proceeding were either the subject of or were addressed directly or indirectly in the June 5, 2001, Award. The same June 5, 2001, Award became final on October 31, 2001 (Final Order). While Supra notes that the findings of the Arbitral Tribunal are not binding on this Commission, Supra believes that the findings of the Arbitral Tribunal are directly related to a number of the issues that the Commission is considering. Thus, Supra believes that this Final Order provides closure and finality to this Commercial Arbitration proceeding whose issues mirror some of the same issues this Commission is addressing in the instant proceeding.

5. Generally speaking, the June 5, 2001, Award covers the subject areas of non-discriminatory access to BellSouth's OSS as well as issues related to collocation

and tortious breach of Interconnection terms and conditions, etc. Among other things, the June 5, 2001, Award granted Supra direct access to BellSouth's OSS – this ruling by-itself directly or indirectly affects Issue Numbers: 5, 18, 20, 38, 46, 47, 57, 59, 60, 61, and 62. Supra believes that BellSouth's compliance with just this portion of the June 5, 2001, Award will render the above listed issues moot, and affect the parties' Follow-On Interconnection Agreement.

6. Supra believes that the record in this proceeding supports and will lead to the same conclusion on the same or similar issues as the Arbitral Tribunal found in its proceeding. While Supra recognizes that the Commission is not bound by the findings or the decisions of the Arbitral Tribunal nor of the Federal District Court (Southern District of Florida), Supra contends that its positions with respect to most of the issues in this proceeding have been reviewed by other judicial bodies and found credible, reasonable, and necessary to ensure Supra ". . . a meaningful opportunity to compete, . . ." pursuant to the Telecommunications Act of 1996.

7. The Final Order adjudged that Supra's Petition to Confirm Arbitration Ward Made by the Arbitral Tribunal " . . . , be, and the same is hereby, GRANTED." Accordingly, Supra has complied with the findings of the confirmed Arbitration Ward Made by the Arbitral Tribunal, issued on October 22, 2001.

WHEREFORE, Supra respectfully moves this Commission for leave to file the attached supplementary authority (as updates to OAR-3) for its consideration in the instant proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U. S. Mail this 14th day of November 2001 to the following:

Nancy B. White, Esq.
James Meza III
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street – Suite 400
Tallahassee, Florida 32301

R. Douglas Lackey
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Atlanta, GA 30375
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via Hand Delivery

Wayne Knight
Staff Counsel
Division of Legal Services
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SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4248
Facsimile: (305) 443-9516

By: Brian Chaiken/ATS
BRIAN CHAIKEN

ATTACHMENTS:

Attachment – A Final Order Granting Petition to Confirm Arbitration Award, Denying Motion to Vacate and Granting Motion to Seal, issued on October 31, 2001, by the United States District Court, Southern District of Florida, Miami Division

Attachment – B Final Award of the Tribunal in Consolidated Arbitrations, issued on October 22, 2001, by the CPR Institute For Dispute Resolution Arbitral Tribunal.

Attachment – C Order on Motions RE: Antitrust Issues in Arbitrations III & IV, issued on October19, 2001, by the CPR Institute For Dispute Resolution Arbitral Tribunal.

Attachment -A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC., a Florida corporation,

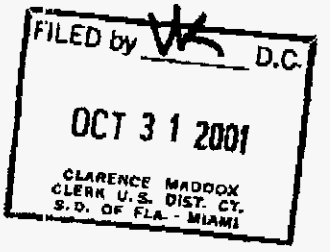
Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia corporation,

Defendant.
_____/

CASE NO. 01-3365-CIV-KING



FINAL ORDER GRANTING PETITION TO CONFIRM ARBITRATION AWARD, DENYING MOTION TO VACATE AND GRANTING MOTION TO SEAL

THIS CAUSE comes before this Court upon Plaintiff Supra Telecommunications & Information Systems, Inc.'s ("Supra") Petition to Confirm Arbitration Award Made by Arbitral Tribunal dated June 5, 2001 which was filed on July 31, 2001.[1] Defendant BellSouth Telecommunications, Inc.'s ("BellSouth") filed a Response in Opposition to Plaintiff Supra's Petition to Confirm Arbitration Award Made by Arbitral Tribunal and Motion to Stay on August 27, 2001. This Court heard oral arguments on the Motions to Vacate, to Stay and to Seal and the parties' responses thereto on October 11, 2001.

[1] Defendant BellSouth challenges the portion of the arbitration award in which the Arbitral Tribunal ordered BellSouth to provide Supra with non-discriminatory direct access to its Operational Support Systems ("OSS") and to cooperate with and facilitate Supra's ordering of services by no later than June 15, 2001. The Arbitral Tribunal found that BellSouth did not provide Supra with an OSS that is equal to or better than the OSS BellSouth provides to itself or customers in non-compliance with its contractual obligations.

I. Procedural Background

This instant action was commenced by Plaintiff Supra to confirm an arbitration award on July 31, 2001. Defendant BellSouth opposed the confirmation of the arbitration award and filed a Motion to Vacate on August 27, 2001. Plaintiff Supra filed a Response to Defendant BellSouth's Motions to Stay and to Vacate on September 7, 2001. Defendant BellSouth filed a Reply Memorandum in Support of its Motion to Vacate and a Reply Memorandum in Support of its Motion to Stay on October 2, 2001.

