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February 13, 2002

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 323099-0850

RE: Docket No. 001097-TP - SUPRA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra Telecom) Motion To Dismiss For Lack of Subject Matter Jurisdiction in the above captioned docket.

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

Sincerely,

Brian Chaiken

Brian Chaiken
General Counsel

DOCUMENT NUMBER-DATE
01704 FEB 13 8
FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
Docket No. 001097-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand-Delivery or by Federal Express on this 13th day of February 2002, to the following:

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

Nancy B. White and Michael P. Coggin
c/o Nancy Sims
BellSouth Telecommunications, Inc.
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BellSouth Telecommunications, Inc.,
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SUPRA TELECOMMUNICATIONS AND
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Miami, Florida 33133
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Brian Chaiken

BRIAN CHAIKEN

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc., for Resolution of Billing Disputes.	Docket No. 001097-TP Filed: February 13, 2002

SUPRA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

SUPRA TELECOMMUNICATIONS & INFORMATIONS SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, hereby files this MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, pursuant to Rule 28-106.204, Florida Administrative Code, in the above referenced matter and states the following in support thereof:

1. Both Florida as well as Federal law permit the filing of a Motion To Dismiss for Lack of Subject Matter Jurisdiction to be made "at any time" in the proceeding.

2. The present Motion to Dismiss, filed by Supra herein, is a factual attack. "Factual attacks . . . challenge the existence of the subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Garcia, M.D. v. Copenhaver, Bell & Associates, M.D.'s*, 104 F.3d 1256, 1261 (11th Cir. 1997).

3. In this case, the "matter" that Supra wishes the Commission to consider is the binding and controlling decision issued by the Eleventh Circuit Court

of Appeal on January 10, 2002: *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.* (00-12809) and *BellSouth Telecommunications, Inc. v. Worldcom Technologies, Inc.* (00-12810).

4. The facts surrounding the publishing of the opinion on January 10, 2002, is that a mandate is to be issued on March 4, 2002. The mandate is to be issued if no motions for reconsideration, whether panel or en banc, are filed on or before February 25, 2002.

5. The law in the 11th Circuit is clear regarding published opinions: under the law of the 11th Circuit, published opinions are binding precedent. Furthermore, the issuance or non-issuance of the mandate does not affect this result.

6. In determining whether the Commission has jurisdiction, the Commission is free to weigh the evidence and to satisfy itself as to the existence of the Commission's initial power or jurisdiction to even hear the case. It is also crucial to understand - that when the Commission considers a Motion to Dismiss that goes to the very heart of whether the Commission even has the power to hear the case - that **no** presumptive thruthfulness attaches to BellSouth's allegations in its initial complaint. And the existence of any disputed fact does not and cannot preclude the Commission from dismissing the case for lack of subject matter jurisdiction. *Id.*

7. On January 10, 2002, the 11th Circuit published its opinion stating that (1) "We instead adopt a reading of the [Federal Telecommunications] statute more consistent with its plain meaning and intent, specifically that state

commissions, like the GPSC, are not authorized under section 252 to interpret interconnection agreements;" and (2) "We hold that the Georgia [State] Act provides no authority for the GPSC to interpret the interconnection agreements in this case."

8. Section XIV of the 1997 Resale Agreement states that the agreement shall be governed by Georgia state law.

9. As outlined above, under Georgia state law there is no subject matter jurisdiction to hear disputes arising out of previously approved interconnection agreements.

10. Given the binding nature of the Eleventh Circuit's Decision, the Florida Public Service Commission (FPSC or Commission) is "under a mandatory duty to dismiss a suit over which it has no jurisdiction." *Southeast Bank, N.A. v. Gold Coast Graphics Group Partners*, 149 F.R.D. 681 (S.D. Fla. 1993).

WHEREFORE, Supra respectfully requests that this Commission dismiss BellSouth's complaint filed on August 9, 2000, in Docket No. 001097-TP for lack of subject matter jurisdiction for the reasons more fully set out in the attached Memorandum of Law.

