ORIGINAL

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February 11, 1999

VIA EXPRESS MAIL
BLANCA BAYO
Director of Records & Reporting
Divison of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850
(850) 413-6770

Re: **Supra v. BellSouth, Docket No. 980800-TP**

Dear Ms. Bayo:

Please find enclosed for filing an original and fifteen (15) copies of the Petitioner Supra Telecommunication & Information Systems, Inc.'s Response To BellSouth's Motion For Stay Pending Appeal. Please also find enclosed an extra copy of the filing, for which we request that you stamp with the filing date and return in the enclosed postage pre-paid, self-addressed envelope.

If you have any questions or comments, please feel free to contact me at (305) 531-5286.

ACK ____
AFA ____
APP ____
CAF ____
CMU Zavarza
CTR ____
EAG ____
LEG 1
LIN 3
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Sincerely,

Mark E. Buechele

3 enclosures

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition For Emergency Relief By Supra Telecommunications & Information Systems, Inc. Against BellSouth Telecommunications, Inc. Concerning Collocation And Interconnection Agreements	)	Docket No.: 980800-TP

SUPRA'S RESPONSE TO BELLSOUTH'S MOTION FOR STAY PENDING APPEAL

PETITIONER, SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, and pursuant to Florida Administrative Code, Rule 25-22.037, hereby files and serves this its Response To BellSouth's Motion For Stay Pending Appeal, and in support thereof states as follows:

In 1993 and 1994 BellSouth sought exemptions from the Federal Communications Commission ("FCC") regarding physical collocation in the North Dade Golden Glades and West Palm Beach Gardens central offices contending that no space was available for physical collocation. Neither Supra or any other party had the opportunity to challenge the requests for a waiver; nor did anyone verify the contentions made by BellSouth in its petitions to the FCC. The waivers were apparently granted by the FCC because they were unchallenged.

On or about June 1998, Supra filed a petition with this Commission seeking a ruling that BellSouth improperly denied Supra collocation space within the two BellSouth central offices. Thereafter, BellSouth filed petition with this Commission seeking a waiver of the collocation requirement at the two central offices. BellSouth also advised this Commission that other Alternative Local Exchange Carriers ("ALECs") had previously requested collocation space in

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the BellSouth central offices, but that BellSouth had denied these collocation requests. Therefore according to BellSouth, if collocation space is to be provided, these other ALECs should be provided priority over Supra.

On October 22, 1998, this Commission ruled that Supra should have collocation priority in the two central offices. On January 5, 1999, this Commission denied BellSouth's motion for reconsideration regarding the priority ruling. On January 6, 1999 this Commission ruled that collocation space was available in the two central offices and that Supra should be granted collocation space. Thereafter, it appears that BellSouth filed a lawsuit in the United States District Court for the Northern District of Florida seeking to review this Commission's priority ruling. The instant motion seeks to stay enforcement of the priority ruling pending BellSouth's litigation of the case before the United States District Court.

BellSouth's instant motion for a stay of the priority order should be denied for a whole hosts of reasons. First, the relief BellSouth seeks is premature and not yet ripe for consideration. Second, BellSouth lacks standing to challenge the issue. Third, BellSouth's action before the United States District Court is frivolous, a mere delay tactic and should either be dismissed for failing to state a claim, or for lack of subject matter jurisdiction. Finally, BellSouth has fail to meet the requirements of Florida Administrative Code, Rule 25-22.061(2). Accordingly, BellSouth's motion for stay should be denied.

I. BellSouth's Request For A Stay Is Premature

First, it should be noted that BellSouth has asked this Commission stay its priority ruling before this Commission has even issued a ruling on BellSouth's Motion For Reconsideration of

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the January 6, 1999 Final Order Resolving Complaint Regarding Physical Collocation (PSC-99-0060-FOF-TP). BellSouth's Motion For Reconsideration contends that this Commission erred in granting Supra collocation within the two BellSouth central offices. Although Supra believes there is no basis for reconsidering the ruling, one must concede that this Commission could conceivably change its prior order, thus rendering moot (in whole or in the part) the instant motion.