On or about October 5, 1999, the parties entered into an Interconnection Agreement (the "Agreement") pursuant to the Telecommunications Act of 1996 (the "Act").[2] Plaintiff Supra filed a Notice of Arbitration and Complaint against Defendant BellSouth on October 25, 2001. Defendant BellSouth also filed a claim for arbitration on January 31, 2001. The Agreement contained an arbitration provision which required the parties to arbitrate all disputes, claims or disagreements arising under or related to the Agreement. A dispute arose between the parties over the provision of services and alleged breaches. Pursuant to section 16.1 of the Agreement, the parties submitted their disputes to arbitration. On June 5, 2001, the Arbitral Tribunal issued an Order (the "June 5th Order"), which is the subject of this instant action. Defendant BellSouth and Plaintiff Supra both

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[2] The Act's purposes are "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104 -104, 110 Stat. 56, 56 (1996) (preamble). To achieve one of its goal with respect to local telephone service, the Act required Incumbent Local Exchange Carriers ('ILECs"), which were historically granted regulated monopolies to provide local telephone services, such as BellSouth, to a host of duties to facilitate competition with Competing Local Exchange Carriers ("CLEC") such as Supra. The Act required ILECs to enter into interconnection agreements with CLECs who sought to compete in a market as the parties to this instant action did.

filed motions regarding the June 5th Order with the Arbitral Tribunal. The Arbitral Tribunal heard oral arguments on the parties' motions on July 16, 2001 and issued an Order Regarding Supra's and BellSouth's Motions for Interpretation of the June 5, 2001 Award in Consolidated Arbitrations on July 20, 2001. Subsequently, the Arbitration Tribunal entered a Final Award of the Tribunal in Consolidated Arbitration on October 22, 2001.

Defendant BellSouth argues that the Court should not confirm the arbitration award because it is not final and should vacate the arbitration award because the arbitrators exceed their authority. The Court finds that the June 5th Order was a final award. The only issue remaining before the arbitrators after their June 5th Order and July 20, 2001 Order was the calculation of Defendant BellSouth's bills based on the Audit, which is not an issue before the Court. In addition, as previously noted, the Arbitral Tribunal issued a final award on October 22, 2001. Defendant BellSouth's argument to stay the proceedings became moot upon issuance of a final award. The remaining issue is whether or not the arbitration award should be confirmed.

II. Discussion

A court has limited review of an arbitration award. See Lifecare Int'l, Inc. v. CD Medical, Inc., 68 F.3d 429, 433 (11th Cir.1995). The Federal Arbitration Act ("FAA") recognizes four statutory bases for vacating an arbitration award. See 9 U.S.C.A. §10(a). Here, Defendant BellSouth moves to vacate a portion of the arbitration award on the ground that the Arbitral Tribunal exceeded its authority by providing relief beyond the scope of the Agreement. Specifically, Defendant BellSouth contends that the direct access to its OSS awarded to Plaintiff Supra goes beyond the non-discriminatory access contemplated by the parties in their Agreement. In response, Plaintiff Supra points to specific provisions in the Agreement where Defendant BellSouth is obligated to provide

Plaintiff Supra with "non-discriminatory access". Plaintiff Supra cites sections 12.1, 23.3 and 28.6.12 of the Agreement to support the arbitration award on the direct access issue. Also, Plaintiff Supra offers sections 30.1, 30.2, 30.3, 30.5, 30.10.3 and 30.10.4 of the Agreement and section 1.2 of attachment 4 of the Agreement as provisions supporting the arbitrators' authority to make the arbitration award.

The Court concludes that the Arbitral Tribunal did not exceed its authority under the Agreement in finding for Plaintiff Supra on the direct access issue in its arbitration award. Acting in compliance with their Agreement, the parties submitted their dispute which arose from the Agreement to the Arbitral Tribunal. The Arbitral Tribunal decided the dispute within its authority. The Court concludes that the arbitrators did not exceed their authority under the Agreement of the parties. Therefore, the arbitration award at issue should be confirmed and the Motion to Vacate be denied.

1. Defendant BellSouth's Motion to Seal

Defendant BellSouth filed a Motion to Seal and an Unopposed Motion for Emergency Consideration of its Motion to Seal on August 8, 2001. Plaintiff Supra filed a Response to Defendant BellSouth's Motion to Seal on August 10, 2001. The Court ordered that all filings in this case be filed under seal in its Order on Defendant's Unopposed Motion for Emergency Consideration of BellSouth's Motion to Seal dated August 9, 2001 until further order of the Court. The Court, in its Order on Defendant's Motion to Seal BellSouth's Motion to Seal, ordered that Defendant BellSouth's Motion to Seal be sealed until a final judgment has been entered by the Court. In its Order on Defendant BellSouth's Emergency Motion to Seal dated August 14, 2001, the Court ordered that all documents which disclose any information about the arbitration order must be filed

under sealed. Defendant BellSouth's Motion to Seal is now ripe for ruling.

Defendant BellSouth wants the June 5th Order and all documents that in any way disclose any information about the arbitration order to be sealed by the Court. To supports its request, Defendant BellSouth argues that the arbitration order as well as the hearings, conferences, discovery and other related events are confidential. According to Defendant BellSouth, section 14.1 of Attachment 1 of the Agreement requires that all such information be confidential.[3] Plaintiff Supra asserts that section 14.1 of Attachment 1 of the Agreement provides an exception to the confidentiality provision. Plaintiff Supra argues that the confidentiality provision does not apply the June 5th Order since it had to seek judicial enforcement of the arbitration award and that the arbitration award contained no proprietary or confidential information.