MEMORANDUM OF LAW

This Motion To Dismiss is being filed pursuant to Rule 28-106.204(2), Florida Administrative Code. This subsection reads as follows:

> "(2) Unless otherwise provided by **law**, motions to dismiss the petition shall be filed no later than 20 days after service of the petition on the party." (Emphasis added).

Florida law as well as Federal law permit the filing of a motion to dismiss for lack of subject matter jurisdiction to be made "at any time" in the proceeding. Accordingly, this motion to dismiss is proper.

Rule 1.140(b), Florida Rules of Civil Procedure clearly states that ". . . any ground showing that the court lacks jurisdiction of the subject matter may be made **at any time**." (Emphasis added). *Coto-Ojedo v. Samuel*, 642 So.2d 587, 588 (Fla. 3rd DCA 1994). Likewise, Rule 12(b)(1) of the Federal Rules of Civil Procedure also clearly provides that a motion to dismiss "based on lack of subject matter jurisdiction, can be raised **at any time**, and lack of the subject matter cannot be waived by consent of the parties." (Emphasis added). *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984).

The introductory phrase of Rule 28-106.204(2), Florida Administrative Code is controlling in this instance: "Unless otherwise provided by law, . . ." It is clear that both the State of Florida and Federal Rules of Civil Procedure permit the filing of a Motion to Dismiss, for Lack of Subject Matter Jurisdiction, to be made "at any time" in a proceeding. Given the citations referenced above, it is clear that this is the "**law**" in both the State of Florida as well as in Federal Court. Accordingly, the 20 day limitation referenced in Rule 28-106.204(2), Florida Administrative Code does not apply as it is contrary to the "law" in the State of Florida.

BellSouth may attempt to argue that the term "law" should really mean "statute." But that would be inappropriate. The language of the rule is clear. The term used by the State of Florida was "law." This term encompasses both state statutes and case law. The case law in the State of Florida as well as the Rules of Civil Procedure are absolutely

unequivocal that this Motion to Dismiss being filed by Supra may be made "at any time." Accordingly, the Motion is proper.

Finally, BellSouth may attempt to argue that Supra waived its right to bring this Motion by participating in the proceeding before the Commission. However, it is well settled that lack of subject matter jurisdiction cannot be waived by either party. *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984). Accordingly, any such argument by BellSouth would have no merit.

<u>Facial v. Factual</u>

"Attacks on subject matter jurisdiction are either "facial" or "factual."" *Baydar v. Renaissance Cruises, Inc.*, 35 F.Supp.2d 916, 918 (S.D. Fla. 1999). "Facial attacks focus on whether the complaint itself states a sufficient allegation of subject matter jurisdiction, whereas factual attacks challenge the existence of subject matter in fact." *Id.*

The present Motion to Dismiss, filed by Supra herein, is a factual attack. "Factual attacks . . . challenge the existence of the subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Garcia, M.D. v. Copenhaver, Bell & Associates, M.D.'s*, 104 F.3d 1256, 1261 (11th Cir. 1997). In this case, the "matter" that Supra wishes the Commission to consider is the binding and controlling decision issued by the Eleventh Circuit Court of Appeal on January 10, 2002: *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.* (00-12809) and *BellSouth Telecommunications, Inc. v. Worldcom Technologies, Inc.* (00-12810). Given the binding nature of the Eleventh Circuit's Decision, the Florida Public Service Commission (FPSC or Commission) is

"under a mandatory duty to dismiss a suit over which it has no jurisdiction." *Southeast Bank, N.A. v. Gold Coast Graphics Group Partners*, 149 F.R.D. 681 (S.D. Fla. 1993).

In distinguishing the differences between a motion to dismiss for failure to state a cause of action and a Motion to Dismiss for Lack of Subject Matter Jurisdiction under Rule 12(b)(1) of the Federal Rules or Rule 1.140(b) of the Florida Rules, the Court in *Garcia, M.D. v. Copenhaver, Bell & Associates, M.D.'s, Supra*, wrote the following:

> "The present case involves a factual attack, and not a facial attack. On a factual attack of subject matter jurisdiction, a court's power to make findings of fact and to weigh the evidence depends on whether the factual attack on jurisdiction also implicates the merits of plaintiff's cause of action. [citation omitted]. If the facts necessary to sustain jurisdiction do not implicate the merits of plaintiff's cause of action, then:
>
> > "[T]he trial court may proceed as it never could under 12(b)(6) [failure to state a cause of action] or Fed.R.Civ.P.56. **Because at issue in a factual** 12(b)(1) [subject matter jurisdiction] **motion** is the trial **court's jurisdiction—its very power to hear the case**—there is **substantial authority** that the **trial court is free to** weigh the evidence and **satisfy itself as to the existence of its power to hear the case**. In short, no presumptive thruthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." (Emphasis added).