Moreover, there has been no ruling yet as to whether these central offices can accommodate any other ALECs who may have previously applied for space and who are still interested in pursuing such collocation space. BellSouth's waiver petition is still pending and this Commission may very well rule that sufficient collocation space exists in one or more of the central offices to accommodate not only Supra, but several other ALECs as well. Thus BellSouth's request for a stay of the priority order is premature at this time and thus not yet ripe for consideration. Accordingly, for this reason alone BellSouth's motion for stay should be denied.

II. BellSouth Lacks Standing To Challenge The Priority Issue

BellSouth also lacks standing on the priority issue because the result to BellSouth of this Commission's rulings will be the same (i.e. that BellSouth will have to provide collocation space). BellSouth's only concern is whether or not space must be made available for collocation in these central offices. BellSouth can hardly argue that it is injured, or that its rights are somehow impaired, by the fact that Supra has priority over other ALECs such as NextLink or E.Spire. The fact that BellSouth may fear Supra as a potential competitor over either NextLink

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or E.Spire does not give rise to legal injury. BellSouth has not and cannot demonstrate that it will suffer injury, or otherwise be impacted, by the fact that one ALEC as opposed to another is given priority on collocation space. Moreover, both NextLink and E.Spire (who sought collocation prior to Supra) were granted and accepted virtual collocation. Neither has appealed this Commission's priority ruling or joined in BellSouth's federal court suit; thus the ALECs who sought priority have acquiesced in this Commission's ruling. Based upon the above, BellSouth lacks sufficient interest in this dispute and thus lacks standing to challenge the priority issue. Accordingly, for this reason alone BellSouth's motion for stay should be denied.

III. BellSouth's Complaint Is Frivolous And Should Be Dismissed

BellSouth's complaint before the United States District Court is frivolous for numerous reasons. First, BellSouth's complaint is both premature and unripe, and BellSouth lacks standing to challenge the issue. Additionally, BellSouth has not filed an appeal with either the Florida Supreme Court or the First District Court of Appeal, thus waiving any appellate rights in these forums. With respect to the federal district court, no subject matter jurisdiction exists over the action filed by BellSouth.

Federal courts are courts of limited jurisdiction. Burns v. Windsor Insurance Co., 31 F.3d 1092, 1095 (11th Cir. 1994); Citizens' Utility Ratepayer Board v. McKee, 946 F.Supp. 893, 895 (D.Kan. 1996). The party seeking a federal forum must establish the basis for the court's jurisdiction. McKee, supra, 946 F.Supp. at 895; GTE South, Inc. v. Breathitt, 963 F.Supp. 610, 612 (E.D.Ky. 1997). Judicial review of administrative actions by federal courts usually rests upon either statutory bases or non-statutory bases (such as injunctions and

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mandamus). 2 Am.Jur.2d Administrative Law, § 422. The existence of an expressed statutory basis for review generally precludes, either expressly or impliedly, any non-statutory review such as injunctions, declaratory relief, mandamus, habeas corpus and damage actions. 2 Am.Jur.2d Administrative Law, § 422; see also 2 Am.Jur.2d Administrative Law, § 430 (non-statutory review such as mandamus is available only in the absence of a specific statute authorizing review in a particular court). A federal court on review can only act within the jurisdiction conferred by law and thus a court's jurisdiction to review an agency action under a statute is limited to those categories of agency action identified in the statute. 2 Am.Jur.2d Administrative Law, § 426. Whether a statute is intended to preclude judicial review is determined from the statute's language, structure, purpose, legislative history and whether the claims can be afforded meaningful review. Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207, 114 S.Ct. 771, 776, 127 L.Ed.2d 29 (1994). The subject matter jurisdiction of the lower federal courts is determined by Congress "in the exact degrees and character which to Congress may seem proper for the public good." Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989); Breathitt, supra, 963 F.Supp. at 612. The wisdom of Congress' scheme is irrelevant, it matters only if Congress conferred subject matter jurisdiction over the dispute. Breathitt, supra, 963 F.Supp. at 612 (where court found no subject matter jurisdiction under the Telecommunications Act over a dispute arising from a state commission's arbitration ruling).

