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February 19, 2002

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

RE: Docket No. 001305-TP - Legal Brief in Accordance With Order No. PSC-02-0202-PCO-TP

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Notice of Service of Legal Brief in accordance with Order No. PSC-02-0202-PCO-TP in the above-referenced docket.

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

Sincerely,

Brian Chaiken/ahs

Brian Chaiken
General Counsel

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery and/or Federal Express this 19th day of February, 2002 to the following:

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By: Brian Chaiken /AHS
BRIAN CHAIKEN, ESQ.

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 Filed: February 18, 2002

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.'S LEGAL BRIEF IN ACCORDANCE WITH ORDER NO. PSC-02-0202-PCO-TP

SUPRA TELECOMMUNICATIONS & INFORMATIONS SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, hereby files this LEGAL BRIEF in accordance with Order No. PSC-02-0202-PCO-TP, and states the following in support thereof:

On January 10, 2002, the Eleventh Circuit Court published its decision in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.* (00-12809) and *BellSouth Telecommunications, Inc. v. Worldcom Technologies, Inc.* (00-12810) (hereinafter "*BellSouth Telecommunications, Inc. v. MCIMetro*"). The Court held: "Instead, we find that the GPSC had no jurisdiction to issue the orders in this case under federal or state statutory bases it cited in its orders." *Id.* at pg. 23. (Emphasis added).

As of January 10, 2002, this published opinion became binding authority in the 11th Circuit. *See Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992).

The central issue before the 11th Circuit was whether the Georgia Public Service Commission could "revisit" a previously approved interconnection agreement. The Court stated: "It would seem . . . 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." *Id.* at pg. 26. (Emphasis added). Accordingly, it is now the law in the 11th Circuit that the Florida Public Service Commission (FPSC) shall not "revisit an interconnection agreement that it has already approved" pursuant to the 1996 Federal Telecommunications Act. Therefore, the only possible remaining jurisdictional authority upon which the FPSC could rely is Florida State Law.

State Law

The Court also outlined the test for determining whether the GPSC could adjudicate disputes arising out of interconnection agreements under Georgia State law. This point is highlighted on page 43 of the Court's decision:

> "Without **explicit** statutory instructions to the contrary, it would be inappropriate for this court to find that the Georgia legislature intended that a question of law should be answered by an unqualified body like the GPSC and not by a court." (Emphasis added).

The 11th Circuit has made this same pronouncement in other cases: "We begin our construction of a statutory provision where the courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision." *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc). Florida State law, in particular Chapter 364, Florida Statutes, is silent with respect to whether the FPSC has the authority to adjudicate a dispute involving an interconnection agreement that has already been approved by the FPSC. Therefore, pursuant to the 11th Circuit decision, no such authority exists.

The FPSC Staff states in its recommendation with respect to Issue I:

> "that [11th Circuit] ruling was based in part on the Court's review of Georgia law, the applicable provisions of which

> appear to be significantly more restrictive than Florida law regarding the Commission's jurisdiction to enforce interconnection agreements." (Emphasis added).

The Staff, however, does not cite to any specific provision in Chapter 364, Florida Statutes, to justify its claim.

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

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

Likewise, it only follows that the FPSC cannot argue that it has "general authority" arising out of Chapter 364, Florida Statutes, to adjudicate disputes involving previously approved interconnection agreements. The Court noted that while it is true that the GPSC does have a "general supervision of all" telecommunications companies in the State of Georgia, "there are limits to this power." *Id.*, at pg. 44. First, there is no explicit statutory authority for adjudicating such disputes. And, second, as a functional matter judicial forums – and not quasi-legislative regulatory bodies – are better suited for the purely legal exercise of construing the terms of interconnection agreements. *Id.* at 42-43.

Adjudication implies an ability to enforce your decision

The 11th Circuit set out a functional test for determining whether State statutes grant state commissions the right to adjudicate contractual disputes.

The 11th Circuit reviewed the Georgia provision which outlines the GPSC's "jurisdiction and authority of commission." Section 46-5-168, Georgia State Act. The Court stated:

> "The Georgia Act empowers the GPSC to implement and administer its provisions. These verbs have similar connotations, namely, that the GPSC is obligated to give practical effect to and to direct . . . the execution . . . of the Georgia Act." *Id.* at 41. "Especially when read in conjunction with those duties of the GPSC that are explicitly mentioned in the statute – for example, making rules regarding service quality and issuing certificates of authority – this language indicates that the GPSC should play a ministerial and even quasi-legislative role within the statutory scheme, **but provides no such support for any adjudicatory powers.**" (Emphasis added). *Id.*

Likewise, Section 364.01, Florida Statutes, states that the FPSC shall exercise the powers conferred by this chapter. Each provision mentioned by the legislature in Section 364, Florida Statutes, focuses on the FPSC's "regulatory" role. There is no mention of an adjudicatory role. For example:

