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March 17, 2003

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. 030200-TP
SUPRA'S MOTION TO DISMISS TO AT&T'S EMERGENCY PETITION REQUESTING A CEASE AND DESIST ORDER AND OTHER SANCTIONS AND MEMORANDUM OF LAW

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion to Dismiss To AT&T'S Emergency Petition 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,

Jorge Cruz-Bustillo/ats

Jorge Cruz-Bustillo
Assistant General Counsel

CERTIFICATE OF SERVICE
Docket No. 030200-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 17th day of March, 2003 to the following:

Carris (Lee) Fordham , Esq.
Staff Counsel
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Florida Public Service Commission
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By: Jorge Cruz-Bustillo / AHS
JORGE CRUZ-BUSTILLO, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency petition of AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaksm Service d/b/a AT&T for cease and desist order and other sanctions against Supra Telecommunications and Information Systems, Inc.	DOCKET NO. 030200-TP FILED: March 17, 2003

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.S MOTION TO DISMISS TO AT&T'S EMERGENCY PETITION REQUESTING A CEASE AND DESIST ORDER AND OTHER SANCTIONS AND MEMORANDUM OF LAW

Supra Telecommunications and Information Systems, Inc., ("Supra"), by and through its undersigned counsel, hereby files this MOTION TO DISMISS the Petition of AT&T Communications of the Southern States, LLC ("AT&T"), filed on February 24, 2003, pursuant to Rule 28-106.204(2), Florida Administrative Code, on the following grounds for Lack of Standing, No Actual Case or Controversy, and Failure to State a Cause of Action in the above referenced matter and states the following in support thereof:

NO STANDING

This Commission must dismiss this petition first and foremost because AT&T does not have standing to raise a claim on behalf of its customer. AT&T cannot claim to be an association with dues paying members. The associational standing criteria is set forth in Florida Home Builders Association, et al v. Department of Labor and Employment Security 412 So. 2d 351 (1982). In Florida Home Builders, the Court outlined a three part conjunctive test: the failure to

meet any one prong would deny the association standing. The Court found that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id. See also Order Nos. PSC-03-0084-PCO-TL and PSC-92-0112-TL. AT&T fails this test on many counts: there exists no association, no members and no charter outlining the "organizational purpose." AT&T cannot be considered an association in any respect. The only party with standing to bring an alleged slamming complaint is the party that was actually switched to another provider without their authorization. Therefore, AT&T lacks standing to file a complaint on behalf of its customers. For this reason alone, AT&T's petition must be dismissed.

NO ACTUAL CASE OR CONTROVERSY

The next reason for dismissing this petition is that there exists no actual case or controversy. AT&T agreed to pay Supra for lawful past due access charges on February 6, 2003. AT&T routinely flouts its obligations to pay lawful access charges.[1] This current petition is therefore nothing more than a request for an advisory opinion from this Commission which is prohibited. AT&T is seeking a decision from this Commission that will act as a bar, or absolute immunity, for AT&T so that it can continue to refuse to pay lawful past due access charges owed to hundreds of LECs. The decision sought by AT&T is also contrary to the public policy position of this Commission.

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[1] Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262 April 26, 2001 stated the following: "AT&T . . . has frequently declined altogether to pay CLEC access invoices . . . We [FCC] see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. . . . Additionally, IXCs have threatened to stop delivering traffic to, or accepting it from, certain CLECs that they view as over-priced. Thus, AT&T has notified a number of CLECs

Further support for the proposition that there exists no actual case or controvery is the fact that AT&T has failed to provide or even proffer a list of its customers who were actually affected by any Supra action, to wit, the names of any individual that has had their long distance carrier switched to another provider without the customer's authorization. This burden is on AT&T to prove.

AT&T is asking this Commission to issue a Cease and Desist Order to enjoin Supra from engaging in a non-existent activity. Because AT&T admittedly has no evidence of any actual violation, AT&T asks this Commission to issue a Show Cause requiring Supra to prove that it is not guilty of the alleged violation. AT&T's request is analogous to asking the police to arrest a person for no other reason than because AT&T is simply mad; and then demanding that the person produce evidence of the his or her innocence. This request is inappropriate. No telecommunications company, nor for that matter any individual American, should ever be forced to prove his or her innocence – especially when AT&T's true motivations can be traced directly to its unhappiness that it was required to pay Supra for past due lawful access charges for the use of its facilities and its desire to obtain an advisory opinion from this Commission that it can refuse to pay for such lawful charges in the future.

If a Show Cause is to be issued it most certainly should be directed at AT&T. This Commission should hold an expedited evidentiary hearing into why AT&T refuses to pay access charges invoiced by CLECs. AT&T should be required to prove that they are in fact paying all access charges to all CLECs for the use of their facilities in originating and terminating calls. Most CLECs will not challenge AT&T because the cost of litigation is simply too high. An

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that it refused to exchange originating or terminating traffic. In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues.

evidentiary hearing before this Commission would be a great service to all CLECs currently being deprived of revenues rightfully belonging to them that AT&T wrongfully withholds.

In addition to the foregoing, and as noted, AT&T's petition fails to indentify an actual case or controvery evidence by the lack of evidence of any individual that claims that they were actually switched to another long distance provider without their authorization. The key point here is that there cannot be a Cease and Desist Order in the absence of an actual case or controvsry. For this reason alone, AT&T's petition must be dismissed. Failure To State A Cause of Action

FIRST BASIS – FAILURE TO STATE A CAUSE OF ACTION

AT&T's Petition must be dismissed on the grounds that it fails to state a cause of action. AT&T filed its Petition pursuant to Rule 28-106.201, F.A.C.[2] Subsection (4) of Rule 28-106.201, F.A.C., explicitly mandates that the Florida Public Service Commission ("Commission") or, other applicable agency, "shall" dismiss a petition "if it is not in substantial compliance with subsection (2) of this rule." Subsection (2) of the rule obligates the petitioner to provide at least eight (8) different categories of information. AT&T's petition at best only provides one of the necessary eight categories. For this reason alone, AT&T's petition must be dismissed.

The Rule also requires that "[d]ismissal of a petition shall, at least once, be without prejudice to petitioner filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured." See Subsection (4). Accordingly, AT&T's petition must be dismissed without prejudice allowing the petitioner one chance to amend. If AT&T is unable to comply with the obligations of the Rule AT&T, itself, invoked, then its petition must be dismissed with prejudice.

[2] See AT&T's Petition, pg. 4, ¶6.

Rule 28-106.201(2) requires the following information to be included in any petition filed under this regulation. The following shall outline the required information and AT&T's compliance therewith.

(2)(a) The name and address of each agency affected and each agency's file or identification number, if known. This information was **not** provided.

(2)(b) The name and address and telephone number of the petitioner. This information was provided.

(2)(b) An explanation of how the petitioner's substantial interests will be affected by the agency determination. This information was **not** provided. Demonstrating substantial interests invokes a two part analysis addressing (1) that AT&T will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that AT&T's substantial injury is of a type or nature which the proceeding is designed to protect. See Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981). AT&T's petition is void of any such Agrico analysis.