The exception to the confidentiality provision does not permit the parties to disclose information and evidence produced during the arbitration proceedings and other related matters (including an arbitration award), beyond a judicial proceeding or unless by order of a court or a governmental body. Further, the Arbitral Tribunal, in its Order dated July 20, 2001, concluded that the arbitration award may contain proprietary or confidential information, which the parties agreed to be held in confidence in accord with the terms of the Agreement. Therefore, to unseal the filings in this case would contravene the confidentiality provision with which the parties agreed.

Plaintiff Supra also claims that sealing the June 5th Order would violate public policy on the grounds that (1) Defendant BellSouth may discriminate against other telecommunications carriers,

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[3]*Section 14.1 of the Attachment 1 of the Agreement states:*
BellSouth, AT&T, and the Arbitrator(s) will treat any arbitration proceeding, including the hearings and conferences, discovery, or other related events, as confidential, except as necessary in connection with a judicial challenge to, or enforcement of, an award, or unless otherwise required by an order or lawful process of a court or government body.

and (2) Plaintiff Supra cannot disclose to its past, present and future customers that Defendant BellSouth may have caused problems with their service. However, the Court is unpersuaded by Plaintiff Supra's contentions and declines to order the June 5th Order or other documents filed in this case to be unsealed, except for this Order.

III. Conclusion

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Plaintiff Supra Telecommunications & Information Systems, Inc.'s Petition to Confirm Arbitration Award Made by Arbitral Tribunal be, and the same is hereby, GRANTED. It is further

ORDERED and ADJUDGED that the Arbitration Award Made by Arbitral Tribunal be, and the same is hereby, CONFIRMED. Defendant BellSouth Telecommunications, Inc. is directed to immediately comply with the Arbitration Award by the Arbitral Tribunal. It is further

ORDERED and ADJUDGED that Defendant BellSouth Telecommunications, Inc.'s Motion to Vacate be, and the same is hereby, DENIED. It is further

ORDERED and ADJUDGED that the Court retains jurisdiction to determine the appropriate costs and attorney's fees incurred by Plaintiff Supra Telecommunications & Information Systems, Inc. for bringing this Petition and for defending the Motion to Vacate upon proper motion by Plaintiff Supra Telecommunications & Information Systems, Inc. All other pending motions are hereby DENIED as moot. The clerk of the Court is hereby DIRECTED to close the above-styled case.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 31st day of October, 2001.

JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

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Counsel for Defendant BellSouth Telecommunications, Inc.

Attachment -B

BEFORE THE CPR INSTITUTE FOR DISPUTE RESOLUTION ARBITRAL TRIBUAL

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Claimant,

v. Arbitration I

BELLSOUTH
TELECOMMUNICATIONS INC.,

Respondent.

****

BELLSOUTH
TELECOMMUNICATIONS INC.,

Claimant and
Counterclaim Respondent,

v. Arbitration II

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Respondent and
Counterclaimant.

FINAL AWARD OF THE TRIBUNAL IN CONSOLIDATED ARBITRATIONS

ARBITRAL TRIBUNAL

M. SCOTT DONAHEY
JOHN L. ESTES
CAMPBELL KILLEFER

BACKGROUND

On June 5, 2001, the Tribunal entered its AWARD OF THE TRIBUNAL IN CONSOLIDATED ARBITRATIONS (herein after referred to as the Award and attached hereto as Exhibit A and incorporated herein).

On June 20, 2001, Supra Telecommunications & Information Systems, Inc. (Supra) filed its motion entitled Supra's Request For Clarification of Award of the Tribunal in Consolidated Arbitrations and Default Damages as a Result of BellSouth's Non-Compliance With Same. On the same date, BellSouth Telecommunications, Inc. (BellSouth) filed its motion entitled BellSouth's Motion for Reconsideration and Interpretation.

Thereafter, after a hearing in Atlanta on July 16, 2001, the Tribunal entered its ORDER REGARDING SUPRA'S AND BELLSOUTH'S MOTIONS FOR INTERPRETATION OF THE JUNE 5, 2001 AWARD IN CONSOLIDATED ARBITRATIONS (hereinafter referred to as the Clarification Order and attached hereto as Exhibit B and incorporated herein) on July 20, 2001.

AUDIT

In its Award, the Tribunal granted Supra's request for an audit and ordered that the audit be completed by July 31, 2001 (Award. pp. 36-38 and 44-45).

In its Clarification Order, the Tribunal extended the time for completion of the audit to August 31, 2001, clarified the scope of the audit, and granted BellSouth's request to audit the results of the Supra audit by September 21, 2001, (Clarification Order p. 5-6).

Supra engaged Morrison, Brown, Argiz Company, Certified Public Accountants, of Miami, Florida, as it auditor which filed its report on August 31, 2001.

BellSouth filed its Response To Supra's Audit Report on September 25, 2001, and Supra filed its Reply In Support of the Audit Report on September 27, 2001.

On October 1, 2001, the Tribunal conducted a hearing in Atlanta to hear arguments with respect to the audit report. Participating in such hearing were Arbitrators M. Scott Donahey, John L. Estes, and Campbell Killefer. T. Michael Twomey represented BellSouth, and Brian Chaiken represented Supra. Michael O'Rourke appeared on behalf of the auditors to respond to questions from the Tribunal and parties.