> Subsection (2), of this Section, the statute reads that the FPSC shall have "exclusive jurisdiction . . . in **regulating** telecommunications companies."
> Subsection (3), the provision states that "the transition from monopoly provision of local . . . service to competitive provision . . . will require appropriate **regulatory** oversight."
> Subsection (4)(b) states that the FPSC shall "encourage competition through flexible **regulatory** treatment."
> Subsection (4)(d) states that the FPSC shall "promote competition . . . by allowing a transitional period in which new entrants are subject to a lesser level of **regulatory** oversight . . ."
> Subsection (4)(f) states that the FPSC shall "**eliminate** any rules or **regulations** which delay . . . competition."
> Subsection (4)(h) states that the FPSC shall "recognize the continuing emergence of a competitive environment . . . through the **flexible regulatory treatment** of competitive telecommunications services."

The FPSC is well empowered to engage in rulemaking to effectuate each and every power described in Section 364.01, Florida Statutes. But, nowhere is the FPSC given the power to adjudicate contractual disputes involving previously approved interconnection agreements. This is the identical finding the 11th Circuit reached with respect to the Georgia State law. *Id.* at pg. 40.

When interpreting statutes "we must presume that Congress [in this instance Florida legislature] said what it meant and meant what is said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) (*citing Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L.Ed.2d 391 (1992). Furthermore, "[t]he 'plain' in 'plain meaning' requires that we look to the actual language used in a statute, not the circumstances that gave rise to that language." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001). In other words, the Florida legislature meant what it said when it continuously and repeatedly used the terms "regulatory" and "regulating." The circumstances that gave rise to the 1995 amendments to Section 364, Florida Statutes, are not relevant. The 11th Circuit has stated that: "given a straightforward statutory command, there is no reason to resort to legislative history." *Id.* at pg. 1222.

In *BellSouth Telecommunications, Inc. v. MCIMetro,* the 11th Circuit makes a second observation regarding the functional test. The Court states:

> "Another section of the Georgia Act underscores this distinction." "Section 46-5-168(f) . . . allows the GPSC to petition, intervene or otherwise commence proceedings before the appropriate . . . courts . . . There would be no need for the GPSC to commence a proceeding in a court of law, however, if it had the authority to adjudicate those proceedings itself." *Id.* at pg. 42. (Emphasis added).

Chapter 364, Florida Statutes, imposes the same substantive restrictions on the FPSC. Section 364.015, Florida Statutes, provides that:

> "The legislature finds that violations of commission orders or rules in connection with the impairment of . . . service, constitutes irreparable harm for which there is no remedy at law. The Commission is authorized to seek relief in circuit court . . ."

According to the 11th Circuit test "there would be no need for the FPSC to commence proceedings in a court of law, if it had the authority to adjudicate those proceedings itself." *See BellSouth Telecommunications, Inc. v. MCIMetro,* at 42.

The Florida statute, directing the FPSC to commence a proceeding in circuit court, is confined to matters involving violations of existing FPSC rules or violations of statute. Contractual disputes do not involve the violation of any rule or statute. Fundamental to the power to adjudicate is the power to order specific performance or to award damages. The FPSC does not have the power to award damages. *Southern Bell Tel. And Tel. Co. v. Mobile America Corp.,* 291 So.2d 199 (Fla. 1974). Likewise, the FPSC does not have the power to order specific performance.

The 11th Circuit has made it clear, that part and parcel of having the power to adjudicate a dispute is the power to enforce your findings at the conclusion of the hearing (i.e. damages, specific performance). *See page 42.* In our case, it is clear that the FPSC has no power to enforce its orders "itself." If a party fails to comply with the FPSC's order – at the conclusion of a breach of contract dispute – the FPSC would be required to go to circuit court for an order requiring the regulated entity to comply with the preceding FPSC order. The only penalty the FPSC can impose for violation of an order, in addition to revoking a certificate of authority, is pursuant to Section 364.285, Florida Statutes.

Under this section the FPSC can impose up to $25,000 dollars per violation. If the FPSC, however, wishes to collect the fine it must, again, institute a proceeding in a court of law. *See* Section 364.285(2), Florida Statutes. The fine ultimately is paid to the General Revenue Fund of the Florida Legislature. Meanwhile, the CLEC, assuming the FPSC ruled in the CLECs favor, still is unable to receive damages. Under all notions of common sense the FPSC does not have the power to adjudicate a contractual dispute "itself." Given all of the procedural hurdles the FPSC must overcome before it can enforce its orders, it would be extremely difficult, if not impossible, for the Florida Statute to meet the 11th Circuit's functional test with respect to whether the FPSC has been granted the power, from the Florida legislature, to adjudicate a contractual dispute "itself."