This Rule also contemplates that the agency, in this case the Commission, has already made some agency determination that the petitioner is seeking to challenge. This is consistent with prior Commission decisions involving proposed agency action. In those instances, after the proposed agency action is issued the Commission notifies parties who may have had their substantial interests affected that they may file for a formal hearing pursuant to Rules 28-106.201 **and** 25-22.029,[3] Florida Administrative Code. AT&T's petition is void of any explanation on how its "substantial interests will be affected by the agency determination." Accordingly, AT&T failed

[3] This Rule is entitled "Point of Entry Into Proposed Agency Action Proceedings."

to comply with its regulatory obligations under the Rule AT&T, itself, chose to invoke as the vehicle for bringing its complaint.[4]

Subsection (2)(c) requires a statement of when and how the petitioner received notice of the agency decision. This information was **not** provided.

Subsection (2)(d) requires a statement of all disputed issues of material fact. If there are none, the petition must so indicate. This information was **not** provided. AT&T does include a section captioned Statement of Facts, but that section is **not** responsive to the regulatory obligation AT&T is required to meet under this subsection.

Subsection (2)(e) requires a "concise" statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action. AT&T's petition is void of either: (1) any "concise" statement of the ultimate facts alleged that would demonstrate and substantiate a reversal or modification of the agency's proposed action in this matter, or (2) any "specific facts" that AT&T contends would demonstrate and substantiate a reversal or modification of some prior Commission action in this matter. This information was **not** provided by AT&T.

Subsection (2)(f) requires a "statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action." While the AT&T petition does attempt to identify specific statutes and rules that Supra allegedly violated, the rule does not ask for such an identification. The Rule asks the petitioner to identify those rules or statutes that the petitioner "contends require reversal or modification." AT&T's petition is void of any such explanation. This information was **not** provided.

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[4] There is a plethora of prior Commission precedent allowing a party to bring a complaint pursuant to Rule 25-22.036, F.A.C, if the complainant's substantial interests are affected and the complained of conduct is a violation of a statute, rule or order of the Commission. AT&T, however, did not invoke this provision as the vehicle for bringing this action. AT&T is solely responsible for properly invoking this Commission's jurisdiction.

Subsection (2)(g) requires a statement of relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action. AT&T failed to meet this requirement for the same reason described above: petition fails to identify precisely what actions the petitioner wishes to take with respect to the agency's proposed action and/or what specific rules or statutes that AT&T contends require reversalor modification. This information was **not** provided.

Of the eight (8) items outlined above that a petitioner is legally obligated to include in a petition, AT&T only provided one (1). For this reason, the petition must be dismissed.

A motion to dismiss raises as a question of law regarding the sufficiency of the facts alleged in the petition to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all of the allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

Rule 28-106.201(4), F.A.C, provides that this Commission "shall" dismiss the petition "if it is not in substantial compliance with subsection (2) of this rule." In evaluating a motion to dismiss, the Commission is obligated to review only the pleading before it. Even if the Commission did accept all of AT&T's allegations as true, this Commission would still have to conclude that AT&T failed to meet the regulatory obligations delineated under Rule 28-106.201(2), F.A.C. Subsection (4) of that same rule requires that "if it [the petition] is not in substantial complaince with subsection (2) of this rule," then the petition "shall" be dismissed. The term "shall" imposes upon the Commission an affirmative and mandatory duty. AT&T

sustains the burden to properly invoke the Commission's juridiction. Accordingly, this Commission must dismiss AT&T's petition on the grounds that it fails to state a cause of action under Rule 28-106.201, F.A.C. – the provision invoked by the petitioner as the proper vehicle for bringing this complaint.

SECOND BASIS – FAILURE TO STATE A CAUSE OF ACTION

If AT&T had cited the proper regulatory provision necessary to invoke this Commission's jurisdiction, AT&T would have still maintained the burden of demonstrating the statute, rule or order Supra allegedly violated. A complaint filed pursuant to Rule 25-22.036(2), F.A.C., requires the complainant to identify some "act or omission . . . which is in violation of a statute enforced by the Commission, or any Commission rule or order. AT&T's petition fails to meet this burden. Accordingly, AT&T's petition must also be dismissed on the grounds that AT&T failed to state a cause of action under this provision as well.

Threshold Issue

The threshold issue for this Commission is whether a telecommunications carrier is permitted to refuse, suspend or cancel service for nonpayment of undisputed charges. It is this Commission's policy that a telecommunications company "must be able to deny service in order to obtain payment for services rendered and/or prevent additional past due charges from accruing." (Emphasis added). See Order No. PSC-02-0413-FOF-TP at p. 54.

This Commission recognized this same principle in a previous arbitration, in Docket No. 000649, where the Commission stated:

> "BellSouth [or other CLEC] must be able to deny service in order to obtain payment for services rendered and/or prevent additional past due charges from accruing. It would not be a reasonable business practice for BellSouth [or other CLEC] to operate 'on faith' that an ALEC [or other carrier] will pay its bills. Indeed, a business could not remain viable if it were obligated to continue providing services to customers who refuse to pay lawful charges."

See Order No. PSC-01-0824-FOF-TP at p. 162.

Likewise, in this matter, it would not be a reasonable business practice for Supra to operate "on faith" that AT&T will pay its bills. Indeed, as reasoned by this Commission, Supra could not remain viable if it were obligated to continue providing services for free to AT&T, or any other Interexchange Carrier ("IXC") who refuses to pay lawful charges. This Commission was clear when it declared that: We believe that the "ability to receive timely payment for undisputed charges is important." (Emphasis added). See Order No. PSC-02-0413-FOF-TP at p. 54.

General Background

Supra is a CLEC, under the Telecommunications Act of 1996 (the "Act"), that provides telephone service in the local voice market to customers throughout Florida. Pursuant to the Act, a CLEC is able to provision telephone service by either reselling an Incumbent Local Exchange Carrier's ("ILEC") physical network or by operating as a Unbundled Network Element ("UNE") provider and leasing physical portions of an ILEC's network. Operating in the UNE environment, a CLEC is entitled to certain revenues that it would not otherwise be entitled to in a resale environment, including access charges which are charges assessed to long distance carriers for their use of the CLEC's facilities to route long distance calls to the long distance carriers' lines. In this instance, Supra has provisioned service as a UNE provider since October 5, 1999, and BellSouth Telecommunications, Inc. ("BellSouth") is the ILEC that has served the relevant geographical region in which Supra has provided and continues to provide local telephone service.

AT&T, which operates as an Interexchange Carrier ("IXC") under the Act, provides long distance service to customers throughout the United States, including Florida. AT&T has used Supra's facilities to route calls made to and from AT&T long distance customers.

Relevant Undisputed Facts

On October 23, 2002, AT&T was properly invoiced a total of $5,274,992.28 for the relevant time period between Janaury 2002 and October 22, 2002. Supra's FCC Tariff provides under Section 2.10.3.G. that "[amounts] not paid within 30 days after the mailing date of invoice will be considered past due." Accordingly, AT&T invoice became due and owing on November 22, 2002. See Relevant pages of Supra's Tariff attached hereto as **Exhibit A.**

Section 2.10.4.A. also provided that "[a]ny objection to billed charges must be reported to the Company or its billing agent within sixty (60) days of the invoice of the bill issued to the Customer." (Emphasis added). "Customer" is defined as "[a]ny . . . entity which uses service under the terms and conditions of this tariff . . . In most contexts, the Customer is an Interexchange Carrier utilizing the Company's Switched or Dedicated Access services." See Section 1 of Supra's FCC Tariff at p. 7.

