BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes.	DOCKET NO. 001097-TP ORDER NO. PSC-02-0484-FOF-TP ISSUED: April 8, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING BELLSOUTH'S MOTION FOR EXTENSION OF TIME, DENYING SUPRA MOTION TO DISMISS, AND DENYING BELLSOUTH'S MOTION TO STRIKE

BY THE COMMISSION:

I. BACKGROUND

BellSouth Telecommunications, Inc. (BellSouth) provides local exchange telecommunications services for resale pursuant to the Telecommunications Act of 1996 and to resale agreements entered into between BellSouth and various Alternative Local Exchange Companies (ALECs). Supra Telecommunications and Information Systems, Inc. (Supra) is an ALEC certified by this Commission to provide local exchange services within Florida. On August 9, 2000, BellSouth filed a complaint against Supra, alleging that Supra has violated Attachment 6, Section 13 of their present agreement by refusing to pay non-disputed sums. The complaint also alleges billing disputes arising from the prior resale agreement with Supra.

On August 30, 2000, Supra filed its Motion to Dismiss Complaint or, in the Alternative, Stay Proceedings and/or Compel Arbitration. That Motion was granted in part and denied in part by Order No. PSC-00-2250-FOF-TP, issued November 28, 2000. In the

Order, we retained jurisdiction over all disputes arising out of the original Agreement between the two parties, entered into on June 1, 1997.

On May 3,2001, an evidentiary hearing was held on the portions of the complaint over which we retained jurisdiction. The findings from that hearing were incorporated in Final Order on Complaint, Order No. PSC-01-1585-FOF-TP, issued July 31, 2001. On August 15, 2001, Supra filed its Motion for Reconsideration of Final Order No. PSC-01-1585-FOF-TP, and that Motion was set for Agenda Conference on October 2, 2001.

Prior to the scheduled Agenda Conference, a procedural irregularity was brought to the attention of this Commission, which prompted a deferral of the item from the scheduled Agenda. This Commission directed further inquiry, which failed to disclose any prejudice to either party. Nevertheless in order to remove any possible appearance of prejudice, this matter was set for a rehearing. Therefore, by Order No. PSC-02-0143-PCO-TP, issued January 31, 2002 (Order Setting Matter For Rehearing and Establishing Procedure), the prehearing conference, hearing, and other key activities dates were set forth for the hearing process in this case. This matter is scheduled for hearing on April 4, 2002.

On February 13, 2002, Supra filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction. On February 20, 2002, BellSouth filed its Motion for Extension of Time to Respond to Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction. On February 27, 2002, BellSouth filed its Response to Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

On February 22, 2002, BellSouth filed its Motion to Strike Portions of the Direct Testimony of Olukayode Ramos and David Nilson. On March 1, 2002, Supra filed its Response to BellSouth's Motion to Strike Portions of the Direct Testimony of Olukayode Ramos and David Nilson.

The Order addresses Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction and BellSouth's Response; BellSouth's Request for Extension of Time to Respond to Supra's Motion to Dismiss; and BellSouth's Motion to Strike and Supra's Response.

II. BELLSOUTH'S MOTION FOR EXTENSION OF TIME

As stated in the Background, on February 13, 2002, Supra filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction. On February 20, 2002, BellSouth requested an extension of time until February 27, 2002 to file its response. As noted previously, on February 27, 2002, BellSouth did file its Response to Supra's Motion.

In Support of its Motion for Extension of Time to Respond, BellSouth states that Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction was filed on the premise that a recent decision by the Eleventh Circuit Court of Appeals in BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc. (00-12809) and BellSouth Telecommunications, Inc. v. WorldCom Technologies, Inc. (00-12810), divests this Commission of subject matter jurisdiction over this matter. BellSouth asserts that pursuant to Order No. PSC-02-0143-PCO-TP, issued January 31, 2002 (Order Setting Matter for Rehearing and Establishing Procedure), it has until February 20, 2002, in which to file its response to Supra's Motion.

BellSouth cites to Rule 28-106.204(5), Florida Administrative Code, which provides that "motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request." BellSouth asserts that it has good cause for the extension, because its resources were being dedicated to comply with other deadlines in this docket - specifically discovery requests filed by Supra. BellSouth states that it was also working on its response to Supra's Motion to Compel due February 22, 2002. Further, BellSouth contends that it was working on reviewing the testimony filed by Supra to determine: 1) whether to file a Motion to Strike; 2) what rebuttal testimony is necessary; and 3) whether BellSouth needs to propound discovery to Supra. Finally, BellSouth asserts that it has been forced to dedicate numerous resources to responding to various motions filed by Supra in the arbitration proceeding in Docket 001305-TP.

BellSouth contends that Supra will not be prejudiced by granting the extension because the extension will not impact the hearing date, which is currently April 4, 2002. Further, BellSouth asserts that an extension will not affect the grounds upon which

Supra bases its Motion to Dismiss. Moreover, BellSouth contends that it seems improbable that a one-week extension will result in this Commission gaining subject matter jurisdiction if, as Supra suggests, this Commission currently lacks such jurisdiction.

