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July 18, 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. 020611-TP –
Supra's Motion to Dismiss BellSouth's Complaint Against Supra For Inappropriate Use of Lens

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion to Dismiss BellSouth's Complaint Against Supra For Inappropriate Use of Lens in the above captioned docket.

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

Sincerely,

Brian Chaiken/ATS

Brian Chaiken
General Counsel

CERTIFICATE OF SERVICE
Docket No. 020611-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery and/or U.S. Mail this 18th day of July, 2002 to the following:

Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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SUPRA TELECOMMUNICATIONS
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By: Brian Chaiken/azs
BRIAN CHAIKEN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. regarding Supra Telecommunications and Information Systems, Inc.'s Inappropriate Use of Lens	)	Docket No. 020611-TP Filed: July 18, 2002

MOTION TO DISMISS

SUPRA TELECOMMUNICATIONS & INFORMATIONS SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, hereby files this MOTION TO DISMISS BellSouth's Complaint against Supra for its use of LENS, pursuant to Rule 28-106.204, Florida Administrative Code, in the above referenced matter and states the following in support thereof:

On June 27, 2002 BellSouth filed its Complaint for relief pursuant to Rules 28-106.201 and 25-22.036, Florida Administrative Code. The certificate of service attached to BellSouth's Complaint indicates that it was served by U.S. Mail. Rule 1.090(e), Florida Rules of Civil Procedure, provides that when a party serves a document by mail, five (5) days shall be added to the prescribed period in which to respond. BellSouth's filing was made on June 27, 2002. The above referenced rule would require Supra to file its response no later than Tuesday, July 23, 2002. Accordingly, Supra's Motion to Dismiss is timely.

This Commission presently lacks the subject matter jurisdiction to adjudicate the issues raised in BellSouth's Complaint. Accordingly, BellSouth's Complaint must be dismissed for lack of subject matter jurisdiction.

LACK OF SUBJECT MATTER JURISDICTION

Supra and BellSouth are parties to an Interconnection Agreement ("Current Agreement") which has been in effect since October 5, 1999. The Agreement provides that the parties shall continue to operate under the terms and conditions of the Agreement until a Follow-on Agreement is approved by the Florida Public Service Commission ("Commission"). Paragraph 16 of the General Terms and Conditions of the present Agreement contains a dispute resolution provision, which reads as follows:

"16. Alternative Dispute Resolution

16.1 All disputes, claims or disagreements (collectively "Disputes") arising under or related to this Agreement or the breach hereof shall be resolved in accordance with the procedures set forth in Attachment 1, except: (i) disputes arising pursuant to Attachment 6, Connectivity Billing . . . Disputes involving matters subject to the Connectivity Billing provisions contained in Attachment 6, shall be resolved in accordance with the Billing Disputes section of Attachment 6. In no event shall the Parties permit the pendency of a Dispute to disrupt service to any AT&T [Supra Telecom] Customer contemplated by this Agreement. . ."

Subparagraphs 14.1, 14.1.1 and 14.1.2 of Attachment 6, provide for an informal dispute resolution process in which the parties progressively escalate the dispute up to the fourth level of management within each respective company. Attachment 1 to the current interconnection agreement provides for Alternative Dispute Resolution. Paragraph 2 of Attachment 1 states in pertinent part that "**[n]egotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between BellSouth and AT&T [Supra Telecom] arising under or related to this Agreement including its breach . . .**"

Commission lacks jurisdiction

BellSouth's Complaint alleges a breach of the Current Agreement. This claim by BellSouth's own admission originated back in December 2001. This Commission lacks the subject matter jurisdiction in order to adjudicate this alleged breach of contract.

Pursuant to the parties' Current Agreement, the **sole and exclusive remedy** available to the parties with respect to this alleged breach is private commercial arbitration. Accordingly, any dispute arising under or related to the present interconnection agreement must be brought before Commercial Arbitrators.