In their Audit Report, the auditors addressed numerous issues and made recommended adjustments. BellSouth agreed with the following items and amounts:

Unlawful Third Party Pass-through calls	$30,087.32
Excess ODUF	4,945.54
Non-discounted trouble determination	$ 1,944.50
TOTAL	$36,977.36

The Tribunal finds that Supra did not meet its burden of proof with respect to all other items addressed in the auditors' report, and therefore all other adjustments are denied.

Section 11.1.5 of the General Terms and Conditions of the Interconnection Agreement executed by BellSouth and AT&T and adopted by Supra provides as follows:

> Audits shall be at [Supra's] expense, subject to reimbursement by BellSouth in the event that an audit finds an adjustment in the charges or in any invoice paid or payable by [Supra] hereunder by an amount that is on an annualized basis greater than two percent (2%) of the aggregate charges for the Services and Elements during the period covered by the audit.

The Tribunal finds that the adjustments resulting from the audit do not exceed two percent (2%) of the aggregate charges for the Services and Elements during the period covered by the audit and that Supra is not entitled to reimbursement of its audit expenses from BellSouth.

DAMAGES

In its Award (Award pp. 36 and 44), the Tribunal awarded $6,374,369.58 to BellSouth, subject to the results of the audit. The Tribunal also awarded Supra setoff damages (Award pp. 41-44) as follows and as contained in the referenced paragraphs:

VI.B.1.	Incremental Net Income Operating as UNE Provider	$2,103,906.40
VI.B.3.a.	Lens Downtime	669,153.00
VI.B.3.b.	Cutoff of Supra's Access	55,488.00
	TOTAL	$2,828,547.40

With respect to the Award VI.B.1, Incremental Net Income Operating as UNE Provider, the damages assessed were based upon calculation of Supra's witness Wood in Exhibits DJW-5 and DJW-6. These calculations of damages were through March 31, 2001. Since the Tribunal awarded Supra damages through May 31, 2001, it was necessary to recalculate Supra's damages to that date as additional damages.

Accordingly, the Tribunal directed Supra's auditor to determine the number of Supra's customers in April and May so that the Tribunal could calculate such additional damages (Award p. 42)

Supra's auditors responded to the Tribunal's direction by finding that the number of Supra's customers in April were 44,171 and in May were 60,985. The parties have agreed that the calculation of damages for this period, based upon an historic blend of residential and business customers for that number of customers is $1,663,018.24. The Tribunal awards such sum as setoff damages to Supra.

In its award (Award p. 46), the Tribunal ordered the auditor to remove any late charges in the process of the audit. The auditors found this sum to be $648.00, and the Tribunal awards such sum to Supra as setoff damages.

BellSouth's invoices include interest. A portion of these invoices are offset by the various monetary awards to Supra herein. The interest on the amount of BellSouth's invoices so offset should also be awarded to Supra. Therefore, the Tribunal has calculated and finds that Supra is entitled to further offset damages in the amount of $186,551.82 for this interest factor.

SUMMARY OF FINAL AWARD WITH RESPECT TO DAMAGES

BellSouth Invoices	$6,374,369.58
Damages awarded Supra in the Award	(2,828,547.40)
Adjustments resulting from audit	(36,977.36)
Additional UNE Provider damages	(1,663,018.24)
Removal of late charges	(648.00)
Total	$1,845,170.58
Removal of BellSouth's interest charges	(186,551.82)
NET MONETARY AWARD	$1,658,618.76

In summary, in addition to the non-monetary matters granted in the Award, the net monetary award is to BellSouth in the amount of $1,658,618.76, plus post-judgment interest at the rate prescribed by Florida law, from the date hereof.

DATED: October 22, 2001

M. Scott Donahey John L. Estes Campbell Killefer

CONFIDENTIAL

Attachment -C

BEFORE THE CPR INSTITUTE FOR DISPUTE RESOLUTION ARBITRAL TRIBUNAL

BELLSOUTH
TELECOMMUNICATIONS INC.,

Claimant,

v.

Arbitration III

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Respondent.

****

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Claimant,

v.

Arbitration IV

BELLSOUTH
TELECOMMUNICATIONS INC.,

Respondent.

****

ORDER ON MOTIONS RE: ANTITRUST ISSUES IN ARBITRATIONS III & IV

ARBITRAL TRIBUNAL

M. Scott Donahey
John L. Estes
Campbell Killefer

In its Counterclaim in Arbitration III, and in its Claim in Arbitration IV, Supra Telecommunications and Information Systems, Inc. ("Supra") included allegations that certain actions of BellSouth Telecommunications, Inc. ("BellSouth") constitute violations of Federal Antitrust laws. See, Supra's Notice of Defense and Counterclaim, dated August 31, 2001 (Arb. III), ¶¶ 54-90 and 147-166; Supra's Notice of Arbitration and Complaint, dated August 21, 2001 (Arb. IV), ¶¶ 37-46.

The parties agreed to address certain preliminary issues by briefs, with a hearing on those issues to follow. The issues that the Tribunal ordered the parties to brief are summarized as follows:

1. Are Supra's antitrust claims arbitrable?
2. Assuming that the claims are arbitrable, are Supra's antitrust claims subject to dismissal on the basis of:
   a) Res judicata;
   b) Collateral estoppel;
   c) Issue preclusion?
3. Assuming that the claims are arbitrable and not subject to dismissal under the above doctrines, should the antitrust claims be dismissed under the reasoning of the Court of Appeals for the Seventh Circuit in the case *Goldwasser v. Ameritech Corp.*?
4. Finally, if any antitrust claims survive, should the claims be severed to be determined at a later date?