BellSouth states that it attempted to obtain Supra's position on its Motion via a voice message. However, BellSouth contends that by the filing of its Motion, Supra had not returned that message or otherwise indicated its position. BellSouth concludes that it has meet the requirements of Rule 28-106.204(5), Florida Administrative Code, and requests a seven-day extension of time, through and including February 27, 2002, in which to respond to Supra's Motion to Dismiss.

As noted by BellSouth, Rule 28-106.204(5), Florida Administrative Code, states that "Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request." We note that BellSouth's Motion was filed before the expiration of the deadline sought to be extended, which was February 20, 2002. We further note that Supra has not filed a written response to BellSouth's Motion for Extension of Time and the time for filing such response has expired.

We find that BellSouth has demonstrated good cause for requesting the extension of time. We note that numerous pleadings in this docket and Docket No. 001305-TP, the arbitration proceeding, were filed within a short period of time which required further action by the parties. Further, we find that Supra is not prejudiced by granting BellSouth additional time. Therefore, BellSouth's Motion for Extension of Time to Respond to Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction shall be granted.

III. SUPRA'S MOTION TO DISMISS

As stated above, on February 13, 2002, Supra filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction (Motion). On February 27, 2002, BellSouth filed its Response to Supra's Motion.

A. Supra's Motion

In support of its Motion, Supra states that both Florida and Federal law permit the filing of a Motion to Dismiss for Lack of Subject Matter Jurisdiction at any time in the proceeding. Supra argues that its Motion presents a factual attack. Supra cites Garcia M.D. v. Copenhaver, Bell & Associates, M.D.'s, 104 F.3d 1256, 1261 (11th Cir. 1997), "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." Supra argues that the matter which it wishes this Commission to consider is the binding and controlling decision issued by the Eleventh Circuit Court of Appeal on January 10, 2002, in BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc. (00-12809) and BellSouth Telecommunications, Inc. v. WorldCom Technologies, Inc. (00-12810).[1] Supra argues that the Eleventh Circuit's published opinions are binding precedent, and the issuance or non-issuance of a mandate does not affect this result. Supra cites MCIMetro case for the proposition that the Court found that under the plain meaning of the Telecommunications Act of 1996 (the Act), state commissions, such as the Georgia Public Service Commission (Georgia Commission), are not authorized under section 252 of the federal Act to interpret approved interconnection agreements, and the Georgia Act provides no authority for the Georgia Commission to interpret the interconnection agreements in that case. Supra argues that the disputed 1997 Resale Agreement states it is to be governed by Georgia state law and that under Georgia state law there is no subject matter jurisdiction to hear disputes arising out of previously approved interconnection agreement. Thus, Supra concludes that the Florida Commission is "under a mandatory duty to dismiss a suit over which it has no jurisdiction". [2]

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[1]BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., et. al., 2002 U.S. App. Lexis 373 (11th Cir. 2002) (MCIMetro).

[2]Southeast Bank, N.A. v. Gold Coast Graphics Group Partners, 149 F.R.D. 681 (S.D. Fla. 1993).

1. Timeliness

As noted above, Supra argues that both Florida and Federal law permit a motion to dismiss for lack of subject matter jurisdiction to be made at any time in the proceeding and, accordingly, its Motion is proper. Supra cites to Rule 28-106.204(2), Florida Administrative Code, which states in part:

> (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 in Motion)

Supra cites to Rule 1.140(b), Florida Rules of Civil Procedure, which states that ". . . any ground showing that the court lacks jurisdiction of the subject matter may be made **at any time**." (Emphasis in Motion).[3] Supra also cites to Rule 12(b)(1) of the Federal Rules of Civil Procedure which also 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 in Motion).[4]

2. Type of Attack of Subject Matter Jurisdiction

Supra argues that its Motion to dismiss is a factual attack. Supra citing Garcia[5] for the proposition that "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." Supra argues that the matter which it wishes this Commission to consider is the binding and controlling decision issued by the Eleventh Circuit Court of Appeal on January 10, 2002, in BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., et. al., 2002 U.S. App. Lexis 373 (11th Cir. 2002)(MCIMetro).

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[3]Coto-Ojedo v. Samuel, 642 So. 2d 587, 588 (Fla. 3rd DCA 1994).

[4]Love v. Turlington, 733 F. 2d 1562 (11th Cir. 1984).

[5]Garcia, M.D. v. Copenhaver, Bell & Associates, M.D.'s, 104 F. 3d 1256, 1261 (11th Cir. 1997).

