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November 13, 2001

Ms. Blanca S. Bayo, Director  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Betty Easley Conference Center, Room 110  
Tallahassee, Florida 32399-0850

**HAND DELIVERY**

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COMMISSION  
CLERK

Re: Docket No. 011374-TP

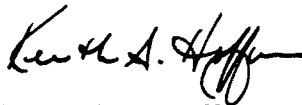
Dear Ms. Bayo:

Enclosed for filing in the above-referenced matter is an original and seven copies of Defendant's Notice to Florida Public Service Commission and Plaintiff of Removal to Federal Court together with attachments removing this case from this Commission to the United States District Court for the Northern District of Florida. The Notice of Removal has been filed with the United States District Court today and a copy of that Notice has been attached hereto.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance in handling this matter.

Sincerely,



Kenneth A. Hoffman

APP \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
COM \_\_\_\_\_  
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LEG KAH/rl  
OPC Enclosures  
PAI cc: All Parties of Record  
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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Complaint of BellSouth Telecommunications, )  
Inc. Regarding the Practices of VarTec Telecom, )  
Inc. d/b/a VarTec Telecom and Clear Choice )  
Communications in the Reporting of Percent )  
Interstate Usage for Compensation for )  
Jurisdictional Access Services. )  
\_\_\_\_\_ )

Docket No. 011374-TP

Filed: November 13, 2001

**NOTICE TO FLORIDA PUBLIC SERVICE COMMISSION  
AND PLAINTIFF OF REMOVAL**

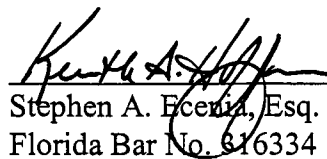
**TO: BLANCA S. BAYO, DIRECTOR, DIVISION OF THE COMMISSION CLERK  
AND ADMINISTRATIVE SERVICES, FLORIDA PUBLIC SERVICE  
COMMISSION**

**TO: NANCY B. WHITE, ATTORNEY FOR PLAINTIFF**

Pursuant to the provisions of 28 U.S.C. § 1446(d), VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications ("VarTec") files herewith a true copy of the Notice of Removal of this case to the United States District Court for the Northern District of Florida filed with that Court on November 13, 2001.

Dated this 13th day of November 2001.

Respectfully submitted,



Stephen A. Ecenia, Esq.  
Florida Bar No. 816334

Kenneth A. Hoffman, Esq.  
Florida Bar No. 307718

RUTLEDGE, ECENIA, PURNELL & HOFFMAN,  
P.A.

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DOCUMENT NUMBER-DATE

14351 NOV 13 2001

FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of November 2001, a copy of the foregoing was furnished by United States Mail to the following:

Nancy B. White  
James B. Meza  
c/o Nancy Sims  
150 South Monroe Street, Suite 400  
Tallahassee, Florida 32301

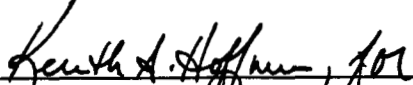
R. Douglas Lackey  
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New Orleans, LA 70130

Edward H. Bergin  
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Carrere & Denegre, LLP  
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New Orleans, LA 70170-5100

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STEPHEN A. EGENIA, ESQ.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

BELLSOUTH TELECOMMUNICATIONS, )  
INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
VARTEC TELECOM, INC. D/B/A )  
VARTEC TELECOM AND CLEAR )  
CHOICE COMMUNICATIONS, )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. 4:01cv480-RH

**NOTICE OF REMOVAL**

Defendant VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications ("~~VarTec~~"), through undersigned counsel, and pursuant to 28 U.S.C. §§ 1441 and 1446, hereby notices the removal of this action currently pending before the Florida Public Service Commission ("Commission") in Docket No. 011374-TP . In support of this Notice of Removal, VarTec states as follows:

1. Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") filed a Complaint with the Commission on or about October 18, 2001, seeking \$3,366,049.00 in damages from VarTec. VarTec was served with this Complaint on or about October 18, 2001. The premise of the Complaint is that VarTec, which purchases both interstate and intrastate telecommunication services from BellSouth, allegedly reported inaccurate estimates of "percent interstate usage." BellSouth alleges

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that it uses these estimates to calculate the amount to bill VarTec. BellSouth claims that VarTec owes more than it has paid and demands payment of the amount allegedly owed.

2. This Notice of Removal is filed with this Court within thirty (30) days of receipt of the Complaint as required by 28 U.S.C. §1446(b).