On September 20, 2001, BellSouth filed its Motion to Dismiss Antitrust Claims and For Severance, and Supra filed its Brief Regarding Arbitrability and Severability of

Supra Telecom's Antitrust Counterclaims. On September 27, 2001, BellSouth filed its Reply in Support of Motion to Dismiss Antitrust Claims, and Supra filed its Response and Opposition to BellSouth's Motion to Dismiss Supra Telecom's Antitrust Claims and for Severance.

On October 1, 2001, at the Georgian Terrace Hotel, in Atlanta, Georgia, all members of the Tribunal were present and heard argument of counsel on all the issues that had been briefed. T. Michael Twomey, Esq. presented argument on behalf of BellSouth. Mark Buechele, Esq. presented argument on behalf of Supra. The following is the Tribunal's unanimous Order on the issues presented.

I. ARBITRABILITY

BellSouth contends that Supra's antitrust claims are not arbitrable, because the parties did not agree to arbitrate such claims. The arbitration clause, which is included in Attachment 1 to the Interconnection Agreement, reads in pertinent part:

> 2. Exclusive Remedy
>
> 2.1 Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between BellSouth and [Supra] arising under or related to this Agreement including its breach, except for: (i) disputes arising pursuant to Attachment 6, Connectivity Billing; and (ii) disputes or matters for which the Telecommunications Act of 1996 specifies a particular remedy or procedure. Except as provided herein, BellSouth and [Supra] hereby renounce all recourse to litigation and agree that the award of the arbitrators shall be final and subject to no judicial review, except on one or more of those grounds specified in the Federal Arbitration Act (9 U.S.C. §§1, *et seq.*), as amended, or any successor provision thereto.
>
> 2.1.1 If, for any reason, certain claims or disputes are deemed to be non-arbitrable, the non-arbitrability of those claims or disputes shall in no way affect the arbitrability of any other claims or disputes.

* * *

7. Duties and Powers of the Arbitrators

The Arbitrators shall receive complaints and other permitted pleadings, oversee discovery, administer oaths and subpoena witnesses pursuant to the United States Arbitration Act, hold hearings, issue decisions, and maintain a record of proceedings. The Arbitrators shall have the power to award any remedy or relief that a court with jurisdiction over this Agreement could order or grant, including, without limitation, the awarding of damages, pre-judgment interest, specific performance of any obligation created under the Agreement, issuance of an injunction, or imposition of sanctions for abuse or frustration of the arbitration process, except that the Arbitrators may not: (i) award punitive damages; (ii) or any remedy rendered unavailable to the Parties pursuant to Section 10.3 of the General Terms and Conditions of the Agreement; or (iii) limit, expand, or otherwise modify the terms of this Agreement.

* * *

12. Decision

The Arbitrator(s) decision and award shall be final and binding, and shall be in writing unless the Parties mutually agree to waive the requirement of a written opinion. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof. Either Party may apply to the United States District Court for the district in which the hearing occurred for an order enforcing the decision. Except for Disputes Affecting Service, the Arbitrators shall make their decision within ninety (90) days of the initiation of proceedings pursuant to Section 4 of this Attachment, unless the Parties mutually agree otherwise.[1]

* * *

9.3 Initiation of Disputes Affecting Service Process.

[1] In this case, the parties agreed to waive this deadline. Scheduling Order Re: Arbitrations III & IV, Rev. 3 ("Scheduling Order, Rev. 3"), § I,A,8, at 3.

* * *

9.7 Hearing

9.7.1 The Arbitrator will schedule a hearing on the Complaint to take place within twenty (20) business days after service of the Complaint. However, if mutually agreed to by the Parties, a hearing may be waived and the decision of the Arbitrator will be based upon the papers filed by the Parties.[2]

9.7.2 The hearing will be limited to four (4) days, with each Party allocated no more than two (2) days, including cross examination by the other Party, to present its evidence and arguments. For extraordinary reasons, including the need for extensive cross-examination, the Arbitrator may allocate more time for the hearing.

* * *

9.8 Decision

9.8.1 The Arbitrator will issue and serve his or her decision on the Parties within five (5) business days of the close of the hearing or receipt of the hearing transcript, whichever is later.

While BellSouth acknowledges that pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1, et. seq.), a presumption in favor of arbitrability exists and that parties must clearly express their intent to exclude categories of claims from their arbitration agreement (*First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945, 115 S. Ct. 1920, 1924-25, 131 L.Ed. 2d 985 (1995)), BellSouth argues that the arbitration provisions at issue, when read as a whole, evidence the parties' intent to exclude antitrust claims. BellSouth argues that the failure of the provisions to reference statutory claims, the

[2] In this case, the Parties agreed to waive this deadline. Scheduling Order, Rev. 3, § II,E, at 4.

accelerated procedures for resolution of disputes, and the specific exclusion of punitive damages, indicate that the parties did **not** intend to arbitrate such claims.