Supra argues that we are under a mandatory duty to dismiss a suit over which it has no jurisdiction. [6]

Supra asserts that Garcia, in distinguishing the difference between a motion to dismiss for failure to state a cause of action versus a motion to dismiss for lack of subject matter jurisdiction, makes it clear that we must dismiss the present proceeding if we find that it lacks subject matter jurisdiction. Supra argues that it is also clear that in determining whether we have jurisdiction, we are free to weigh the evidence and to satisfy ourselves as to the existence of our initial power or jurisdiction to hear the case. Further, Supra asserts that it is also crucial that we understand that when we consider a Motion to Dismiss that goes to the very heart of whether we even have the power to hear the case, BellSouth's allegations in its complaint are not given the presumption of truthfulness. Supra contends that in Garcia the existence of any disputed fact does not and cannot preclude us from dismissing the case for lack of subject matter jurisdiction. Id.

Supra concludes that accordingly the only remaining issues involve the binding nature of the Eleventh Circuit's MCIMetro decision and the controlling impact of that decision on the issues in the instant docket.

3. Binding and Controlling

Supra argues that on January 10, 2002, the Eleventh Circuit issued its decision in MCIMetro case. Supra asserts that as of that date all courts and/or judicial forums in the Eleventh Circuit came under a duty to apply the new precedent established in the MCIMetro case as binding authority. Supra argues that in our staff's initial recommendation filed in Docket No. 001305-T.P., our staff position was that the ruling was not as yet final, as the time for filing a motion for rehearing had not passed and a mandate had not been issued, therefore it did not presently have the force of law. Supra contends that this position has no basis in either law or fact.

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[6] Southeast Bank, N.A. v. Gold Coast Graphics Group Partners, 149 F.R.D. 681 (S.D. Fla. 1993).

Supra alleges that on January 30, 2002, it filed a Motion for Leave to File Supplemental Authority in Docket No. 001305-TP, in order to bring the MCIMetro decision to our attention. Supra contends that by chance on January 24, 2002, it learned of the Eleventh Circuit's decision in MCIMetro that a state commission does not have authority to revisit an interconnection agreement that it had already approved. Supra asserts that BellSouth's contention that it wait to file this motion to cause delay in Docket No. 001305-TP was without merit because it took several days to read the opinion, understand it and draft the appropriate motion. Supra contends that BellSouth could have notified this Commission of the decision itself on January 11, 2002. Supra argues that BellSouth had good reason to hide this legal decision from us. Further, Supra argues that in Order No. PSC-02-0159-PCO-TP, issued February 1, 2002, in Docket No. 001305-TP, granting in part and denying in part Supra's Motion to File Supplemental Authority, the word "controlling" was struck because the term was argument. Supra argues that the MCIMetro decision is "controlling" and "binding" as of January 10, 2002, as therefore the term "controlling" is not argument but fact. Supra asserts that BellSouth's contention that the decision is not controlling because the decision is a nonfinal order involving a split panel subject to reconsideration is a material misrepresentation.

Supra argues that the Eleventh Circuit has well-established Federal Rules of Appellate Procedure (FRAP) and Internal Operating Procedures (IOPs) with respect to the precedential value of a published decision prior to the issuance of a mandate. Supra states that the IOPs describe the internal workings of the clerk's office and the courts. Supra argues that the parties in MCIMetro case have until February 25, 2002, to request reconsideration by the panel or by the Eleventh Circuit en banc. Supra states that should neither party move for reconsideration by that date, then the Court would issue a mandate on March 4, 2002. Supra cites IOP No. 2 found under FRAP No. 36, the Eleventh Circuit state:

> Effect of Mandate on Precedential 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 in Motion).

Supra contends that the Eleventh Circuit's IOP No. 2 makes clear that published opinions are binding precedent and that the issuance or non-issuance of a mandate does not affect this result. Supra asserts this IOP clearly refutes the argument that time allotted for the filing of reconsideration or rehearing somehow tolls the binding nature of the Court's decision. Supra cites to Martin v. Singletary, in which the Court found

> 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 judgement 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 judgement 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.

Supra argues that it is simply inconceivable for this Commission or any other judicial forum in the Eleventh Circuit to conclude that the MCIMetro decision does not presently have the force of law.

4. MCIMetro case

Supra states that the MCIMetro case involves two arbitrated agreements entered into by BellSouth and MCIMetro and MCI WorldCom which were submitted to the Georgia Commission and subsequently approved. Supra asserts that the dispute arose as to whether ISP traffic was included in the definition of local traffic as the term was used in the interconnection agreements and the dispute was submitted to the Georgia Commission. Supra states that the Georgia Commission ruled that the traffic was local in nature for purposes of the reciprocal compensation provision in the interconnection agreements and both were contractually obligated to pay reciprocal compensation.

Supra asserts that BellSouth appealed the Georgia Commission decision to Federal District Court. Supra contends that BellSouth

sought (1) vacation of the Georgia Commission orders; (2) a Declaratory Statement that ISP traffic was not local in nature; and (3) an injunction to prevent the Georgia Commission from enforcing the order. Supra argues that BellSouth took the position in Federal Court that the state commission lacked subject matter jurisdiction to hear disputes regarding contract interpretation, while it took the exact opposite position before this Commission. Supra asserts that the Federal District Court denied BellSouth's request and ordered it to pay the CLECs in accordance with the Georgia Commission order.