Given the foregoing, it is clear that the FPSC must dismiss the present proceeding if the Commission finds that it lacks subject matter jurisdiction. It is also clear that in determining whether the Commission has jurisdiction, the FPSC is free to weigh the evidence and to satisfy itself as to the existence of the Commission's initial power or

jurisdiction to even hear the case. It is also crucial that the FPSC understand - that when the Commission considers a Motion to Dismiss that goes to the very heart of whether the Commission even has the power to hear the case - that **no** presumptive thruthfulness attaches to BellSouth's allegations in its initial complaint. And the existence of any disputed fact does not and cannot preclude the Commission from dismissing the case for lack of subject matter jurisdiction. *Id.*

Accordingly, the only remaining issues involve (1) the binding nature of the Eleventh Circuit Court's decision issued on January 10, 2002, and (2) the controlling impact of the Eleventh Circuit's Decision to the issues raised in Docket No. 001097-TP.

Binding and Controlling

On January 10, 2002, the Eleventh Circuit (11th Cir.) issued a decision in the consolidated appeals of *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.* (00-12809) and *BellSouth Telecommunications, Inc. v. Worldcom Technologies, Inc.* (00-12810) (hereinafter "*BellSouth Telecommunications, Inc. v. MCI*"). On that day – January 10, 2002 – the *BellSouth Telecommunications, Inc. v. MCI* case became the law in the 11th Circuit. In other words, all courts and/or judicial forums in the 11th Circuit – on January 10, 2002 – came under a duty to apply the new precedent established in *BellSouth Telecommunications, Inc. v. MCI* as **binding authority**.

On February 7, 2002, the Staff of the Florida Public Service Commission (Commission or FPSC) issued a Staff Recommendation in Docket No. 001305-TP. Under Issue 1 of Docket No. 001305-TP, the Staff addresses the precedential value of the 11th Circuit's decision in *BellSouth Telecommunications, Inc. v. MCI.* The Staff writes:

> "The ruling is not as yet final, as the time for filing a motion for rehearing has not passed and a mandate has not been issued, **and so it does not presently have the force of law**." (Emphasis added).

The Staff's recommendation has no basis in either law or fact. The Staff's above referenced claim is identical to the position asserted by BellSouth. BellSouth was also absolutely incorrect.

On Wednesday, January 30, 2002, Supra filed a Motion For Leave to File Supplemental Authority in Docket No. 001305-TP, in order to bring to the Commission's attention the decision in *BellSouth Telecommunications, Inc. v. MCI.* Supra learned by chance, on Thursday, January 24, 2002, that the 11th Circuit had rendered its decision in *BellSouth Telecommunications, Inc. v. MCI* finding that state commissions did not have authority to "revisit an interconnection agreement that it had already approved."

In BellSouth's response to Supra's motion, BellSouth claimed that Supra waited until January 30, 2002, in which to file its Motion in order to cause delay. Supra of course did no such thing. It took several days to read the opinion, understand what it said and then draft the appropriate motion for the Commission. There was also an intervening weekend. This accounts for Supra's delay in filing its Motion.

What is ironic is that BellSouth knew of the 11th Circuit's decision from the day that it was issued and BellSouth never brought it to the attention of the Florida Commission. It must be noted that the 11th Circuit case in *BellSouth Telecommunications, Inc. v. MCI* was brought by BellSouth, itself. BellSouth could have simply notified the Commission of its issuance the next day on January 11, 2002. Interestingly, BellSouth did not. And, as this Memorandum of Law will demonstrate, BellSouth had good reason to hide this legal decision from the Florida Commission.