In the case of BellSouth's complaint, 28 U.S.C. § 1331 simply provides that federal courts have original jurisdiction over actions arising under the laws of the United States.

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However, 28 U.S.C. § 1331 does not provide an independent basis for subject matter jurisdiction. See McKee, supra, 946 F.Supp. at 895 (in an action under the Telecommunications Act, 28 U.S.C. § 1331 identifies the proper court and 47 U.S.C. § 252(e)(6) sets forth the basis and limits of federal court jurisdiction). Statutory review of an agency action is generally found in the agency's enabling statute. 2 Am.Jur.2d Administrative Law, § 422. In this case the agency at issue is this Commission, a Florida State agency governed by the Florida Administrative Procedure Act (Fla.Stat. Chapter 120). Judicial review of actions taken by this Commission are statutorily established by Fla.Stat. § 120.68 and Fla.Stat. § 350.128, which state in relevant part that a party adversely affected by a final decision of this Commission may seek judicial review before the Florida appellate courts; thus providing BellSouth an adequate forum for judicial review of this Commission's decisions and disfavoring any subsequent exercise of federal court jurisdiction. See e.g. Reich, supra, 114 S.Ct. at 776. Federal statutes which divest a state court of jurisdiction should be strictly construed and interpreted against exercising federal court jurisdiction. See Hill v. General Motors Corporation, 654 F.Supp. 61 (S.D.Fla. 1987) (removal statute is strictly construed because it is in derogation of state court jurisdiction); and Burns, supra, 31 F.3d at 1095 (removal statutes are narrowly construed with uncertainties being resolve in favor of state court jurisdiction); see also McKee, supra, 946 F.Supp. at 895 (Section 252(e)(6) of the Telecommunications Act of 1996 must be construed strictly and any doubts should be resolved against federal jurisdiction). Therefore the statutory framework of the Telecommunications Act should be strictly construed against federal court jurisdiction.

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The relevant jurisdictional statute under which BellSouth seeks to obtain subject matter jurisdiction in the federal district court is set forth in 47 U.S.C. § 252(e)(6) which states in pertinent part as follows:

> "In any case in which a State commission makes a determination under this section [i.e. section 252], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section [i.e. section 252]."

As is clear from the above referenced language, in order for federal subject matter jurisdiction to exist, there must first be a "determination under [section 252]". See McKee, supra, 946 F.Supp. at 895 ("[u]nder 47 U.S.C. § 252(e)(6), the court may exercise its jurisdiction only in a case 'in which a State commission has made a determination under [section 252] . . .'"). In this instance, BellSouth has not alleged and cannot allege that this Commission's priority order was a determination under 47 U.S.C. § 252. Without a determination under Section 252 of the Telecommunications Act, no subject matter jurisdiction exists. See GTE Florida, Inc. v. Johnson, 964 F.Supp. 333, 335 (N.D.Fla. 1997); GTE South Inc. v. Morrison, 957 F.Supp. 800, 805 (E.D.Va. 1997); and McKee, supra, 946 F.Supp. at 895. Moreover, section 252(e)(6) limits the type of action which a federal court may hear to those actions by "an aggrieved party" in which "a State commission makes a determination under [section 252]." A party who has not been "aggrieved" by any such determination has no standing to bring a federal court action. McKee, supra, 946 F.Supp. at 895. In this instance BellSouth cannot alleged it is an aggrieved party since it admits that someone will get the space and that BellSouth is simply a neutral observer to this "ALEC race for collocation space". Thus

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the narrow statutory language of section 252(e)(6) does not favor federal court jurisdiction. See Reich, supra, 114 S.Ct. at 776. Moreover, given the above facts, it is doubtful that BellSouth's complaint even states a valid cause of action. Accordingly, for this reason alone BellSouth's motion for a stay should be denied.