Supra states that BellSouth filed an appeal to the Eleventh Circuit Court of Appeal. Supra asserts that on January 10, 2002, the Eleventh Circuit published an opinion stating that the Georgia Commission lacked the authority to hear disputes arising out of previously approved interconnection agreements under either federal or state law. Supra states that the Court held as follows:

> '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.' [7]

Supra argues that it is clear from the Eleventh Circuit's decision in interpreting the Act that the states exclusive jurisdiction over local telephone service has been repealed and that the Act provides no explicit authority permitting state commissions to hear disputes arising out of interconnection agreements.

Supra further contends that the Eleventh Circuit made 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. Supra states that the Court added that "nothing in the Georgia Act gives

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[7]Consolidate Orders Nos. 00-12809 and 00-12810 at pgs. 33 and 432 respectively.

the Georgia Commission the right to interpret a contract between to parties just because the two parties happen to be certificated telecommunications companies." *Id.* Supra argues that this was significant because the Georgia Commission had argued that it did have authority to adjudicate disputes arising from interconnection agreements because of its general jurisdiction over telecommunications companies.

Supra asserts that the Eleventh Circuit found that while the Georgia Commission does have a general supervision authority over all telecommunications companies in Georgia, there are limits to this power. Supra contends that in addition to the lack of explicit authority, the Eleventh Circuit also identified functional reasons for excluding interpretation of interconnection agreements from the Georgia Commission jurisdiction. Citing to MCIMetro, Supra states that Eleventh Circuit found

> 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.(Emphasis in Motion)

Id. at pg. 46-47. Thus, Supra contends that the Eleventh Circuit concluded that contract interpretation is not within the expertise of a state commission, like the Georgia Commission and this Commission. Supra argues that as 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.

Supra argues that this Commission, like the Georgia Commission, is a quasi-legislative body charged with ensuring that utility rates are set appropriately and public services are provided fairly. Supra contends that the Eleventh Circuit

indicated that interpretation of interconnection agreements does not fall within the scope of such authority by explaining:

> 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. Thus, Supra argues that this Commission cannot cite to its general jurisdiction as authority to adjudicate disputes arising out of interconnection agreements previously approved. Supra contends that this Commission must cite to specific authority and this Commission cannot do that. Supra concludes that as such, this Commission, like the Georgia Commission, lacks subject matter jurisdiction to hear disputes arising out of a previously approved interconnection agreement.

Supra further argues that while it has demonstrated that we lack subject matter jurisdiction under both federal and Florida state law, it must point out that the applicable law governing the contractual dispute in this docket is Georgia State law. Supra states that the 1997 Resale Agreement in dispute, approved by us in Order No. PSC-97-1213-FOF-TP, issued October 8, 1997, in Docket No. 970783-TP, contains Section XIV which states:

> **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 in Motion)

Supra asserts that the import of this provision is simple; that we are under a duty to employ Georgia state law in construing and enforcing the 1997 Resale Agreement. Supra argues that under Georgia state law there is no subject matter jurisdiction to hear disputes arising out of previously approved agreements as noted by the Eleventh Circuit statement that:

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

Supra concludes that pursuant to federal and state law it is appropriate for it to file its Motion to Dismiss for Lack of Subject Matter Jurisdiction. Supra argues that we are not authorized under the Act to adjudicate disputes arising out of previously approved agreements. Supra contends that the 1997 Resale Agreement is governed by the laws of the State of Georgia and we cannot cite to any provision in Georgia state law which would allow us to adjudicate a dispute arising out of a previously approved interconnection agreement. Therefore, Supra states that we lack subject matter jurisdiction to adjudicate a dispute arising out of the previously approved 1997 Resale Agreement and BellSouth's complaint must be dismissed for lack of subject matter jurisdiction.

B. BellSouth's Response

In its Response, BellSouth states that Supra relies solely upon the recent MCIMetro decision as the basis for its Motion to Dismiss for Lack of Subject Matter Jurisdiction. BellSouth argues that Supra's reliance on the MCIMetro decision is misplaced because: (1) Supra misconstrues the impact of the MCIMetro decision on this Commission; and (2) Supra fails to recognize the exclusive remedy provision of the 1997 Resale Agreement. BellSouth also notes in a footnote that both the Georgia Commission and MCI requested a Rehearing En Banc on February 25, 2002, in the MCIMetro case.

1. The Impact of the MCIMetro decision

BellSouth argues that we should disregard Supra's reliance upon the MCIMetro decision because, at most, that decision stands for the proposition that, under the court's interpretation of federal law and Georgia law, the Georgia Commission has no authority to interpret or enforce the terms of the MCI/BellSouth Interconnection Agreement in Georgia. BellSouth states that the Eleventh Circuit did not consider the issue or whether this Commission has jurisdiction under Florida law to resolve disputes arising under an interconnection agreement.