BellSouth places its primary reliance on the case of *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998). The facts of that case are essential to the Court's decision. In *Paladino*, the Court of Appeals was confronted with a consent to arbitration contained in an employee handbook which the plaintiff-employee signed, a clause that the court noted was in smaller type than the handbook's text. *Id.*, at 1056. The provision limited the arbitrator's ability to award damages to those damages resulting from breach of contract only. *Id.*

Because the limitation of remedies clause violated the prohibition against waiver of statutory remedies as a condition of employment, the defendant, who had drafted the provision, argued that the court should strike the limitation of remedies portion of the agreement, but uphold the balance of the arbitration clause. *Id.*, at 1057-58.

However, the Court rejected defendant's argument, stating that such an interpretation would taint the entire arbitration agreement. *Id.*, at 1058. In order to save the arbitration agreement, the Court treated the limitation of remedies clause as a limitation of the claims which could be submitted to arbitration. *Id.* The Court noted that the provision at issue, drafted entirely by the defendant, did not fully inform the plaintiff-employee that any statutory claims would be subject to arbitration, noting that the employee was not trained to decipher legalese, and that the language was unclear. *Id.*, at 1059.

The facts in *Paladino* are significantly different from those in the present case. Rather than an agreement entirely prepared by a corporate employer for acceptance by an

unrepresented employee, the Interconnection Agreement at issue was negotiated by counsel for BellSouth and AT&T, two large, sophisticated corporations, and filed with and approved by a regulatory authority. The arbitration clause makes it obvious that the parties knew how to except specific disputes from the ambit of the agreement to arbitrate. In the present arbitration clause, the parties expressly agreed to except disputes concerning connectivity billing and disputes or matters for which the Telecommunications Act of 1996 specifies a particular remedy or procedure. Interconnection Agreement, Attachment 1, § 2.1.

Moreover, it is not required that an arbitration clause specifically reference a statutory claim in order to bring such claim within its ambit. In the case of *Simula, Inc. v. Autoliv*, 175 F.3d 716 (9th Cir. 1999), the Court of Appeals summarized the many cases which have held that general arbitration provisions are to be construed broadly to include tort and statutory claims. Among the cases analyzed was that of *Coors Brewing Co. v. Molson Breweries*, 51 F.3d 1511 (10th Cir.), which held that an arbitration clause covering "any dispute arising in connection with the implementation, interpretation, or enforcement" of a license agreement included antitrust disputes between the parties. *Id.*, at 1515. Likewise, the Court in *Simula* found that antitrust claims were covered by an arbitration clause which provided for arbitration of disputes "arising in connection with this agreement." *Simula, supra*, at 723. Both of those cases contained arbitration language decidedly similar to the arbitration language in the Interconnection Agreement.

Both *Simula* and *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 87 L.Ed. 2d 444, 105 S.Ct. 3346 (1985), involved international arbitrations under arbitration rules that severely limited the parties' right to conduct discovery. In both

cases the parties' antitrust claims were referred to arbitration. Thus, BellSouth's argument that procedural limitations manifest an intent **not** to arbitrate antitrust claims is contrary to decisions of the highest courts.

BellSouth argues that the limitation on punitive damages should be viewed as indicating a waiver of tort and statutory claims to which punitive damages attach. However, this argument is self-defeating. If tort claims or statutory claims to which punitive damages might attach could not be arbitrated, there would be no point in excluding such damages, since non-tortious breach of contract cannot give rise to punitive damages. Moreover, Supra points to numerous decisions which hold that antitrust treble damages are considered remedial, rather than punitive. Supra's Response and Opposition to BellSouth's Motion to Dismiss Supra Telecom's Antitrust Claims and For Severance, at 4-6.

In summary, the Panel has before it an expansive arbitration clause with express exceptions, negotiated at arm's length by sophisticated parties. Such clauses are to be broadly construed under the Federal Arbitration Act, and any doubts concerning arbitrability are to be resolved in favor of arbitration. *Moses H. Cone Mem'l Hospital v. Mercury Construction Corp.*, 480 U.S. 1, 24-25, 74 L.Ed. 2d 765, 103 S.Ct. 927 (1983). Accordingly, the Tribunal finds that Supra's antitrust claims are arbitrable.

II. MOTION FOR DISMISSAL

A. *Res Judicata*

Assuming that the claims are arbitrable, BellSouth argues that since Supra could have raised these claims in Arbitrations I and II and because the United States District Court dismissed almost identical claims in *Supra Telecommunications & Information*

Systems, Inc. v. BellSouth Telecommunications, Inc., Case No. 99-1706-CIV-SEITZ (S.D. Fla.), the claims are precluded by the doctrine of *res judicata*.

Res judicata is applicable in cases where "1) there has been a final judgment on the merits, 2) rendered by a court of competent jurisdiction, 3) in a case with identical parties, and 4) on the same cause of action." *Andujar v. National Property and Casualty Underwriters*, 659 So. 2d 1214, 1216 (Fla. D.C.A. 1995), citing *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468 (11th Cir. 1986). Applying these standards to the Award in Arbitrations I and II, the Tribunal notes that 1) no final judgment has been issued on the award, and 2) the cause of action for antitrust violations was not present in Arbitrations I and II. Accordingly, the Panel finds that antitrust claims are not barred by virtue of the award in Arbitrations I and II.

The parties agreed at the hearing that no final judgment had been issued in the case before the United States District Court in Miami, Florida, and that the District Court case involved different contracts and a different time period. Accordingly, the Panel finds that the claims for antitrust violations are not barred by the prior district court order of dismissal.