It must be noted that the Commission issued Order No. PSC-02-0159-PCO-TP, on February 1, 2002, granting in part and denying in part Supra's Motion to File Supplemental Authority. The Commission's Order struck the word "controlling" in the fourth and fifth paragraph's of Supra's Motion. The Order stated on page three (3) that the term "controlling" was argument. As will be outlined in this Memorandum of Law, the 11th Circuit decision in *BellSouth Telecommunications, Inc. v. MCI* is "controlling" and "binding" and does have the effect of law as of January 10, 2002. As such, the use of the term "controlling" was not argument – but fact. The Florida Commission, on its own Motion, should amend Order No. PSC-02-0159-PCO-TP to reflect the reality of the binding and controlling nature of 11th Circuit's decision.

Finally, Commission Order No. PSC-02-0159-PCO-TP stated that the 11th Circuit's decision "shall be properly considered." After Supra filed its Motion for Leave to File Supplemental Authority in Docket No. 001305-TP, BellSouth filed a response in which BellSouth argued that:

> "Supra is incorrect in stating that the Eleventh Circuit's decision is "controlling." That decision is a nonfinal order, involving a split panel. Reconsideration and even reconsideration en banc is still available."

This is, without question, a material misrepresentation. Supra will refrain, at this time, from speculating whether this material misrepresentation was made deliberately with the intention to mislead the Florida Commission.

Federal Rules of Appellate Procedure 36 and IOP 2.

The 11th Circuit has well established appellate rules or IOPs (aka Internal Operating Procedures) with respect to the precedential value of a published decision prior to the issuance of a mandate. The IOPs describe the internal workings of the clerk's

office and the court. Circuit rules or IOPs not inconsistent with FRAP govern. *See Cover Letter to the Rules of the United States Court of Appeals for the Eleventh Circuit, issued on January 1, 2000.*

The 11th Circuit's decision in *BellSouth Telecommunications, Inc. v. MCI* was published on January 10, 2002. The parties were given until February 25, 2002, in which to file for reconsideration or rehearing by the three (3) judge panel who heard the case the first time or for reconsideration en banc – that is reconsideration by the entire 11th Circuit Court. If neither party moves for reconsideration on or before February 25, 2002, then the Court will issue a mandate on March 4, 2002.

Under IOP NO. 2, found under FRAP No. 36, the 11th Circuit states the following:

> "Effect of Mandate on Precential Value of Opinion. **Under the law of this circuit, published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result**. *See Martin v. Singletary*, 965 F.2d 944, 945 n. 1 (11th Cir. 1992). . . . ." (Emphasis added).

The facts in this case surrounding the publishing of the opinion on January 10, 2002, is that the mandate is to be issued on March 4, 2002. The mandate is to be issued if no motions for reconsideration, whether panel or en banc, are filed on or before February 25, 2002. The language in the 11th Circuit's IOP No. 2 is clear: under the law of the 11th Circuit, published opinions are binding precedent. Furthermore, the issuance or non-issuance of the mandate does not affect this result.

The case cited by the 11th Circuit in IOP No. 2 clearly refutes the argument, for those who still wish to make it, that somehow the time alloted for the filing of reconsideration or rehearing some how tolls the binding nature of the Court's decision.

In *Martin v. Singletary*, 965 F.2d 944, 945 n. 1 (11th Cir. 1992), the Court states the following:

> "Although the mandate in *Johnson* has not issued, it is nonetheless the law in this circuit. A mandate is the official means of communicating our judgment to the district court and of returning jurisdiction in a case to the district court. The stay of the mandate in *Johnson* merely delays the return of jurisdiction to the district court to carry out our judgment in that case. The stay in no way affects the duty of this panel and courts in this circuit to apply now the precedent established by *Johnson* as binding authority. Thus, *Johnson* is the law in this circuit unless and until it is reversed, overruled, vacated or otherwise modified by the Supreme Court of the United States or by this court sitting en banc. [Citation omitted].