BellSouth asserts in a footnote that Supra's contention that under the choice of law provision of the Resale Agreement, we must rely upon Georgia law as the basis for our jurisdiction is an

irrational interpretation of the choice of law provision which defies logic and should be summarily rejected by this Commission. Further, BellSouth argues that the choice of law provision merely dictates what law we must apply in resolving disputes arising under the 1997 Resale Agreement in Florida and it has no effect on the underlying jurisdiction of this Commission to resolve such a dispute.

BellSouth contends that in the MCIMetro decision, the Eleventh Circuit held that the Georgia Commission did not have authority to resolve disputes between BellSouth and MCI/WorldCom concerning the payment of reciprocal compensation under two interconnection agreements. BellSouth states that the parties' agreements had been filed with and approved by the Georgia Commission under 47 U.S.C. §252. BellSouth asserts that upon petition of the parties, the Georgia Commission resolved the dispute, which was then appealed to the Federal District Court which affirmed the Georgia Commission's decision.

BellSouth states that on appeal, the Eleventh Circuit concluded that the Act did not expressly provide for a state commission to resolve disputes arising after an interconnection agreement was approved and that no such authority should be implied:

> The plain meaning of [47 U.S.C. §252(e)(1)], however, grants state commissions, like the GPSC, the power to *approve* or *reject* interconnection agreements, not to interpret or enforce them. It would seem, therefore, that the 1996 Act does not permit a State commission, like the GPSC, to revisit an interconnection agreement that it has already approved, like the ones in this case. 2002 WL 27099, slip op. at 6. (Emphasis in Motion)

BellSouth contends that in reaching its decision, the Georgia Commission had no authority to interpret or enforce the terms of an interconnection agreement, the Eleventh Circuit rejected the decisions of the First, Fourth, Fifth, Seventh, Eighth, and Tenth Circuit Courts of Appeals, as well as the Federal Communications

Commission's (FCC) conclusion, that the state commissions have such authority under the Act.[8]

BellSouth argues that it is not necessary for us to delve into the Eleventh Circuit's analysis of the Act because the court expressly stated that the scope of a state commission's authority is not determined solely by reference to federal law, but instead requires an analysis of state law. BellSouth asserts that under Florida law, we have express authority to interpret and enforce interconnection agreements between ILECs and ALECs. BellSouth cites to Section 364.162(1), Florida Statutes (1995), specifically granting us "the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." BellSouth argues that while this section was adopted prior to the Act, it was not preempted by the legislation and remains in full force and effect. BellSouth asserts that 47 U.S.C. §251(d)(3) recognized that certain states, including Florida, had already taken steps to introduce local exchange competition and left state law in effect, except in limited circumstances. Thus, BellSouth contends that unlike the Eleventh Circuit's characterization of the Georgia Commission's authority under Georgia law, this Commission has specific and express authority to decide any dispute regarding interpretation of the terms and conditions on interconnection and resale. BellSouth states that this obviously includes the authority to interpret such terms and conditions when they are included within an interconnection agreement.

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[8]Puerto Rico Tel. Co. v. Telecomm. Regulatory Bd. of Puerto Rico, 189 F. 3d 1, 10-13 (1st Cir. 1999); Bell Atlantic Maryland v. MCI WorldCom, 240 F. 3d 279, 304-305 (4th Cir. 2001); Southwestern Bell Tel. Co. v. Public Util. Comm'n, 208 F.3d 475, 479-480 (5th Cir. 2000); Illinois Bell Tel. Co. v. WorldCom Techs., Inc., 179 F.3d 566, 571-72 (7th Cir. 1999); Iowa Util. Bd. v. F.C.C., 120 F.3d 753, 804 (8th Cir. 1997), rev'd on other grounds, AT&T v. Iowa Util. Bd., 522 U.S. 1089, 118 S.Ct. 879. 139 L.Ed.2d 867 (1998); Southwestern Bell Tel. Co. v. Brooks Fiber Optic Comm'n of Oklahoma, Inc., 235 F3d 493, 497 (10th Cir. 2000); In re Starpower Communications, 15 F.C.C.R. 11, 277 (2000).

Moreover, BellSouth argues in a footnote that we also have more general authority in Section 364.01(4)(g), Florida Statutes, to "[e]nsure that all providers of telecommunications services are treated fairly. . . ." BellSouth continues that similarly, Section 364.337 (5), Florida Statutes, authorizes this Commission to exercise:

> . . . continuing regulatory oversight over the provision of basic local exchange telecommunications service provided by a certificated alternative local exchange telecommunications company . . . for purposes of . . . ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace.

BellSouth argues that either of these general grants of authority could be considered broad enough to include the adjudication of disputes arising under an interconnection agreement.