IV. BellSouth Has Failed To Meet Rule 25-22.061(2)

Finally, BellSouth has failed to meet the requirements of Florida Administrative Code, Rule 25-22.061(2) which requires BellSouth to show in pertinent part: (a) likelihood of success on appeal; (b) likelihood that BellSouth will suffer irreparable harm; and (c) that the delay will not substantially harm Supra and is not contrary to the public interest. In this regard, BellSouth has failed to demonstrate a single requirement of Rule 25-22.061(2) and thus its motion for a stay should be denied.

First, as stated above, BellSouth has little chance of prevailing on appeal. Indeed, BellSouth has not even filed an appeal, but rather has sued in the federal district court. For the reasons previously enumerated, BellSouth's lawsuit before the federal district court is frivolous and should be dismissed. Moreover, even if BellSouth's complaint is not dismissed "off-hand", it stands little chance of succeeding because central office space is dynamic and nobody knows the status of those central offices at the time the other ALEC may have requested space. Moreover, the "first-come, first-served" rule will likely be interpreted to mean that the party who seeks a commission determination gets the space first, thus making Supra the first-come ALEC. Moreover, the ALECs who sought collocation prior to Supra were granted and accepted virtual collocation from BellSouth, thus exhibiting content with the status quo. Finally, there

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has been no ruling yet as to whether these central offices can accommodate any other ALECs who may have previously applied for space and who are still interested in pursuing collocation space. BellSouth's waiver petition is still pending and this Commission may very well rule that sufficient collocation space exists in one or more central office to accommodate not only Supra, but several other ALECs as well. Thus the federal complaint stands little chance of success on the merits.

Second, as stated above, BellSouth is merely a third-party observer in this so-called "race for collocation space" in these central offices. BellSouth concedes that someone will get the space. Thus regardless of the outcome, BellSouth will still have to provide collocation space to someone and thus regardless of whatever occurs in the federal district court, BellSouth will suffer no injury (or any difference in injury - if providing collocation space can be deemed an injury). Finally, BellSouth is simply attempting to delay Supra's network deployment and therefore prevent meaningful competition from entering the local exchange market. In this regard, BellSouth's request for a stay is designed and intended to delay Supra from adequately and completely deploying its network for possibly two or more years (the time it will reasonably take to litigate a federal court case). BellSouth's flight to the federal court as opposed to a state court appeal indicates a deliberate intent to drag this matter out as long as possible; hoping that Supra will run out of funding and simply go away. A delay in collocation in these central offices would be devastating to Supra and BellSouth fully appreciates its strategy in this matter. Thus not only would a stay and the accompanying delay severely damage (it not destroy) Supra, but it will also deny the public the benefits of a competitive market place (a prospect which is

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contrary to the public interest). Therefore, because BellSouth has completely failed to meet any of the requirements set forth in Florida Administrative Code, Rule 25-22.061(2), the instant motion for a stay should be denied.

V. If A Stay Is Considered, A Steep Bond Should Be Required

Notwithstanding the above, in the event this Commission is even considering a stay, a hearing should be held to determine a sufficient bond in favor of Supra in the event BellSouth is unsuccessful. Because of the tremendous potential of severely damaging and/or destroying Supra's business as a result of delaying its network deployment, any bond considered should be set in excess of twenty million dollars ($20,000,000).

WHEREFORE Petitioner SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC. hereby files and serves this its Response To BellSouth's Motion For Stay Pending Appeal, and respectfully requests that this Commission deny the instant motion of BELLSOUTH TELECOMMUNICATIONS, INC.

Respectfully Submitted this 11th day of February, 1999.

MARK E. BUECHELE, ESQ.
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Information Systems, Inc.
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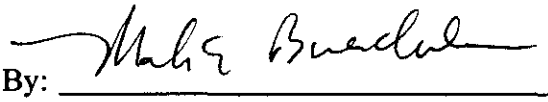
By: 

MARK E. BUECHELE
Fla. Bar No. 906700

CERTIFICATE OF SERVICE

I HEREBY Certify that a true and correct copy of the foregoing has been furnished by U.S. Mail upon NANCY WHITE, ESQ., 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301 and BETH KEATING, ESQ., 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, this 11th day of February, 1999.

By: _____
MARK E. BUECHELE
Fla. Bar No. 906700

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