"In the event that a billing dispute occurs concerning any charges billed to the Customer by the Company, the Customer [i.e. AT&T] must submit a documented claim for the disputed amount." (Emphasis added). See 2.10.4.B. at p. 25. Furthermore, "[a]ll claims must be submitted to the Company within sixty (60) days of the invoice date for the disputed services." (Emphasis added). Id. In this matter, the sixty (60) window expired on December 21, 2002. Prior to this date, AT&T never provided a documented claim identifying what charges it asserted were disputed and why such charges were disputed.[5]

[5] The October 23, 2002 invoice included AT&T's proper Carrier Identification Codes ("CIC"). AT&T never disputed these codes.

Supra's tariff is absolute: "If the Customer does not submit a claim as stated above, the Customer waives all rights to filing a claim thereafter." See Section 2.10.4.B. In this case, as of December 21, 2002, AT&T had waived all its rights to filing a valid, legitimate dispute with Supra for the invoiced services. On December 24, 2002, Supra provided AT&T with written notice that payment on its account was overdue. See December 24, 2002 Letter[6] attached hereto as **Exhibit B**.

The Law

"A validly filed tariff also 'consitutes the contract of carriage between the parties.'" BellSouth Telecommunications Inc. v. Jacobs, 834 So. 2d 855, 859 (Fla. 2002). As a matter of law, Supra's FCC Tariff operates as a contract between Supra and AT&T as well as every other IXC. This valid tariff places AT&T under a duty to make all payments regarding past due amounts in accordance with the terms and conditions described therein. More importantly, is that Supra is entitled to deny services for nonpayment of past due charges.

Section 2.14.3(a) provides that: "For nonpayment: The Company, by written notice to the Customer and in accordance with applicable law, may refuse[7], suspend or cancel service without incurring any liability when there is an unpaid balance for service that is past due." This provision grants Supra the discretion to refuse, suspend or cancel service without incurring any liability. This provision has the force and effect of federal law. See Marcus v. AT&T Corp, 138 F.3d 46 (2d Cir. 1998) ("A federal tariff has the force and effect of federal law.").

[6] This December 24th Letter also includes AT&T's CICs in addition to the codes identified in the original invoice.
[7] Supra was well within its rights to refuse to allow customers to switch "to" AT&T as their long distance provider. AT&T was considered to be "unavailable" for purposes of providing interexchange service because of its failure to pay past due undisputed lawful charges.

Identical provisions found in other tariffs

Sprint, the Incumbent Local Exchange Carrier ("ILEC") has similar provisions included in its federally filed access tariff:

> E2.1.8 Refusal and Discontinuance of Service
>
> A. **If the IC [i.e. IXC]** or End User fails to comply with the provisions set forth in this Tariff, including any payments to be made by it on the dates and times herein specified, the Company may, on thirty (30) days written notice . . . **refuse additional applications for service and/or refuse to complete any pending orders for service by the noncomplying IC** or End User **at any time thereafter**. . . ." (Emphasis added).
>
> B. **If the IC** or End User fails to comply with the provisions set forth in this Tariff, including any payments to be made by it on the dates and times herein specified, the Company may, on thirty (30) days written notice . . . at any time thereafter. . . . **nothing contained herein shall preclude the Company's right to discontinue the provision of the services to the noncomplying IC** or End User **without further notice**. (Emphasis added).

BellSouth, too, includes similar provisions in its FCC Access Tariff:

> 2.1.8 Refusal and Discontinuance of Service:
>
> (A) . . . if a customer fails to comply with . . . including any payments to be made by it on the dates and time herein specified, the Telephone Company may, on thirty (30) days written notice . . . refuse additional applications for service and/or **refuse to complete any pending orders for service by the noncomplying customer at any time thereafter**. . . ." (Emphasis added).
> (B) . . . if a customer fails to comply with . . . including any payments to be made by it on the dates and time herein specified, the Telephone Company may, on thirty (30) days written notice . . . **discontinue the provision the provision of the services to the noncomplying customer at any time thereafter.** . . . nothing contained herein shall preclude the Telephone Company's right to discontinue the provision of the services to the noncomplying customer without further notice." (Emphasis added).

Section 6.1 of BellSouth's Tariff makes evident that the "Customer" referred to in these provisions is an IXC. 6.1 General reads as follows:

> "BellSouth SWA [Switched Access] service, which is available to customers for their use in furnishing their services to end users . . . BellSouth SWA service

provides for the ability to originate calls from an end user's premises . . . and to terminate calls from a customers's end user's premises . . ."

Most interesting of all of the tariff's reviewed by Supra was that of Teleport Communications Group ("TCG"). TCG of South Florida[8] is a CLEC and a wholly owned subsidiary of AT&T. Section 3.9.1 of TCG's Tariff reads as follows: "Call Completion Service provides for the capability of originating and terminating interstate long distance calls to and from an end user's premises to a customers facilities via TCG's switch." The referenced customer is an IXC. Accordingly, TCG's tariff does provide services for originating and terminating long distance traffic. This Tariff also provides for the discontinuance of this service for nonpayment. TCG's Section 2.5.8 Discontinuance of Service reads as follows:

> "If Customer fails to pay timely any amount required and such failure continues for ten (10) days after written notice thereof to Customer . . .then, as to the applicable services, Company at its sole option may elect to pursue one or more of the following courses of action: . . . (ii) **discontinue existing services, suspend existing services or refuse[9] to accept orders for additional services** . . ." (Emphasis added).

In summary, it is common practice for CLECs and ILECs in the State of Florida to discontinue or refuse new service for nonpayment of past due charges. This common industry practice is also consistent with Commission precedent.

Five day notice provision

Section 2.14.3, of Supra's Tariff, provides that the "Customer shall be given five (5) days written notice to comply with any . . . deficiency: for nonpayment." In this case, Supra provided AT&T with five (5) days written notice on January 8, 2003. See January 8, 2003 Letter attached hereto as **Exhibit C**. As of January 8, 2003, AT&T's invoice had remained unpaid for over seventy eight (78) days. Consistent with Commission precedent: "a business could not remain

[8] TCG's Company Code Number TA032: can be found on the Florida Public Service Commission Website.
[9] TCG is authorized to refuse to accept any new orders from a customer asking to switch "to" another provider.

viable if it were obligated to continue providing services to customers who refuse to pay lawful charges." Order No. PSC-02-0413-FOF-TP at p. 54. Likewise, Supra could not remain viable if it were obligated to continue providing free services to AT&T who refuses to pay lawful and undisputed charges.

In this January 8th Letter Supra wrote the following:

> "This is to notify you that your account is in serious delinquency and has been referred to collection. . . . Starting January 13, 2003, and pursuant to our collection policies, Supra Telecom will no longer accept AT&T's long distance traffic and/or provide access services to AT&T until AT&T brings its account current with Supra."