BellSouth contends that in the MCIMetro decision, the Eleventh Circuit expressly based its decision on a finding that the Georgia Commission was merely a quasi-legislative body unsuited to hear contract disputes. BellSouth asserts that under Florida law, however, we exercise quasi-judicial authority when such authority is delegated to it by the Florida Legislature. BellSouth cites to Southern Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm'n, 453 So. 2d 780. 781 (Fla. 1984) for the proposition that statutes authorizing us to adjudicate contract disputes concerning toll revenue was a "proper assignment of quasi-judicial authority" pursuant to Fla. Const. Art. V, §1. BellSouth argues that the express authority under Section 364.162, Florida Statutes (1995), to resolve any dispute regarding interpretation of the terms and conditions of interconnection or resale is also a proper assignment of quasi-judicial authority under the Florida Constitution. BellSouth asserts that we would not be acting in a quasi-legislative capacity when resolving disputes between ILECs and ALECs arising out of interconnection disputes. BellSouth concludes that whatever the Georgia Commission's authority, this Commission plainly has ample authority under state law to resolve disputes that may arise between BellSouth and Supra under the 1997 Resale Agreement.

2. Exclusive Remedy Provision of Resale Agreement

BellSouth contends Supra neglects to address the fact that Supra and BellSouth mutually agreed that we would have exclusive jurisdiction to address disputes arising under the 1997 Resale Agreement. BellSouth cites Section XI (Resolution of Disputes) of the 1997 Resale Agreement which provides that:

> Except as otherwise stated in this Agreement, the parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the parties **will** petition the applicable state Public Service Commission for resolution of the dispute. However, each party reserves any rights it may have to seek judicial review of any ruling made by that Public Service Commission concerning this Agreement. (Emphasis in Motion)

BellSouth states that the United States District Court for the Southern District of Florida confirmed the exclusivity of this Commission as the forum to resolve disputes under the 1997 Resale Agreement. BellSouth asserts that in rejecting Supra's claim that we lack jurisdiction to resolve disputes arising under the 1997 Resale Agreement, the Court held:

> Of utmost importance in the resolution of this issue is the fact that Supra contractually agreed to submit all claims pertaining to the implementation of the Agreements to the FPSC. By entering into the Agreements, Supra voluntarily agreed to submit claims of this nature to an administrative agency that cannot award money damages. In doing so, Supra "waived" its ability to present such claims to a state or federal court, either of which is empowered to award money damages. As the Agreements were the product of negotiations between the parties, Supra was in a position to either bargain the dispute resolution clauses out of the Agreements or walk away from the negotiations altogether. However, Supra agreed to the dispute resolution clauses, notwithstanding the fact that the FPSC was incapable of awarding money damages.

USDC Orders dated November 12, 1999 at pp 6-7.[9]

BellSouth argues that also instructive on the issue of exclusive remedy clause is an unpublished opinion from the Eleventh Circuit that interpreted language identical to that found in Section XI of the 1997 Supra/BellSouth Resale Agreement.[10] BellSouth contends that the Agreement at issue in the NOW opinion was a 1997 Resale Agreement between NOW Communications and BellSouth, which contained a forum selection clause identical to the one at issue in this proceeding. BellSouth asserts that in affirming the district court's decision rejecting NOW Communications' arguments that the Alabama Public Service Commission was not the proper venue to resolve disputes under its Agreement, the Eleventh Circuit held:

> Appellant's arguments against application of forum selection clause to this dispute are unavailing. The gravamen of appellant's complaint is appellee's alleged failure to fulfill its obligations under the parties' Resale Agreement. . . Whether appellant can obtain money damages for its alleged injuries from a public service commission and whether it can appeal a decision of a public service commission to a federal court does not affect the validity of the parties' forum selection clause. "We will not invalidate choice clauses . . . simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States." Lipcon, 148 F.3d at 1297.[11]

BellSouth contends that the MCIMetro decision is fully consistent with the NOW opinion and the USDC Orders. BellSouth

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[9]Supra Telecommunications & Information Systems, Inc. v. BellSouth Telecommunications, Inc., Case No. 99-1706-CIV-DAVIS/BROWN, Order dated November 12, 1999 and order dated January 20, 2000. (USDC Orders)

[10]NOW Communications, Inc. v. BellSouth Telecommunications, Inc., Case No. 99-12032 (11th Cir. December 28, 1999) (NOW opinion)

[11]NOW opinion at pgs 3-4.

asserts that in discussing the dispute resolution forum language, the Eleventh Circuit noted that "[w]hile we acknowledge that parties are free to predetermine a forum for dispute resolution, there is no indication in the record that the GPSC based its jurisdiction to resolve the dispute between BellSouth and MCImetro on section 23." MCIMetro decision at FN 13. BellSouth argues that clearly the Eleventh Circuit did not rule in the MCIMetro decision that a state commission was precluded from being the choice of forum under a contract, but rather that the Eleventh Circuit merely noted that the Georgia Commission did not rely on a choice of forum provision as the basis for jurisdiction.

BellSouth contends that this is not the case in the instant proceeding, where we specifically rely upon the choice of forum provision in the 1997 Resale Agreement as a basis for jurisdiction over the dispute. BellSouth states that in the Order on Motion to Dismiss, issued November 28, 2000, in this docket, we determined that "Section XI of the prior agreement provides that all disputes shall be resolved by petition to the Florida Public Service Commission. We, therefore, clearly have exclusive jurisdiction to consider disputes arising under the earlier agreement." Id. at 4-5. BellSouth concludes that even if Supra was correct, that we lack subject matter under the Act and Florida law, we still have subject matter jurisdiction over this proceeding pursuant to the dispute resolution provisions of the 1997 Resale Agreement.