Given the foregoing, it is unequivocal that a decision, like the one published on January 10, 2002 in *BellSouth Telecommunications, Inc. v. MCI*, is binding authority in the 11th Circuit. As described above, the date of the mandate is merely the official means of communicating with the district court. The date of the mandate does not in any way effect the duty of all courts in the 11th circuit to apply the new precedent established in *BellSouth Telecommunications, Inc. v. MCI* as of January 10, 2002. It short, the 11th Circuit's decision in *BellSouth Telecommunications, Inc. v. MCI* is controlling and binding in the 11th Circuit as of January 10, 2002.

Given the 11th Circuit's Rules and the Court's explanation in *Martin v. Singletary*, 965 F.2d 944, 945 n. 1 (11th Cir. 1992), it is simply inconceivable for the Florida Public Service Commission or any other judicial forum in the 11th Circuit to conclude that the decision in *BellSouth Telecommunications, Inc. v. MCI* "does not presently have the force of law." Of course, as outlined earlier herein, the Staff of the Commission reached this

exact conclusion in Docket No. 001305-TP in its recommendation issued on February 7, 2002.

It seems that the Staff simply accepted the arguments put forth by BellSouth, without researching the issue on its own. It took Supra personnel less than twenty-five (25) minutes to review the Federal Rules of Appellate Procedure, identify Rule 36 and IOP No. 2 and to pull the case cited by the 11th Circuit – *Martin v. Singletary*, 965 F.2d 944, 945 n. 1 (11th Cir. 1992). In this brief amount of time, Supra was able to substantiate with solid authority that the 11th Circuit's decision in *BellSouth Telecommunications, Inc. v. MCI* does, in fact, presently have the force of law. This of course is the exact opposite of the Commission Staff's conclusion in Docket No. 001305-TP.

The Commissioners should expect their own Legal Staff to verify the precedential value of the January 10, 2002 decision. The Commission should be embarrassed by its Staff's regurgitation of BellSouth's position. The Commission Staff could have simply called the Clerk's Office of the 11th Circuit at (404) 335-6100, to obtain the same legal authority presented here today by Supra. While it could be argued that the Commission Staff is overworked, there is absolutely no excuse for BellSouth's material misrepresentations to the Commission on this issue.

The Commission Staff's performance, as outlined above, raises serious questions about the remainder of Staff's rationale underlying its recommendation on Issue 1.

The Eleventh Circuit's Decision

Background

This case involves two interconnection agreements entered into by BellSouth and MCI Worldcom (MCI) and MCImetro (MCIm). Both of these agreements were submitted for approval to the Georgia Public Service Commission (GPSC) and were subsequently approved. Both agreements provided that the parties will each receive reciprocal compensation for local traffic only. A dispute arose as to whether ISP traffic was included in the definition of local traffic as the term was used in the interconnection agreement. MCI and MCIm both filed Complaints with the GPSC to resolve the dispute.

On December 28, 1999, the GPSC ruled that the traffic was in fact local in nature for the purposes of the reciprocal compensation provision in the contracts. The GPSC concluded that both parties are "contractually" obligated to pay the reciprocal compensation.

On January 27, 1999, BellSouth instituted two actions in the Federal District Court. BellSouth predicated the Federal Court's jurisdiction under 28 USC 1331 [Federal Question] and 47 USC 252(e)(6). BellSouth sought (1) vacating of GPSC Orders, (2) a Declaratory Statement that ISP traffic was NOT local in nature, and (3) enjoining the GPSC from enforcing the Order.

Significantly, albeit not unsurprisingly, BellSouth takes the position in Federal Court that the state commission lacks subject matter jurisdiction to hear disputes regarding contract interpretation, while it takes the exact opposite position before this Commission. Apparently, BellSouth does not have a consistent argument regarding how

the Act should be applied, other than it should be applied in all circumstances to suit BellSouth's purposes.

On May 3, 2000, the Federal District Court denied BellSouth's requested relief and ordered BellSouth to pay the CLECs in accordance with the GPSC Order.

BellSouth appeals to the 11th Circuit

BellSouth filed an appeal with the Eleventh Circuit. On January 10, 2002, the 11th Circuit published an opinion stating that the GPSC lacked authority to hear disputes arising out of previously approved interconnection agreements under either federal or state law. The Court stated: (1) "We instead adopt a reading of the [Federal Telecommunications] statute more consistent with its plain meaning and intent, specifically that state commissions, like the GPSC, are not authorized under section 252 to interpret interconnection agreements;" and (2) "We hold that the Georgia [State] Act provides no authority for the GPSC to interpret the interconnection agreements in this case." Consolidated Order Nos. 00-12809 and 00-12810, at pgs. 33 and 43, respectively.