Commission Order No. PSC-00-2250-FOF-TP

This Commission made this same ruling regarding subject matter jurisdiction in Order No. PSC-00-2250-FOF-TP. In that matter, the Commission rejected BellSouth's claim pursuant to the exclusive arbitration clause. The Commission wrote:

> " . . .we find that the dispute resolution provisions . . . should be strictly followed. . . . Accordingly, we find that Supra's Motion to Dismiss should be granted as to the portion of the Petition alleging Supra's failure to pay for services received under the present agreement, **because of the exclusive arbitration clause**. . . ." (Bold and underline added for emphasis).

Following Commission precedent, any claim by BellSouth that Supra is allegedly in breach of its Current Agreement **must** be brought before the Commercial Arbitrators pursuant to the parties' Current Agreement.

The law is well settled that arbitration provisions are to be interpreted liberally in favor of requiring the dispute to be arbitrated. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (Federal Arbitration Act establishes a federal policy in favor of arbitration); Collins, supra, 168 F.R.D. at 677; Roe v. Amica Mutual Insurance Co., 533 So.2d 279 (Fla. 1988) (arbitration is favored under Florida law); Ronbeck Construction Co., Inc. v. Savanna Club Corp., 592 So.2d 344 (Fla. 4th DCA 1992) (any doubts about the scope of arbitration should be resolved in favor of arbitration). Indeed, the federal courts have held that **"the FAA creates a presumption in favor of arbitrability; so, parties must clearly express their intent to exclude categories of claims from their arbitration**

agreement." Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 1222 (11th Cir. 2000). Thus, unless expressly excluded by the language of the arbitration clause, statutory [and other] claims are subject to being arbitrated. Brown, supra, 211 F.3d at 1222.

No damages

It is also well settled in Florida, that the Commission cannot award damages as requested by BellSouth. As such, this request for relief is improper and must be denied.

Issue never raised with Arbitrators

It is publicly well documented[1] that BellSouth was ordered to provide Supra with direct access to the same OSS, that its own retail division utilizes. BellSouth was ordered to comply with this requirement by no later than June 15, 2001. BellSouth has chosen to ignore this lawful order so as to avoid allowing Supra to compete on a level playing field. To date, BellSouth has refused to comply with the plain meaning of the express terms of the parties' Current Agreement.

LENS is an inferior interface by any measure. Contrary to BellSouth's assertions, Competitive Local Exchange Carriers (CLECs), like Supra, can utilize the Local Exchange Navigation System ("LENS") only in the way in which its was designed. If there are any problems with a CLECs ability to access LENS, these problems are the sole and direct result of BellSouth and no one else.

It is ironic that BellSouth has a 271 application pending before this Commission to offer long distance in the State of Florida. A significant part of whether BellSouth's petition is granted involves whether BellSouth's Operational Support System ("OSS") provides non-discriminatory access to other CLECs. The Federal Communications Commission's ("FCC") Third Report and Order found that "lack of access to

[BellSouth's and other ILEC's] OSS impairs the ability of requesting carriers to provide the services they seek to offer." Third Report and Order Paragraph 433, at 192. By BellSouth's own admission, within the context of this complaint, it acknowledges that CLECs are having problems accessing BellSouth's OSS LENS interface because it was not designed to handle competitors with a large customer base.

BellSouth files this Complaint now in an attempt to place the blame on Supra for LENS' admitted failures. Supra's program to monitor BellSouth's undocumented down time is consistent with the parties' Current Agreement and BellSouth's own specifications for the use of LENS. This would explain why BellSouth has chosen never to raise this issue with the Commercial Arbitrators. More importantly, the program is only designed to view the main page of LENS.[2] Common sense – as well as any empirical data – demonstrates that simply viewing a home page without any other affirmative activity cannot be the cause of any of the ailments BellSouth claims LENS is suffering.

What BellSouth does not tell the Commission is that Supra submits on average of One Thousand Five Hundred and Thirty Four (1,534) Local Summary Request (LSRs) per day. This is a conservative estimate. There are many periods where Supra repeatedly exceeds Two Thousand (2,000) LSR's per day.