C. Analysis

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. However, we note that Supra's

Motion to Dismiss questions this Commission's authority to hear the subject matter. Thus, regardless of whether all of BellSouth's allegations in its complaint were facially correct, if we were to determine that we lack subject matter jurisdiction, the complaint would have to be dismissed.

As noted previously, Supra filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction on February 13, 2002. Supra argues that its Motion is timely because under both federal and state law a motion to dismiss based on lack of subject matter jurisdiction may be raised at any time. Rule 28-106.204(2), Florida Administrative Code, states in part:

> (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 in Motion)

Rule 1.140(b), Florida Rules of Civil Procedure, states that ". . . any ground showing that the court lacks jurisdiction of the subject matter may be made at any time." We find that Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction is timely under Rule 28-106.204(2), Florida Administrative Code, and the Florida Rules of Civil Procedure.

Supra argues that the MCIMetro decision, as a published opinion, is binding authority on all courts and judicial forums in the Eleventh Circuit. We note that the U.S. District Court for the Northern District of Florida has issued Orders in several of its pending cases regarding disputes arising out of interconnection agreements recognizing the Eleventh Circuit's opinion in MCIMetro. Nevertheless, the Court continues to stay (rather than dismiss) those proceedings, pending issuance of a mandate by the Eleventh Circuit and resolution of pending U.S. Supreme Court cases involving this and other issues. Further, we note that BellSouth indicated in its Response that the Georgia Commission and MCI/Worldcom have requested a Rehearing en banc of the MCIMetro decision. However, we agree that MCIMetro decision has precedential value.

Supra and BellSouth agree the MCIMetro decision clearly holds that the federal Act does not authorize state commissions to

interpret or enforce the terms of an interconnection agreement. However, Supra and BellSouth disagree as to the interpretation of MCIMetro's effect on our authority pursuant to Florida state law to resolve disputes arising under a previously approved interconnection agreement.

We note that after the Eleventh Circuit determination that the federal Act did not provide authority to state commissions to interpret or enforce interconnection agreements, the Court went on to analyze the Georgia Commission's authority pursuant to Georgia state law. Id. at 37-38. Similar to the Georgia Commission, Supra argues that this Commission cannot cite to any explicit authority on which to base its jurisdiction to resolve disputes arising from a previously approved agreement. BellSouth disagrees and cites to Section 364.162, Florida Statutes, as explicit state law authority to address such disputes. Section 364.162(2), Florida Statutes, provides:

> Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

The federal Act is clear that parties have the ability to arrive at interconnection agreements either through negotiation or through arbitration with this Commission. Thereafter, such agreements must be approved by the state commission in accordance with Section 252(e) of the Act. Once approved, however, the Eleventh Circuit's MCIMetro decision is clear that we are not authorized by the federal Act to resolve complaints arising out of that agreement, but may only do so pursuant to a grant of authority under state law. While the Eleventh Circuit Court found the Georgia Commission lacked an express grant of authority in Georgia statutes, the Eleventh Circuit has not made such a determination regarding Florida state law. Were the U.S. District Court for the Northern District of Florida given an opportunity for such consideration, we believe that the Court would find such authority for the Florida Commission in the language of Section 364.162(1), Florida Statutes, which expressly confers upon this Commission the

authority "to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." We believe that such language would survive the scrutiny of the federal courts. Moreover, we find that the authority to resolve such disputes is clearly an assignment of quasi-judicial authority by the state legislature, a factor the Eleventh Circuit also found lacking in Georgia. We further emphasize that Section 364.162, Florida Statutes, does not limit or otherwise distinguish between our authority to resolve (1) disputes arising out of the initial establishment of an interconnection or resale agreement and (2) disputes arising out of previously approved agreements. Thus, the Florida Legislature apparently intended this Commission to act in this area.[12]

We disagree with Supra's argument that the 1997 Resale Agreement's choice of law provision, which states that the agreement will be governed by, construed and enforced in accordance with Georgia state law, divests us of subject matter jurisdiction in this case. Supra argues that because the Eleventh Circuit found that Georgia state law did not authorize the Georgia Commission to resolve such disputes, that under the choice of law provision this Commission lacks subject matter jurisdiction. Supra's application of the choice of law provision is illogical. As noted above, we find that Section 364.162, Florida Statutes, clearly authorizes us to resolve such disputes. The choice of law provision merely dictates what law we should apply in resolving such disputes. Further, we note that the parties pursuant to Section XI of the 1997 Resale Agreement chose this Commission as the forum to resolve their interconnection agreement disputes.