3. Under 28 U.S.C. §1441(a), a case may be removed to the federal district court provided it is a civil action over which the district court would have had original jurisdiction. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 355-56 (1988) (citing Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344-45 n.9, (1976)) (holding that a district court has no discretion to decline to accept a removed diversity jurisdiction case). In the present case there is diversity under 28 U.S.C. §1332(a) as BellSouth is a corporation organized and existing under the laws of the State of Georgia with its principal place of business in Georgia, whereas VarTec is a corporation organized and existing under the laws of the State of Texas with its principal place of business in that state. Diversity of jurisdiction exists presently and existed at the time Plaintiff filed the Complaint. The amount in controversy exceeds \$ 75,000 as required by 28 U.S.C. §1332. In addition, the Complaint filed also presents a federal question providing jurisdiction under 28 U.S.C. §1331 because BellSouth's theory of liability depends on the difference between the rates for interstate service set forth in a tariff filed with the Federal Communications Commission (governed by federal law) and the rates for intrastate services set forth in Florida tariffs filed with the Commission, and BellSouth must prove that difference as part of its case.

4. The Commission is a state court for purposes of the requirement of 28 U.S.C. § 1441 that the action have originated in a "state court." Federal courts considering this question with similar agencies have applied a two part "functional" test to determine whether the entity from which

removal is sought is a "court" for purposes of removal jurisdiction. First, the federal court must "evaluate the functions, powers, and procedures of the state tribunal" to determine if it is acting in an adjudicatory manner similar to that of a court. Secondly, the court must "consider those factors along with the respective state and federal interests in the subject matter and in the provision of a forum." Floeter v. C.W. Transport, Inc., 597 F.2d 1100, 1102 (7th Cir. 1979); see also Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Board, 454 F.2d 38, 44 (1st Cir. 1972).

5. The Commission's procedures are "substantially similar to those traditionally associated with the judicial process." See Floeter v. C.W. Transport, Inc., 597 F.2d 1100 (7th Cir. 1979); see also Kolibash v. Committee on Legal Ethics of the West Virginia Bar, 872 F.2d 571 (4th Cir. 1989) (Court held that Bar Committee that was authorized to hold evidentiary hearings, subpoena witnesses, take testimony under oath, make factual findings and recommend sanctions was a State court for purposes of removal under Section 1442, a statute similar to Section 1441); Oregon Bureau of Labor & Indus. v. US West Communications, Inc., 2000 U.S. Dist. LEXIS 16300 (D. Or. 2000)(Court ruled that state agency is similar enough to a state court to be considered a state court for purposes of removal under § 1441); Martin v. Schwerman Trucking Co., 446 F. Supp. 1130 (D. Wis. 1978)(Removal from state agency appropriate where agency follows procedures which may be described as judicial in character).

6. Under the Commission's procedures, an action is initiated through the filing of a Complaint or Petition, to which an answer may be filed. Fla. Admin. Code R. 28-106.201, 28.106.203. The parties may file motions, engage in discovery, and issue subpoenas. Fla. Admin. Code R. 28-106.204, 28-106.206, 28-106.212; Fla. R. Civ. P. 1.280 through 1.400. The Commission is authorized to issue final orders, which are reviewable by the Florida appellate courts, §350.128(1),

Fl. Stat. (2000). Clearly, the procedures of the Commission are substantially similar to those of the judicial process for purposes of removal.

7. Plaintiff's Complaint makes no claims for prospective relief or state regulatory changes. The complaint is premised on a private dispute over money damages based on Plaintiff's claim that Defendant improperly reported the relative amounts of interstate usage (governed by federal tariffs) and intrastate usage (governed by state tariffs) of Plaintiff's services.

8. Significantly, this division of minutes of use and service revenue between state tariffs and federal tariffs must be done consistently with federal law. See Hawaiian Telephone Co. v. Public Utility Commission of the State of Hawaii, 827 F.2d 1264, 1274-1276 (9<sup>th</sup> Cir. 1987); see also BellSouth Telecommunications, 8 FCC Rcd. 1403 (1993). VarTec will demonstrate that BellSouth's actions with regard to this division are inconsistent with this federal law in that BellSouth has failed to exhaust the Percentage Interstate Usage dispute resolution procedures in its federal tariff that are a prerequisite to filing suit, and in that BellSouth also seeks to disregard the tariff's limitation on retroactive readjustment of Percentage Interstate Usage estimates. Thus, there is a substantial federal interest in the subject matter of this litigation.

9. Removal of this action is proper under 28 U.S.C. § 1441(a) because the Court has original jurisdiction over Plaintiff's claims.

10. Venue lies in this Court because BellSouth's action is pending in this district and division. 28 U.S.C. § 1441(a).

11. The Director of the Commission's Division of the Commission Clerk and Administrative Services and BellSouth's counsel have been given written notice of the filing of this petition.

12. Copies of all pleadings filed with the Commission in Docket No. 011374-TP are attached hereto.

WHEREFORE, VarTec respectfully Notices the Removal of this action from the Florida Public Service Commission.

Respectfully submitted,



Stephen A. Ecenia, Esq.

Florida Bar No. 316334

Kenneth A. Hoffman, Esq.

Florida Bar No. 307718

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-- and --

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Attorneys for VarTec Telecom, Inc.



**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of November 2001, a copy of the foregoing NOTICE OF REMOVAL was furnished by United States Mail to the following:

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James B. Meza  
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\_\_\_\_\_  
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