It is important to note the following, in understanding the true scope of the Court's opinion with respect to section 252 of the 1996 Act. The Court wrote in part:

> "We instead choose to interpret section 252 in a manner more consistent with the clear meaning of the statute. [citation omitted]. Congress passed the 1996 Act based on a belief that more competition, rather than more regulation, will benefit all [local telephone] consumers. (Phrase "local telephone" is in the original). [citation omitted]. Not surprisingly, an integral part of this legislation was the repeal of a section of the 1934 Federal Communications Act that gave state commissions exclusive jurisdiction over local telephone service. Admittedly, the 1996 Act provided state commissions with an important role to play in the field of interconnection agreements, [citation omitted] as Congress granted state commissions the power to arbitrate and approve or reject interconnection

> agreements, if they chose to use it. Nevertheless, it would seem contrary to Congress' express intent to curtail state commission authority if we expand the power of state commissions beyond what Congress explicitly provided and, moreover, beyond the scope of their administrative expertise."
>
> "If we allowed state commissions to interpret and enforce interconnection agreements, we would be opening the floodgates for them to regulate local telephone service – in direct contradiction to the stated purpose of the 1996 Act. State commissions are not bound by the strictures of judicial process and procedure, and Congress provided no guidelines in the 1996 Act for interpreting interconnection agreements. Hence, the commissioners, who are selected for their expertise in the quasi-legislative task of rule-making and not for their knowledge in the legal art of contract interpretation, would be free to construe agreements as they saw fit. . . ."
>
> "We cannot accept the proposition that Congress would pass a statute stripping state commissions of their jurisdiction to regulate local telephone service but then, in the same statute, give them back the power in another form. . . . We instead adopt a reading of the statute more consistent with its plain meaning and intent, specifically that state commissions, like the GPSC, are not authorized under section 252 to interpret interconnection agreements." *See BellSouth Telecommunications, Inc. v. MCI*, at pgs 35-37. (Emphasis added).

It is clear from the Court's explanation above (1) that the states exclusive jurisdiction over local telephone service has been repealed, and (2) that the 1996 Act provides no explicit authority permitting state commission to hear disputes arising out of interconnection agreements.

Explicit authority necessary

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

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

Accordingly, the Court makes it clear that unless the state law is "explicit" in conferring the power to adjudicate disputes arising out of previously approved interconnection agreements, then no such authority exists.

Furthermore, the Court added that:

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

The above stated finding was significant because the GPSC had argued that it did have authority to adjudicate disputes involving interconnection agreements because "of an alleged general jurisdiction over telephone companies."

The Court noted that while it is true that the GPSC does have a "general supervision of all" telecommunications companies in the State of Georgia, "there are limits to this power." *Id.*, at pg. 44. In addition to the lack of explicit authority, the Court identified functional reasons for excluding interpretation of interconnection agreements from the GPSC jurisdiction. The Court writes:

> "The GPSC is a quasi-legislative body charged with ensuring that utility rates are set appropriately and public services are provided fairly. . . For this reason, courts give deference to the GPSC's orders on matters, like rate-setting, that fall within its distinct area of expertise . . . **Contract interpretation is not an area within the GPSC's expertise**, however. It would be grossly unwarranted to suggest that a quasi-legislative body, like the GPSC, would be better suited than a court to answer the strictly legal questions of contract interpretation." *Id.*, at pg. 46. (Emphasis added).

In other words, the Court expressly concluded that contract interpretation is not an area within the expertise of a state commission, like the GPSC and FPSC. As such, as a functional matter, judicial forums – and not quasi-legislative regulatory bodies – are better suited for the purely legal exercise of construing the terms of interconnection agreements. Examining the Commission Staff's recommendation, that the FPSC is the proper forum, under the guise of the 11th Circuit's findings that judicial forums – including arbitration – are better suited to adjudicate such disputes, raises serious a legitimate concerns regarding the Staff's recommendation, both on a legal and functional basis.