B. Collateral Estoppel

Like *res judicata*, collateral estoppel is only applicable to a final judgment. *City of Oldsmar v. State of Florida*, 790 So. 2d 1042, 2001, Fla. Lexis 1394 (Fla. Sup. Ct. 2001) ("[T]he particular matter must be fully litigated in a contest that results in a final decision of a court of competent jurisdiction"). Since neither the Tribunal's award in Arbitrations I and II, nor the district court's order of dismissal have resulted in a final judgment, collateral estoppel cannot serve as a bar to Supra's antitrust claims.

C. Issue Preclusion

BellSouth's other basis for dismissal is that even if *res judicata* and collateral estoppel do not apply, Supra's antitrust claims should be barred by the theory of issue preclusion. Once again, under Florida law the theory of issue preclusion applies to a final judgment. There are four elements to issue preclusion under applicable Federal law: 1) the issue at stake must be identical to the issue in the prior litigation; 2) the issue must have been actually litigated in the prior litigation; 3) the determination of the issue must have been a critical and necessary element of the judgment in the prior litigation; and 4) the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Baxas Howell Mobley, Inc. v. BP Oil Company*, 630 So. 2d 207, 209 (Fla. 3d Dist. Ct. App. 1993) (summarizing Eleventh Circuit law on the theory of issue preclusion). Since no judgment has been entered on the Award in Arbitrations I and II, and since no final judgment has been entered in the District Court case, and since the issues in each prior proceeding are not identical to the issues in Arbitrations III and IV, issue preclusion cannot apply to the arbitration award or to the district court order.

Thus, the Tribunal determines that Supra's antitrust claims are not subject to dismissal on the basis of *res judicata*, collateral estoppel, or issue preclusion.

III. APPLICATION OF *GOLDWASSER* DECISION

In light of the Tribunal's ruling that Supra's antitrust claims are arbitrable and not subject to dismissal on the foregoing grounds, we next address whether some or all of the antitrust claims should be dismissed under the rationale of the Seventh Circuit Court of

Appeal in the case of *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000).[3] In *Goldwasser*, a class of consumers brought an action for alleged violations of the federal antitrust laws, alleging that the defendant had failed to comply with its obligations to competitors under the 1996 Telecommunications Act (the "Act"). The *Goldwasser* court noted that in order to compete effectively, any competitor needs to be able "to make decisions about with whom and in what terms it will deal." *Id.*, at 397. Even monopolists normally have no duty to affirmatively help their competitors, and are entitled to choose efficient methods of doing business. *Id.* Where a complaint alleges that the defendant is a monopolist, that the defendant did not help its competitors enter the market and challenge its monopoly, and that therefore the prices paid by the plaintiff/consumer class are too high, the complaint does not state a claim for violation of the Sherman Act. *Id.*, at 400.

To the extent that such a duty to assist competitors to enter the market and compete in the telecommunications market exists, that duty arises from the Act. *Id.* "Our principal holding is thus not that the 1996 Act confers implied immunity on behavior that would otherwise violate the antitrust laws . . . it is that the 1996 Act imposes duties on the ILECS that are not found in the antitrust laws." *Id.*, at 401.

In dismissing antitrust claims Supra filed based on action taken in the pre-October 5, 1999, time period, the United States District Court for the Southern District of Florida interpreted the *Goldwasser* reasoning as follows: "The [Act] creates affirmative duties

[3] The Tribunal acknowledges that the *Goldwasser* rationale has not been followed by all courts. *See, Electronet Intermedia Consulting, Inc. v. Sprint-Fla.*, Inc., No. 4:00-CV-0176-RH, Slip Op. at 2, n.1 (N.D. Fla. Sept. 20, 2000); *MGC Communications, Inc. v. Sprint Corp.*, No. CV-S-00-0948-PMP (D. Nev. Dec. 12, 2000); *Stein v. Pacific Bell Co.*, No. C00-2915 SI (N.D. Cal. Feb. 14, 2001).

for ILECS that require them to provide equal service to their competitors. These duties extend far beyond the purview of antitrust laws which generally do not require a monopolist to 'cooperate with competitors.' Thus, this court finds that because Supra alleges the violation of duties that arise **only** as a result of the [Act], the [Act] 'must take precedence over the general antitrust laws' and Counts One and Two must be dismissed." *Supra Telecommunications & Information Systems, Inc. v. BellSouth Telecommunications, Inc.*, Order Granting Motion to Dismiss, Case No. 99-1706-CIV-SEITZ, filed June 8, 2001 (citing *Goldwasser*, emphasis added and other citations omitted).

In the present arbitrations, BellSouth attached as Exhibit 3 to its Motion to Dismiss Supra's Antitrust Claims and For Severance, an order in the case of *Intermedia Communications, Inc. v. BellSouth Telecommunications, Inc.*, dated December 15, 2000, Case No. 8:00 - Civ - 1410 - T- 24 (C) (U.S.D.C. M.D.Fl. Tampa Division). In that Order the court attempted to harmonize the *Goldwasser* rationale with the decision in *AT&T Wireless PCS, Inc. v. City of Atlanta*, 210 F.3d 1322 (11th Cir. 2000), vacated on other grounds, 223 F.3d 1324 (11th Cir. 2000), which held that an antitrust claim could be based on a violation of the Act. The District Court harmonized the two decisions in the following manner:

> In analyzing both *Goldwasser* and *AT&T Wireless*, the Court finds that the two cases can be read together. *Goldwasser* stands for the proposition that a violation of the [Act] cannot automatically be the basis for an antitrust claim, since there would be no antitrust claim in the absence of the [Act] (because without the [Act], there is no obligation to help one's competitors). However, other behavior that could be the basis for an antitrust claim, regardless of whether the [Act] existed, is not immune from antitrust liability even though it also violates the [Act]. This contention is consistent with *AT&T Wireless*, which notes that nothing in the [Act] modifies or

> impairs antitrust liability. Thus, any behavior that can be the basis for an antitrust claim before the creation of the [Act] still can be the basis for an antitrust claim after the creation of the [Act].