As described herein, AT&T had not filed a valid dispute regarding any of the amounts of the October 23, 2002 invoice and AT&T's invoice had remained unpaid for over 78 days. Despite providing AT&T with proper written notice of the date [i.e. January 13, 2003] upon which service would be suspended, Supra provided AT&T with a substantial delay before Supra would lawfully act to suspend service. AT&T would be given until February 13, 2003 – an additional 35 days after the initial required 5 day notice to pay all undisputed charges. Pursuant to Supra's tariff no such delay was required or necessary.

AT&T disingenuously alleges: "in late January 2003, in the midst of negotiations . . . Supra took actions to begin a process to disconnect approximately 40,000 AT&T customers." AT&T Petition at p. 6, ¶18. This allegation has no legal relevance regarding whether Supra was entitled to suspend service without any further notice after the January 8, 2003 Letter. For purposes of this motion to dismiss, taking this allegation as true, this Commission would still be required to find that Supra was within its legal rights[10] to suspend service as early as January 13,

[10] "A validly filed tariff also 'consitutes the contract of carriage between the parties.'" BellSouth Telecommunications Inc. v. Jacobs, 834 So. 2d 855, 859 (Fla. 2002). See Marcus v. AT&T Corp, 138 F.3d 46 (2d Cir. 1998) ("A federal tariff has the force and effect of federal law."). AT&T cites to no authority for its proposition that Supra waives its right to suspend services, after Supra has complied with all of the notice provisions, simply

2003, and most certainly on the later date of February 13, 2003. Furthermore, Section 2.14.3(a) of Supra's Tariff states clearly that after issuing the five (5) day notice that Supra may refuse, suspend or cancel service "without incurring any liability[11] when there is an unpaid balance[12] for service that is past due." (Emphasis added). For this reason, AT&T irrelevant allegation, taken as true, has no legal relevance with respect to whether Supra was entitled to take the actions that it did.

As described, Supra's Tariff requires a five (5) day written notice. This notice was provided to AT&T on January 8, 2003. This notice clearly stated that after January 13, 2003, Supra would no longer accept AT&T traffic and/or provide access service. Despite this notice, AT&T refused to pay past due charges. Supra did not send out its first letter to customers until January 29, 2003. Supra's action was properly noticed and expected by AT&T.

Supra was faced with a business delimma because those AT&T customers were also Supra voice customers. Customers typically associate interruptions of their telephone service with their local providers – irrespective of the actual cause. While not legally bound to do so, Supra chose to inform those Supra voice customers that utilized AT&T, as their long distance provider, that AT&T had voluntarily chosen to make itself "unavailable" to offer long distance service to Supra voice customers because of their refusal to pay past due charges for the use of Supra's lines.

Supra finally sent out Letters to its own voice customers in batches of 10,000 on January 29, 30, 31 and February 1, 2003. As noted, these letters informed Supra local voice customers of

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because it has agreed to listen to AT&T in its efforts to negotiate the invoice downward. AT&T's negotiations never questioned the legitimacy of the charges. AT&T refused to articulate with any specificity what portion of the invoice AT&T believed was actually in dispute and why.

[11] Similar provisions can be found in Sprint and BellSouth's access tariffs.

[12] AT&T, or any IXC, remains liable for the entire past due amount irrespective of whether the IXC has submitted a valid documented bona fide dispute. The IXC withholds the disputed amount at its own risk. See Section 2.10.4.D.

AT&T's refusal to pay lawful charges. The letters also allowed each customer fifteen (15) days from the date of the letter to select a new long distance carrier as a courtesy, so as to allow the customer to transition its long distance service without experiencing any interruptions. Supra did not want its own voice customers to be left without a long distance carrier of their choice simply because AT&T refused to meet its legal obligations.

The issuance of the Letter was an entirely reasonable means of protecting Supra's own financial interest. More importantly, though, is that the sending of these letters was justified and privileged.

Letters were justified and privileged

AT&T attaches a declaration of Judith Dean to its Petition in which Ms. Dean repeatedly employs the legal parlance "tortious interference." The uses of these terms of art presuppose that the Commission has the subject matter jurisdiction to adjudicate a cause of action in tort such as tortious inteference. It is well settled that the Commission does not have authority to fix or assess damages for traditional civil litigation matters involving telecommunications companies. In Southern Bell Telephone and Telegraph Company v. Mobile America Incorporation, Inc., 291 So.2d 199 (Fla. 1974) the Court found that the Commission does not have authority to adjudicate issues in a suit for *money damages*[13] for completed, *past* failures, such as a *tort* or breach of contract. (Emphasis added). Id. Such actions based upon completed, past failures, are matters of "judicial cognizance and determination." Id. See also, Mobile America Corporation, Inc. v. Southern Bell Telephone and Telegraph Company, 282 So.2d 181, 183 (Fla.1st DCA 1973). In Mobile America, the 1st DCA wrote the following:

In this case, AT&T never provided a documented claim identify what charges it asserted were in dispute and why such amounts were in dispute. AT&T also cannot provide such a document to this Commission.

> "From a careful study of Chapter 364, Florida Statutes, F.S.A., it appears that the legislative intent in fixing the regulatory powers of the Public Service Commission was to regulate the rate structure and operating conditions. All of these powers are prospective in nature, with only retrospective power to determine whether or not a rule or regulation promulgated by the Commission has been violated."

282 So.2d at 183.

The Third District Court of Appeal has more recently visited this issue. In addressing a matter involving Florida Power and Light Company and the Commission, the Third District cited each of the above Mobile America cases with approval. Florida Power and Light Company v. Glazer, 671 S.2d 211, 214 (Fla. 3rd DCA 1996). In Glazer, the 3rd DCA recognized the fundamental jurisdictional differences between the legislature and administrative agencies, on the one hand, and the judiciary on the other. Quoting an observation from a Michigan Supreme Court case, which relied upon by the 1st DCA in Mobile America, the Court stated:

> [A]n administrative agency, vested with quasi-judicial as well as quasi-legislative powers, can act upon complaints properly filed and accord a hearing to all parties. The jurisdiction of the public service commission under the statutory provisions is broad and comprehensive. Yet that jurisdiction has generally been prospective in operation. *However, it is not a proper tribunal to decide a controversy after damage has been inflicted.* This is *a civil action to recover damages* for breach of contract or for negligence. *The Commission has no jurisdiction to award plaintiff damages or to reimburse plaintiff for its losses.* Only a court, in accordance with due process, can constitutionally award damages in a civil action. (Emphasis added).

Id. at 214 (citations omitted)

Even if the Commission did have subject matter jurisdiction to adjudicate a claim regarding tortious interference, AT&T's petition would still have to be dismissed. To prevail on

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[13] See Judith Dean Declaration ¶2, where she states: "The purpose of my declaration is to describe the . . . *damage* to AT&T . . ." The Commission does not have subject matter jurisdiction to resolve causes of action in tort or to award damages.

a claim for tortious interference with a business relationship, one must prove (i) the existence of a business relationship; (ii) knowledge of the relationship on the part of the defendant; (iii) an intentional and unjustified interference with the relationship by the defendant; and (iv) damages to the plaintiff as a result of the breach of the relationship. Chicago Title Ins. Co. v. Alday-Donalson Title Co. of Fla., Inc., 832 So.2d 810, 814 (Fla. 2d DCA 2002) (citing Tamiami Trail Tours, Inc. v. Cotton, 463 So.2d 1126, 1127 (Fla.1985)).