No direct impact between Interconnection Agreements and service

As outlined above, the FPSC, like the GPSC, is a quasi-legislative body charged with ensuring that utility rates are set appropriately and public services are provided fairly. There may be an attempt by the Commission Staff and BellSouth to argue that interconnection agreements directly impact the provisioning of local telephone service to the public. The 11th Circuit, however, has already dealt with this argument by stating the following:

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

Accordingly, any such argument by BellSouth would have no merit. As such, the Florida Commission like the Georgia Commission cannot cite its general jurisdiction as authority to adjudicate disputes arising out of interconnection agreements previously approved. The FPSC must identify explicit authority. The FPSC cannot do that. As

such, like the GPSC, the FPSC lacks subject matter jurisdiction to hear disputes arising out of previously approved interconnection agreement.

Governing law provision in Docket No. 001097-TP

Having demonstrated that the FPSC has no authority under which to claim subject matter jurisdiction under federal and Florida law, it must be pointed out that the applicable law governing the contractual dispute in Docket No. 001097-TP is Georgia State law.

The 1997 Resale Agreement at issue in Docket No. 001097-TP was executed by Supra on May 19, 1997 and by BellSouth on May 28, 1997. The agreement subsequently became effective on June 1, 1997. This Resale Agreement was filed for approval with the FPSC on June 26, 1997. The Resale Agreement was subsequently approved by the FPSC in Docket No. 970783-TP Order No. PSC-97-1213-FOF-TP, dated October 8, 1997.

Section XIV of the 1997 Resale Agreement contains the following provision:

> **"This Agreement shall be governed by, and construed and enforced in accordance with the laws of the State of Georgia, without regard to its conflicts of laws principles."** (Emphasis added).

The import of the above provision is simple: the Florida Public Service Commission is under a duty to employ Georgia state law in "construing and enforcing" the 1997 Resale Agreement. And as outlined so clearly, herein, under Georgia state law there is no subject matter jurisdiction to hear disputes arising out of previously approved interconnection agreements. As the Court so clearly states on page 43 of the opinion:

> **"We hold that the Georgia [State] Act provides no authority for the GPSC to interpret the interconnection agreements in this case."**

Let me repeat, under Georgia law there is no authority to interpret the 1997 Resale Agreement at issue in this docket.

Conclusion

Pursuant to both federal and state law, it is appropriate for Supra to file this Motion To Dismiss for Lack of Subject Matter Jurisdiction at this time.

The Florida Public Service Commission is not authorized under section 252 of the 1996 Federal Telecommunications Act to adjudicate disputes arising out of previously approved interconnection agreements.

As described herein, the 1997 Resale Agreement requires the Florida Public Service Commission to construe and enforce this agreement in accordance with Georgia state law. Furthermore, the Florida Public Service Commission cannot cite to any provision in Georgia state law that would allow the Florida Commission to adjudicate a dispute arising out of a previously approved interconnection agreement.

Accordingly, the Florida Public Service Commission lacks subject matter jurisdiction to adjudicate a dispute arising out of the previously approved 1997 Resale Agreement. As such, BellSouth's complaint must be dismissed for lack of subject matter jurisdiction.

WHEREFORE, Supra respectfully requests that this Commission dismiss BellSouth's complaint filed on August 9, 2000, in Docket No. 001097-TP for lack of subject matter jurisdiction

RESPECTFULLY SUBMITTED this 13th day of February, 2002.

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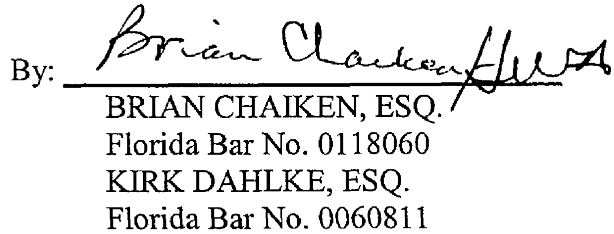

By: ______________________
BRIAN CHAIKEN, ESQ.
Florida Bar No. 0118060
KIRK DAHLKE, ESQ.
Florida Bar No. 0060811