Order, *supra*, at 6.

The Tribunal finds the reasoning of *Goldwasser*, as further explicated in the orders of the two United States District Courts in Florida, to be persuasive. Accordingly, the Tribunal determines that those claims which would not exist but for the Act are not actionable as antitrust claims, but that those claims for behavior which could constitute antitrust violations are actionable, even if they also may be violations of the Act.

In reviewing Supra's Notice of Defense and Counterclaim in Arbitration III ("Arb. III Counterclaim") and Supra's Notice of Arbitration and Complaint in Arbitration IV ("Arb. IV Claim"), the Tribunal has determined that all but the antitrust claims specifically enumerated hereafter must be dismissed as antitrust claims since the duties arose only as a result of the Act:

1. BellSouth's alleged illegal tying of its voice services to its data and/or non-voice services (Arb. III Counterclaim, ¶ 55,j, at 21. Arb. IV Claim, ¶¶ 37-39, at 22);
2. BellSouth's alleged implementation of unlawful consumer retention programs, such as "win back" and "full circle" (Arb. III Counterclaim, ¶ 55,c, at 21);
3. The alleged disconnection and threats to disconnect Supra's customers' xDSL services (Arb. III Counterclaim, ¶ 55,h, at 21); and
4. The alleged making of defamatory statements about Supra to Supra's customers (Arb. III Counterclaim, ¶ 55,m).

The above enumerated counterclaims may be maintained as antitrust claims. All remaining antitrust claims are dismissed.

IV. MOTION TO SEVER

BellSouth asks the Tribunal to sever the antitrust claims for hearing at a later date. BellSouth argues that CPR Rule 9.3 vests the Tribunal with discretion to sever the claims. That rule provides in pertinent part:

> The Tribunal shall hold an initial pre-hearing conference for the planning and scheduling of the proceeding. . . . Matters to be considered in the initial pre-hearing conference may include, inter alia, the following:
>
> a. Procedural matters (such as . . . the desirability of bifurcation or other separation of the issues in the arbitration. . . .).

BellSouth offers Fed.R.Civ.P. 21 and 42 as guidance to the Tribunal on the exercise of discretion. Rule 21 states, in pertinent part, that "Any claim against a party may be severed and proceeded with separately." Fed.R.Civ.P. 42(b) allows a court to order a separate trial as follows: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaim, third-party claims, or issues. . . ." BellSouth also argues that absent severance and a separate hearing, BellSouth will be deprived of an adequate opportunity to prepare and to defend against Supra's antitrust claims.

Supra argues that CPR Rule 9.3(a) contemplates bifurcation only if the parties so agree. The Tribunal finds no such limitation in the rule. Further, Supra argues that as the Interconnection Agreement calls for the application of Florida law, the Tribunal should

apply Florida procedural law which permits bifurcation of claims only in furtherance of convenience or avoidance of prejudice, citing *Traveler's Express, Inc. v. Acosta*, 375 So. 2d 733, 737.

Section 22.6 of the General Terms and Conditions of the Interconnection Agreement provides in pertinent part:

> The validity of this Agreement, the construction and enforcement of its terms and the interpretation of the rights and duties of the Parties shall be governed by the laws of the State of Florida other than as to conflicts of laws except insofar as federal law may control any aspect of this Agreement, in which case federal law shall govern such aspect.

Such a provision has generally been held to provide only for the application of the substantive law of the jurisdiction, and not of its procedural law. *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52 (1995). Even if the designation of Florida law could be read to include Florida procedural law, the rationale of the *Traveler's Express* case is intended to avoid the possibility of inconsistent verdicts awarded by different juries. *Traveler's Express, supra*, 397 So. 2d at 737, n.6. That is clearly not a possibility here, since severed claims would be heard by the same Tribunal.

Even though by this order the Tribunal has significantly reduced the number of antitrust claims against which BellSouth will have to defend, the Tribunal believes that the remaining claims raise complex and serious allegations and that in the interests of justice in order to permit BellSouth to fully prepare its defense, the antitrust claims should be severed.

V. CONCLUSION

In summary, the Tribunal orders that all antitrust claims **other than** the claims for 1) alleged unlawful tying of BellSouth's voice services to its data and/or non-voice

services, 2) BellSouth's alleged implementation of unlawful consumer retention programs such as "win back" and "full circle," 3) the alleged disconnection and threats to disconnect Supra's customers' xDSL services, and 4) the alleged making of defamatory statements about Supra to Supra's customers are hereby dismissed. The four antitrust claims enumerated above are severed, and will be heard per a schedule to be determined.

DATED: October 19, 2001

John L. Estes M. Scott Donahey Campbell Killefer