The fatal flaw in AT&T's argument is that Supra action of sending the Letter to its own customers, utilizing AT&T long distance service, and advising them of the need to obtain another long distance carrier was justified and privileged. Therefore, the third and fourth elements cannot be met.

To determine whether interference is intentional and unjustifiable (the third element), the Court does not look at whether there is a bona fide dispute[14] between the parties rather the Court weighs the competing interests of the parties. Whether interference with a business relationship is privileged "depends upon a balancing of the importance . . . of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances among which the methods and means used and the relation of the parties are important." Int'l

[14] In this case, there was no bona fide dispute submitted by AT&T. AT&T never submitted a documented claim identifying what charges it asserted were disputed and why such charges were disputed. By failing to file such a dispute AT&T waived any right to make such a claim in accordance with Section 2.10.4.B. of Supra's Tariff. Even taking AT&T's allegation as true that it filed a bona fide dispute, this presumed fact would still have no legal bearing on the reality that AT&T's invoice was past due. AT&T, or any IXC, remains liable for the entire past due amount irrespective of whether the IXC has submitted a valid documented bona fide dispute. The IXC withholds the disputed amount at its own risk. See Section 2.10.4.D. AT&T by its own admission never articulated what portions of the invoice it claimed was in dispute. AT&T did raise a question regarding 47 CFR 61.26(d). On December 20, 2002, in response Supra provided Customer Detail Records ("CDR") for early June 2001. Reviewing the call detail for the sample days provided by Supra takes less than 24 hours. AT&T was still "dragging-its-feet" as late as Janaury 8, 2003. Despite providing AT&T with notice of the exact date of suspension [i.e. January 13, 2003] AT&T still refused to pay any amount or to identify with any specificity the exact amount of the invoice that was in dispute. Supra would not send out its first letter to its customers until January 29, 2003. Thereby making the actual date of suspension no earlier than February 13, 2003. Supra's action was properly noticed and expected by AT&T. Taking AT&T's allegation as true would not have prevented Supra from exercising its rights under its validly filed tariff.

Sales and Serv. Inc. v. Austral Insulated Prods. Inc., 262 F.3d 1152, 1159 (11th Cir. 2002) (citation omitted); see also Morsani v. Major League Baseball, 663 So.2d 653, 657 (Fla. 2d DCA 1995) (stating "[w]here there is a qualified privilege to interfere with a business relationship, the privilege carries with it the obligation to employ means that are not improper."); Mfg Research Corp. v. Greenlee Tool Co., 693 F.2d 1037, 1040 (11th Cir.1982) ("Although businesses are accorded leeway in interfering with their competitors' business relationships, they must abide by certain 'rules of combat' and not use improper means of competition."); Johnson Enters. v. FPL Group, Inc., 162 F.3d 1290, 1321 (11th Cir.1998) ("Florida law recognizes the principle that actions taken to safeguard or protect one's financial interest, so long as improper means are not employed, are privileged.").

Here, the Letter and Supra's corresponding decision to no longer accept AT&T's long distance traffic and/or provide access services over Supra's facilities was privileged and justified for several reasons.

First, Supra has and maintains a preexisting business relationship with these very same customers by providing them with local telephone service, and Supra's actions were taken to notify the customers of its intent to mitigate its damages because of AT&T's failure and refusal to pay for access charges rightfully owed to Supra. As cogently explained by the Florida Fifth District Court of Appeals: "[i]f a defendant interferes with a contract in order to safeguard a preexisting economic interest of his own, the defendant's right to protect his own established economic interest outweighs the plaintiff's [i.e. AT&T's] right to be free of interference, and his actions are usually recognized as privileged and nonactionable." Heavener, Ogier Services, Inc. v. R. W. Florida Region, Inc., 418 So.2d 1074, 1076 (Fla. 5th DCA 1982). Supra was acting to safeguard a preexisting economic interest of its own.

Interestingly, this case law is consistent with this Commission's stated policy in Order Nos. See Order No. PSC-01-0824-FOF-TP at p. 162 and PSC-02-0413-FOF-TP at p. 54. This case law is also consistent with this Commission's admonishment that it is the carrier that refuses to pay undisputed charges that places the customers in jeapordy of possible disconnection. See Order No. PSC-02-0413-FOF-TP at p. 55 (where this Commission stated: "This should serve as a significant incentive for [AT&T] to avoid disconnection by paying legimitaley undisputed bills.").

Second, Supra's issuance of the Letter was an entirely reasonable means of protecting its financial interest because the Letter was also directed to afford the customer's with ample time to make the necessary arrangements to select another long distance company. The January 8, 2003, Letter also gave AT&T, itself, ample notice that unless payment is received Supra will no longer accept AT&T's long distance traffic.

Third, is Supra's right to suspend AT&T's long distance traffic over its facilities. Supra is legally afforded the right, pursuant to Commission precedent as well as the tariff it filed with the FCC, to disconnect and/or refuse to accept traffic in the event of non-payment. See Relevant portions of Supra's tariff, attached hereto as Exhibit A.

As noted at the outset, even if the Commission did have subject matter jurisdiction to adjudicate a claim regarding tortious interference, AT&T's petition would still have to be dismissed because Supra's actions in notifying its own customers was justified and privileged. Given the foregoing, AT&T's decision to employ the legal parlance of a claim for "tortious interference" is legally inapplicable and contrary to Commission precedent. Supra did not violate any statute, rule or order in suspending AT&T's ability to use Supra's facilities. Accordingly,

AT&T's petition would have to be dismissed for its failure to identify what statute, rule or order, if any, Supra violated - in effect, dismissed for failure to state a cause of action.

Section 364.02(2)

AT&T's attempt to identify specific provisions of law that Supra has intentionally violated begins with Section 364.02(2), Florida Statutes. AT&T suggests that this provision places a CLEC under a duty to originate and terminate long distance traffic of the IXC – irrespective of whether or not the IXC chooses to meet its legal duty to pay for such services. In effect, AT&T's position is that this statute provides it a safe haven or absolute immunity from suspension.

The key word AT&T singles in on is "available." AT&T claims it is "available" to offer long distance services and therefore all LECs have an absolute duty to allow a customer access to AT&T. Supra submits that when AT&T chose not to pay past due charges, AT&T made itself "unavailable" for purposes of providing interexchange services.

In Docket No. 001305, this Commission observed that: "a billing dispute between BellSouth and Supra has the potential to unfairly affect customers throughout the state." Order No. PSC-02-0413-FOF-TP at p. 55. Likewise, in this matter, a billing dispute between Supra and AT&T has the potential to unfairly affect customers throughout the state. This Commission found that: "Disconnection could likely have devastating business consequences for Supra." Id. Similarly, in this case, disconnection could likely have devastating business consequences for AT&T. Given this premise, this Commission concluded that: "This should serve as a significant incentive for Supra to avoid disconnection by paying legitimately undisputed bills." Id. This Commission conclusion is binding on AT&T as well: the concern that disconnection could likely have a devastating business consequence for AT&T, should serve as a significant incentive for

AT&T to avoid disconnection by paying legitimately undisputed bills. The key point here is that it is AT&T, itself, that is placing its long distance customers in jeopardy and not Supra. In the parlance of Section 364.02(2), it is AT&T that is making itself "unavailable" to serve its customers because of its own, internal decision to refuse to pay lawful past due access charges.