BellSouth asserts that a typical CLEC logs in 20-60 times a day.[3] Obviously, LENS was only designed to handle CLECs with virtually no customer base. It is safe to conclude that LENS was never designed nor developed to handle a CLEC with orders of excess of 1,400 per day. Supra notes that BellSouth conveniently equates a simple "log-

[1] October 31, 2001 Federal District Court Order entered in Civil Case No. 01-3365-CIV-KING.
[2] *See* December 21, 2001 Letter from Supra to BellSouth, pg. 2, 2nd to last paragraph.

in" with a corresponding log-out (to view the main page of LENS with no additional activities or queries) with the more involved activity associated with accessing a CSR with customer approval and subsequently submitting an LSR. Supra does not access CSRs without customer approval.[4] BellSouth is attempting to imply that Supra's mechanized system to monitor undocumented down time is the equivalent to the "activity" of over 1,400 requests for service. This simply cannot be the case by any measure.

The only "activity" that could be the cause of problems to BellSouth's inferior LENS interface, is Supra's legitimate activity to convert new customers. As noted above, Supra does access LENS for the purpose of reviewing CSRs with customer approval and submitting LSRs on average of 1,534[5] times a day. Ironically, BellSouth writes in its Complaint that "LENS was not designed, nor developed, for such . . . activity."[6] In describing the impact on LENS when a CLEC, any CLEC, submits more than 1,400 LSR's per day, BellSouth states that such activity "degrades reliability," creates "excessive load," and "memory problems." All of these admissions go to the heart of the 1996 Federal Telecommunications Act.

While the 1996 Federal Telecommunications Act ("FTA") does not mandate direct access to BellSouth's OSS, the FTA, also, does **not** prohibit a state utilities commission from ordering direct access to an ILEC's OSS. Allowing competitive carriers

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[3] *See* BellSouth's Complaint, pg. 3, part V.

[4] BellSouth could never substantiate this baseless charge. *See* Exhibit C, to BellSouth's Complaint, pg. 2, first sentence of 2nd full paragraph: "BellSouth has no way of knowing what data from LENS is being accessed, copied or viewed."

[5] This is a conservative estimate.

[6] *See* BellSouth's Complaint, pg. 3, part VII. BellSouth had inserted the word "abusive" in its admission that LENS was not designed with the expectation that a CLEC might be converting more than 1,400 customers per day. Presumably, BellSouth equates real competition affecting BellSouth's customer base as

direct access to the **same** electronic OSS that BellSouth's own retail division utilizes is the **only true way** to implement the spirit of the 1996 FTA – anything less is to leave a competitive advantage in the hands of the former monopoly (i.e BellSouth).

BellSouth is not interested in offering Supra, or any other CLEC, a level playing field. Evidence for this proposition can be found in BellSouth's own inferior LENS program. As noted above, BellSouth has already readily admitted "LENS was not designed, nor developed, for such . . . activity" (i.e a CLEC with more than 1,400 LSR's per day).

Conclusion

BellSouth's Complaint alleges a breach of the Current Agreement. This claim by BellSouth's own admission originated back in December 2001. This Commission lacks the subject matter jurisdiction in order to adjudicate this alleged breach of contract. Pursuant to the parties' Current Agreement, the **sole and exclusive remedy** available to the parties with respect to this alleged breach is private commercial arbitration. Accordingly, any dispute arising under or related to the present interconnection agreement must be brought before Commercial Arbitrators. Moreover, it is also well settled in Florida, that the Commission cannot award damages as requested by BellSouth. As such, this request for relief is improper and must be denied.

WHEREFORE, Supra respectfully requests that this Commission dismiss BellSouth's Complaint for lack of subject matter jurisdiction.

"abusive" conduct by its competitor. This BellSouth admission alone is sufficient basis for this Commission to deny BellSouth's application to offer long distance services in the State of Florida.

Respectfully, submitted this 18th day of July, 2002.

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