The only two regulatory provisions regarding the Initiation of a Proceeding before the FPSC also cannot be cited as a basis for the FPSC to adjudicate a contractual dispute. Rule 25-22.036, and Rule 28-106.301, Florida Administrative Code both limit the filing of a petition to the circumstance involving the violation of a rule, statute or agency action. A claim for breach of an interconnection agreement cannot be considered a violation of a rule or statute. As the 11th Circuit stated:

> "In the case at hand, the interconnection agreements formed between BellSouth and the CLEC defendants, while compelled by federal law, [are] . . . basic corporate contracts and [do] . . . not directly impact provision[ing] of local telephone service to the public." *Id.*, at pg. 45.

Because an interconnection agreement does not impact on the provisioning of local service, it cannot be argued to impact on any rule or statute within the FPSC's jurisdiction. Accordingly, this argument has already been dismissed.

To the extent that BellSouth wants to argue that the Order approving the interconnection agreement is "agency action," then BellSouth's petition with respect to any dispute is limited to the time limits for protesting "agency action." This argument, if made by BellSouth, is of course nonsense because Section 252(6)(e) requires all protests of arbitrations to go to federal court. Therefore, as stated above, neither of these two regulatory provisions can be cited as the basis for bringing a dispute over a previously approved interconnection agreement. One minor note: it is these two rules that are always cited by BellSouth when they file a petition for breach of contract. On a going forward basis, the FPSC should simply begin dismissing these petitions on subject matter jurisdiction grounds, on its own motion. Allowing BellSouth to go forward with these types of petitions, based on these two regulations, "flies in the face" of what authority is, in fact, contained in those regulations.

In short, Chapter 364, Florida Statutes, fails the functional test.

Section 364.07(2), Florida Statutes

BellSouth may attempt to argue Section 364.07(2), Florida Statutes, provides the FPSC with authority to adjudicate disputes. This provision, however, addresses contracts "for joint provision of intrastate interexchange service." This statutory section does not provide the FPSC with any such power with respect to previously approved interconnection agreements. The law is clear and absolute:

> "[w]here Congress [or the Florida legislature in our case] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-1226 (11th Cir. 2001). (Emphasis added).

In our case, where the Florida legislature includes a power in one provision (364.07(2)), but fails to include the same power in another provision (364.162) in the same Chapter (364). It must be presumed that the Florida legislature has acted intentionally and purposely in excluding the power from Section 364.162.

Section 364.07(2), Florida Statutes, was last amended in the year 1991. The limited ability to adjudicate disputes in a quasi-legislative manner, regarding intrastate interexchange service contracts, was delegated to the FPSC when BellSouth was a monopoly and before the enactment of the 1996 Federal Telecommunications Act. Supra characterizes this power as a "limited ability to adjudicate disputes in a quasi-legislative manner," because it is clear that the FPSC still must overcome many hurdles in order to enforce any order it issues arising out of a dispute under Section 364.07(2). It is clear that the phrase "adjudicate disputes" as used by the Florida legislature for resolving interexchange service contracts, is fundamentally different from the way the 11th Circuit defines a states commission's ability to "adjudicate disputes." Under the 11th Circuit test, the FPSC must be able to resolve enforcement of its orders without having to resort to a separate proceeding in a court of law. The FPSC lacks this power under any provision of Chapter 364, Florida Statutes.

Notwithstanding the foregoing, Supra need not prove that this functional test is in fact applicable to Florida law in order to prevail in its argument in this Legal Brief. For the simple reason that the Florida legislature has intentionally and purposely already told the FPSC that the Commission has no such authority to adjudicate disputes involving previously approved interconnection agreements.

Section 364.162, Florida Statutes, was created for the first time in 1995 and specifically addresses interconnection and resale agreements. It was amended again in 2000. Today in 2002, the provision remains silent on whether the FPSC may adjudicate disputes with respect to interconnection agreements. "Where Congress knows how to say something but chooses not to, **its silence is controlling**." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1226 (11th Cir. 2001). (Emphasis added). It is absolutely clear that where the Florida legislature knows how to say something in Section 364.07(2), but chooses not to include that same power in Section 364.162, the Florida legislature's silence is controlling.

Accordingly, the FPSC may not cite to Section 364.07(2), Florida Statutes, as authority to adjudicate disputes arising out of previously approved interconnection agreements. No debate.

Conclusion

In summary, 11th Circuit's decision of January 10, 2002 is binding and controlling with respect to the Florida Public Service Commission. Therefore, the FPSC cannot be the appropriate forum for dispute resolutions arising out of an existing interconnection agreement.

RESPECTFULLY SUBMITTED this 19th day of February, 2002.

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