The Commission policy (as affirmed in Docket Nos. 000649 and 001305) came to fruition and had the Commission intended consequence on AT&T, when AT&T executed an agreement on February 6, 2003, to pay to Supra the total of $4,637,206.68. Accordingly, Supra acted in accordance with its validly filed tariff and this Commission's precedent regarding nonpayment of past due charges.

It is generally recognized that the Commission's "interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by this Court if it is not clearly erroneous." BellSouth Telecommunications Inc. v. Jacobs, 834 So.2d 855 (Fla. 2002). This Commission is the entity charged with interpreting its own statutes, not AT&T. Allowing AT&T to interpret Section 364.02(2), Florida Statutes, as granting it an absolute immunity from paying for the use of a CLEC's or ILEC's facilities would be contrary to the explicit terms and conditions of the tariffs filed by Supra, Sprint, BellSouth as well as TCG. AT&T's interpretation would also be in conflict with Order Nos. PSC-01-0824-FOF-TP at p. 162 and PSC-02-0413-FOF-TP at p. 54.

This Commission made a public policy statement that the "ability to receive timely payment for undisputed charges is important." Id. at p. 54. A tariff is legally considered to be a contract with the effect of law. This Commission policy is therefore equally applicable to a party seeking payment under a tariff as much as under an interconnection agreement – both are valid contracts. It is well settled that contract provisions that are contrary to public policy or are illegal

cannot be enforced. AT&T interpretation of s. 364.02(2) will void all CLEC and ILEC tariff and interconnection provisions allowing for the disconnection of services for nonpayment.

This Commission is not required to hold a hearing on this issue nor is the Commission required to brief this issue. The Commission is well within its authority to give Section 364.02(2), Florida Statutes, an interpretation that is consistent with past Commission decisions given the Commission's admittedly "broad authority." Florida Interexchange Carriers Ass'n v. Beard, 624 So.2d 246, 251 (Fla.1993). See also Florida Power and Light Company v. Glazer, 671 S.2d 211, 214 (Fla. 3rd DCA 1996) ("The jurisdiction of the public service commission . . . is broad and comprehensive). This Commission can simply include a statement, in its order granting Supra's Motion to Dismiss, to the effect that:

> "This Commission construes s. 364.02(2), Florida Statutes, to be consistent with this Commission's prior public policy statements with respect to payment for undisputed charges. Accordingly, the Commission concludes that in the event an IXC chooses not to pay past due lawful access charges, the IXC shall be considered "unavailable" for the purposes of Section 364.02(2), Florida Statutes, and Rule 25-24.825, F.A.C.

The Commission's interpretation of Section 364.02(2), Florida Statutes, that AT&T is "unavailable" for the purposes of the statutory obligation that a CLEC or ILEC allow a customer access to an IXC, most certainly falls within the range of possible interpretations. See Gold CrestNursing Home v. State, Agency for Health Care Administration, 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995) ("It is well settled that the appellate court will give deference to any interpretation by an agency that falls within the permissible range of statutory interpretation."); See also Department of Professional Regulation, Board of Medical Examiners v. Durrani, 445 So. 2d 515, 517 (Fla. 1st DCA 1984) ("The agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable; it need only be within the range of possible interpretation."). As such, given the above referenced case law coupled with prior

Commission public policy, any Court would most certainly accord the Commission deference to its interpretation. Accordingly, AT&T's petition must be dismissed for its failure to identify what statute, rule or order, if any, Supra violated - in effect, dismissed for failure to state a cause of action.

Rule 25-4.118

AT&T's next attempt to identify a specific provision of law that Supra has intentionally violated is Section 364.603, Florida Statutes, and its accompanying Commission Rule 25-4.118, F.A.C.

This Commission initiated rulemaking on proposed Rule 25-4.118, F.A.C., back in 1997. See Order No. PSC-97-1615-NOR-TI. The public policy concern underlying the need for the rule was a desire that telecommunications companies should compete for customers in the market place as opposed to stealing them without the customer's knowledge. One of the deceptive means of slamming was combining a letter of authorization with another inducement where it was not readily apparent to the consumer that the purpose of the signature was to authorize a change to another provider. The other problem was outright fraud where a company would submit change request to an ILEC on behalf of a customer that had never authorized the switch. The rule was adopted with the intent that no individual should be moved from one carrier to another carrier without the customer's authorization. This Commission sentiment is embodied in the first sentence of Rule 25-4.118, F.A.C.: "(1) The provider of a customer shall not be changed without the customer's authorization."

This rule did not contemplate the scenario of what would happen to a customer in the event that an IXC refused to pay for lawful access charges for the use of a LEC's facilities. For this reason alone, Supra cannot be found to be in violation of this Rule. Notwithstanding, there are other valid reasons why Supra's actions, in conformance with its lawfully filed tariff and prior Commission orders, are not in violation of this Rule.

Once a decision is made by a CLEC, providing service over UNE or UNE-P, to refuse to originate or terminate an IXC's long distance traffic for nonpayment, the only practical means of implementing this favored public policy is to move the customer to a No-PIC in the event the customer does not make an affirmative choice to switch to another provider. In this particular case, AT&T finally agreed to pay a substantial portion of its past due invoice on February 6, 2003. A Letter dated February 11, 2003 was sent, by Supra, to the customers that had received the prior letter informing them that a settlement was reached and that the customer's that AT&T services would not be interrupted. As such, no customer was moved to a No-PIC. Therefore, even taking all of AT&T allegations as true, Supra could not have violated Rule 25-4.118 under AT&T's interpretation because no customer was moved to a No-PIC.[15] Accordingly, the dismissal of AT&T's petition is warranted.

At all times AT&T customers had access to "dial-around."[16] In this instance, the customer was given notice that AT&T had placed their long distance service in jeopardy by their refusal to pay lawful charges. As a courtesy, Supra notified them that they could lose the ability to make long distance calls if they did not choose another provider. This notification was

[15] Further support for this proposition can be found in the fact that AT&T petition is void of any such evidence.

[16] The only reason an individual customer would not have access to "dial around," is because the "dial around" IXC has chosen not to enter into a BNA with the CLEC from where the call originates. See Judith Dean declaration ¶19, in which she alleges that an unidentified AT&T customer was unable to "dial-around" using an AT&T subsidiary. The AT&T "dial-around" subsidiary must have refused to enter into a BNA with Supra. That is the fault of AT&T and not Supra.

justified and privileged under Florida law. The choice and authorization for which carrier the customer would chose was left entirely with the customer. At no time did Supra switch a customer to a different carrier without the customer's authorization.

Despite this Commission's public policy stance and a plethora of tariffs, including that of AT&T's subsidiary TCG, AT&T alleges that Rule 25-4.118 prohibits the moving of a customer to a No-PIC in the event of AT&T's or any IXC's refusal to pay lawful undisputed charges. In other words, it is AT&T's position that Rule 25-4.118 grants it absolute immunity from suspension in the event AT&T refuses to pay lawful charges. For the same reasons outlined earlier herein, regarding s. 364.02(2), this Commission cannot allow AT&T's "safe harbor" interpretation to prevail. AT&T's interpretation of this Rule will void all CLEC and ILEC tariff and interconnection provisions permitting disconnection for nonpayment and undermine the public policy position taken by this Commission.

The Commission is well within its authority to give Rule 25-4.118, F.A.C., an interpretation that is consistent with its prior decisions. This Commission does not need to hold a hearing or require the parties to brief this issue. In granting Supra's motion to dismiss the Commission can simply include a statement that:

> "The granting of the motion to dismiss is warranted because we find that it is not a violation of Rule 25-4.118, F.A.C., to move a customer to a No-PIC (in the event a customer does not affirmatively authorize a switch to a different interexchange carrier) under the limited circumstances where an IXC has failed to pay past due lawful access charges for the use of the facilities of a LEC. To find otherwise would be to undermine our public policy position that the ability to receive timely payment for undisputed charges is important."

This Commission interpretation would fall within the range of possible interpretations. It is well settled that an agency's interpretation need not be the sole possible interpretation or even the most desirable, it need only be within the range of possible interpretations to be upheld. See

also Gold CrestNursing Home v. State, Agency for Health Care Administration, 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995); See also Department of Professional Regulation, Board of Medical Examiners v. Durrani, 445 So. 2d 515, 517 (Fla. 1st DCA 1984). Given the above case law coupled with prior Commission public policy, any Court would most certainly accord the Commission deference to its interpretation. Accordingly, AT&T's petition must be dismissed for its failure to identify what statute, rule or order, if any, Supra violated - in effect, dismissed for failure to state a cause of action.

47 U.S.C. §222(b)

Finally, AT&T alleges that Supra violated 47 U.S.C. §222(b) when it sent letters to Supra's own customers that also utilized AT&T as their long distance provider. Jurisdiction to enforce Federal Communication Commission ("FCC") statutes and regulations resides with that agency. Section 120.80(13)(d), Florida Statutes, is inapplicable in this instance because that provision is directed at the Commission employing procedures consistent with the Telecommunications Act of 1996. AT&T is not asking the Commission to employ procedures consistent with the Act; rather it is asking the Commission to enforce an FCC statute. Therefore, taking AT&T's allegations as true would still require this Commission to grant Supra's motion to dismiss.

If the Commission found that it had jurisdiction to review this allegation, Supra submits that a dismissal would still be warranted. AT&T cites to the Second Report and Order, In the Matter of Implementation of the Subscriber Carrier Selection Provisions of the Telecommunications Act, 14 FCC Rcd. 1508, ¶99 and 106 (vacated) for the proposition that Supra's letter violated 47 U.S.C. §222(b). In this Second Report and Order the FCC was concerned with "the executing carrier sending a subscriber who has chosen a new carrier a

promotional letter (winback letter) in an attempt to change the subscriber's decision to switch to another carrier." Id. at ¶106. Supra's letter cannot be characterized as a winback letter. The issuance of this letter was an entirely reasonable means of protecting Supra's own financial interests. See Section 222(d) ("Nothing in this section prohibits a telecommunications carrier from using . . . proprietary network information . . . (1) to . . . collect for telecommunications services; (2) to protect the rights . . . of the carrier, or to protect users of those services . . ."). Supra acted to collect lawful past due access charges, to protect its rights set out in its federally filed tariff and prior Commission orders, and to protect its customers so that they would not be stranded without any long distance service.

The other scenario AT&T referenced from the Second Report and Order involves a situation where the executing carrier attempts to verify a carrier change request. The FCC was concerned that "executing carriers would have both the incentive and ability to delay or deny carrier changes, using verification as an excuse, in order to benefit themselves or their affiliates." Id. at ¶99. Supra's actions did not involve either the delay or the denial of service, using verification as an excuse, after the customer had requested a change. Accordingly, §222(b) is inapplicable to the facts and circumstances addressed in this motion.

The common concern articulated by the FCC involved the executing carriers interference with a decision to switch to another carrier, once that customer has chosen to switch. Section 222(b) does not contemplate the scenario where an IXC has chosen to ignore lawful past due charges for the use of LEC facilities, thereby making itself "unavailable" for purposes of providing long distance service.

The inclusion of the paragraph identifying Supra as an "available" alternative, is consistent with prior Commission orders allowing LECs to identify themselves as alternative

carriers prior to reading a list of carriers that are available to the customer. See Order No. PSC-98-0710-FOF-TP ("Use of the phrase 'in addition to us' is potentially helpful and informative to customers.").

Accordingly, taking all of AT&T's allegations as true, this Commission must still dismiss their petition because 47 U.S.C. ¶222(b) as interpreted by the Second Report and Order does not contemplate a nonpaying IXC that refuses to pay lawful past due access charges in violation of valid federally filed tariffs and state-specific Commission policies that require telecommunications carriers to meet its financial obligations. Supra's actions, at all time, were in conformance with its lawfully filed federal tariff and prior Commission orders. Accordingly, AT&T's petition must be dismissed for its failure to identify what statute, rule or order, if any, Supra violated - in effect, dismissed for failure to state a cause of action.

Conclusion

AT&T's petition must be dismissed first and foremost because AT&T lacks standing – in that it does not meet the associational standing criteria. Next, AT&T's petition fails because there exists no actual case or controversy. AT&T seeks a prohibited advisory opinion to allow it to continue to refuse to pay lawful access charges in the future. Third, AT&T's petition must be dismissed because it failed to comply with the regulatory obligations delineated in Rule 28-106.201(2), the very provision that AT&T chose as the vehicle to invoke this Commission's jurisdiction.

Fourth, AT&T's petition must be dismissed because it failed to any statute, rule or order Supra allegedly violated. See Rule 25-22.036(2), F.A.C. ("Complainant must identify some "act or omission . . . which is in violation of a statute enforced by the Commission, or any Commission rule or order."). (Emphasis added). AT&T failed to identify with specificity any

order that Supra allegedly violated. Supra, on the other hand, demonstrated herein how its actions were consistent with prior Commission orders. AT&T's only alleged violation that would necessitate a Cease and Desist Order involved Rule 25-4.118, F.A.C. AT&T, however, failed to identify any specific customer that had their long distance service switched to another provider without their authorization.

Moreover, AT&T's interpretation of Rule 25-4.118 requires this Commission to find that the Rule grants AT&T an absolute immunity from disconnection in the event AT&T refuses to pay past due lawful charges for the use of ILEC or CLEC facilities. Accordingly, taking AT&T's allegations as true still warrants dismissal because Rule 25-4.118 does not operate to grant IXCs a safe haven or immunity from payment of past due amounts. If AT&T cannot identify any specific statute, rule or order that Supra has violated, even taking all of AT&T's allegations as true, then this Commission must dismiss AT&T's petition.

Accordingly, AT&T's petition must be dismissed on the grounds that AT&T failed to state a cause of action – under either Rule 28-106.201(2) or 25-22.036(2), F.A.C.

WHEREFORE, Supra respectfully requests this Commission grant this Motion To Dismiss on the grounds outlined herein.

RESPECTFULLY SUBMITTED this 17th day of March 2003.

SUPRA TELCOMMUNICATIONS &
INFORMATION SYSTEMS, INC.
2620 S.W. 27th Ave.
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Telephone: 305.476.4252
Facsimile: 305.443.9516

By: Jorge L Cruz-Bustillo /AHS
Jorge L. Cruz-Bustillo,
Florida Bar No. 0976441

SUPRA TELECOM INC.

ACCESS SERVICES TARIFF

Regulations and Schedule of Interstate Access Rates

This tariff includes the rates, charges, terms and conditions of service for the provision of interstate access telecommunications services by Supra Telecom Inc. This tariff is available for public inspection during normal business hours at the main office of Supra Telecom Inc., at 2620 SW27 Avenue, Miami, FL 33133.

Issued By: Ann Shelfer, Vice President – Regulatory Affairs
Supra Telecom Inc.
2620 SW27 Avenue
Miami, FL 33133

Docket No. 030200-TP
Exhibit A

SECTION 2 - RULES AND REGULATIONS, (CONT'D)

2.10 Billing and Payment For Service (Continued)

2.10.3 Payment for Service

A. All charges due by the Customer are payable to the Company or any agent duly authorized to receive such payments. Terms of payment shall be according to the rules and regulations of the agent and subject to the rules of regulatory bodies having jurisdiction.

B. Non-recurring charges for installations, service connections, moves or rearrangements are due and payable upon receipt of the Company's invoice by the Customer. At the Company's discretion, payment of all or a portion of any non-recurring charges may be required prior to commencement of facility or equipment installation or construction required to provide the services requested by the Customer.

C. The Company shall present invoices for recurring charges monthly to the Customer, in advance of the month in which service is provided.

D. When billing is based upon Customer usage, usage charges will be billed monthly in arrears for service provided in the preceding billing period.

E. Customer billing will begin on the service commencement date, which is the day the Company determines in its reasonable sole discretion that the service or facility is available for use, except that the service commencement date may be postponed by mutual agreement of the parties, or if the service or facility does not conform to standards under this tariff or the service order. Billing accrues through and includes the day that the service, circuit, arrangement or component is discontinued.

F. When service does not begin on the first day of the month, or end on the last day of the month, the charge for the fraction of the month in which service was furnished will be calculated on a pro rata basis. For this purpose, every month is considered to have 30 days.

G. Amounts not paid within 30 days after the mailing date of invoice will be considered past due.

SECTION 2 - RULES AND REGULATIONS, (CONT'D)

2.10 Billing and Payment For Service (Continued)

2.10.4 Disputed Charges

A. Any objections to billed charges must be reported to the Company or its billing agent within sixty (60) days of the invoice of the bill issued to the Customer. Adjustments to Customers' bills shall be made to the extent that circumstances exist which reasonably indicate that such changes are appropriate.

B. In the event that a billing dispute occurs concerning any charges billed to the Customer by the Company, the Customer must submit a documented claim for the disputed amount. The Customer will submit all documentation as may reasonably be required to support the claim. All claims must be submitted to the Company within sixty (60) days of the invoice date of the bill for the disputed services. If the Customer does not submit a claim as stated above, the Customer waives all rights to filing a claim thereafter.

C. If the dispute is resolved in favor of the Customer and the Customer has withheld the disputed amount, no interest credits or penalties will apply.

D. If the dispute is resolved in favor of the Company and the Customer has withheld the disputed amount, any payments withheld pending settlement of the disputed amount shall be subject to the late payment penalty as set forth in 2.10.5.

E. If the dispute is resolved in favor of the Customer and the Customer has paid the disputed amount, the Customer will receive an interest credit from the Company for the disputed amount times a late factor as set forth in 2.10.5.

F. If the dispute is resolved in favor of the Company and the Customer has paid the disputed amount on or before the payment due date, no interest credit or penalties will apply.

SECTION 2 - RULES AND REGULATIONS, (CONT'D)

2.14 Cancellation by Company (Continued)

2.14.3 The Company may refuse or discontinue service provided that, unless otherwise stated, the Customer shall be given five (5) days written notice to comply with any rule or remedy any deficiency:

(a) For nonpayment: The Company, by written notice to the Customer and in accordance with applicable law, may refuse, suspend or cancel service without incurring any liability when there is an unpaid balance for service that is past due.

(b) For returned checks: The Customer whose check or draft is returned unpaid for any reason, after two attempts at collection, may, at the Company's discretion, be subject to refusal, suspension or cancellation of service in the same manner as provided for nonpayment of overdue charges.

(c) For neglect or refusal to provide reasonable access to the Company or its agents for the purpose of inspection and maintenance of equipment owned by the Company or its agents.

(d) For Customer use or Customer's permitting use of obscene, profane or grossly abusive language over the Company's facilities, and who, after five (5) days notice, fails, neglects or refuses to cease and refrain from such practice or to prevent the same, and to remove its property from the premise of such person.

(e) For use of telephone service for any property or purpose other than that described in the application.

(f) For Customer's breach of any contract for service between the Company and the Customer.

(g) For periods of inactivity in excess of sixty (60) days.

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AT&T Communications
George J. Stanek
180 Park Ave., Room 2D36
Florham Park, NJ 7932

December 24, 2002

Dear George J. Stanek:

Our records indicate that payment on your account is overdue in the amount of $ 5,274,992.28. This amount reflects pending balances for switch access usage on carrier identification codes: 288, 292 and 386.

If the amount has already been paid, please contact us to verify we have received and properly posted your payment. If you have not yet mailed your payment, please give this matter your immediate attention so that no further action on our part will be necessary. We shall expect a remittance by return mail or the courtesy of a reply to our letter as to why payment is being withheld.

Thank you in advance for your anticipated cooperation in this matter.

Best regards,

María Angélica Sintes
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Fax: (305) 476-8483
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Docket No. 030200-TP
Exhibit B

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January 8th, 2003

AT&T
Communications
George J. Stanek
180 Park Ave., Room
2D36
Florham Park, NJ 7932

Dear Sir/Madam:

This is to notify you that your account is in serious delinquency, and has been referred to collection. Your outstanding balance of $ 5,288,466.12 is over 50 days past due. Starting January 13, 2003, and pursuant to our collection policies, Supra Telecom will no longer accept AT&T's long distance traffic and/or provide access services to AT&T until AT&T brings its account current with Supra. In addition, Supra Telecom will advise its customers that have chosen AT&T as their PIC that Supra will no longer accept traffic from AT&T, but will give them the option to choose a Long Distance Carrier that is current with Supra Telecom or Supra Telecom's own long distance service.

The policy outlined above is in addition to legal remedies that Supra Telecom will undertake to recover money owed for access services provided to AT&T. Supra Telecom has exhausted all amicable revenues available to resolve this situation, but AT&T has refused to pay without justification. Please note that failure to promptly resolve this matter will affect your credit with Supra Telecom, and Supra Telecom's ability to accept traffic from and provide access services to AT&T in the future. In addition, Supra Telecom may require the posting of a security deposit prior to accepting traffic from AT&T.

Please call us promptly at (305)476-4250 to discuss this matter.

Sincerely,

Victor Miriki
VP – Carrier Operations

Cc: Maria Sintes - CABS Coordinador
Adenet Medicier Esq.