We find that one important difference between the MCIMetro case and the instant case is our determination regarding jurisdiction based on 1997 Resale Agreement. The Eleventh Circuit noted:

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[12]See Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990)(PSC is authorized "to interpret statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly.")

> Under section 23 of the BellSouth-MCImetro Agreement, "the parties agreed that any dispute arising out of or relating to this Agreement that the parties themselves cannot resolve, may be submitted to the Commission for resolution." **While we acknowledge that parties are free to predetermine a forum for dispute resolution, there is no indication in the record that the GPSC based its jurisdiction to resolve the dispute between BellSouth and MCImetro on section 23.** Moreover, section 23 indicates that both parties were under the mutual and mistaken impression that "the Commission had continuing jurisdiction to implement and enforce all terms and conditions of the Agreement." Consequently, we do not consider that the GPSC acted under any sort of contractual authority when it issued its order interpreting the BellSouth-MCImetro Agreement. (Emphasis added)

Id. at 22, Footnote 13. The Eleventh Circuit found it important that the record did not indicate that the Georgia Commission based its jurisdiction on the BellSouth-MCImetro Agreement itself. In Order No. PSC-00-2250-FOF-LTP, issued November 28, 2002, Granting Supra's Request for Oral Argument and Granting in Part and Denying in Part Motion to Dismiss, we found:

> Section XI of the prior [1997 Resale] agreement provides that all disputes shall be resolved by petition to the Florida Public Service Commission. We, therefore, clearly have exclusive jurisdiction to consider disputes arising under the earlier agreement.

Id. at p. 5. We find that, unlike the Georgia Commission in the MCIMetro case, we have clearly determined jurisdiction based upon the 1997 Resale Agreement.

Thus, based on the reasons stated above, we find that the instant case is distinguishable from the MCIMetro case. First, unlike the Georgia state law, Section 364.162, Florida Statutes, provides explicit authority for this Commission to "to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." Second, we determined we have

jurisdiction pursuant to Section XI of the 1997 Resale Agreement.

For the foregoing reasons, Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction shall be denied.

IV. BELLSOUTH'S MOTION TO STRIKE

As noted in the Background, on February 22, 2002, BellSouth filed its Motion to Strike Portions of the Direct Testimony of Olukayode Ramos and David Nilson. On March 1, 2002, Supra filed its Response to BellSouth's Motion to Strike Portions of the Direct Testimony of Olukayode Ramos and David Nilson.

A. BellSouth's Motion to Strike

In support of its Motion, BellSouth states that on January 31, 2002, we issued Order No. PSC-02-0143-PCO-TP (Order Setting Matter for Rehearing and Establishing Procedure) that set forth the issues to be addressed in this proceeding. BellSouth states that those issues, which were adopted from our Order Establishing Procedure (Order No. PSC-01-0388-PCO-TP) dated February 15, 2001, are:

Issue 1: Should the rates and charges contained (or not contained) in the 1997 AT&T/BellSouth Agreement apply to the BellSouth bills at issue in this Docket?

Issue 2: Did BellSouth bill Supra appropriately for End-User Common Line Charges pursuant to the BellSouth/Supra interconnection and resale agreement?

Issue 3: Did BellSouth bill Supra appropriately for changes in services, unauthorized local service changes, and reconnections pursuant to the BellSouth/Supra interconnection and resale agreements?

Issue 4: Did BellSouth bill Supra appropriately for secondary service charges pursuant to the BellSouth/Supra interconnection and resale agreements?

BellSouth alleges that the scope of these issues was defined by us in two Orders: (1) our Order Granting Oral Argument and Granting in Part and Denying in Part Motion to Dismiss (Order No. PSC-00-2250-FOF-TP, dated November 28, 2000) (Order on Motion to Dismiss); and (2) our Order Denying Motion for Reconsideration or Clarification of Order on Motion to Dismiss (Order No. PSC-01-0493-FOF-TP, dated February 27, 2001) (Order on Reconsideration). BellSouth contends that these Orders limited the scope of this proceeding to billing disputes arising under the 1997 BellSouth/Supra Resale Agreement. Further, BellSouth states that we discussed the issue limitations imposed on this proceeding in our Final Order on Complaint (Order No. PSC-01-1585-FOF-TP, dated July 31, 2001):

> In Order No. PSC-00-2250-FOF-TP, issued November 28, 2000, we determined that the relevant agreement in this instant matter is the resale agreement entered into by BellSouth and Supra on June 28, 1997, approved by us on October 8, 1997, and effective June 1, 1997, through December 1999. For clarification, we found that those issues in dispute arising on or after October 5, 1999, the effective date of Supra's adoption of the AT&T/BellSouth agreement, were to be addressed by the sole and exclusive remedy available, pursuant to the terms of the adopted agreement, which is private arbitration.

Order No. PSC-01-1585-FOF-T.P. at p.3.

BellSouth contends that Supra has raised a number of issues surrounding other agreements that Supra had with BellSouth that are outside the issue limitations imposed in this proceeding. Specifically, BellSouth contends that it objects to: (1) testimony surrounding the circumstances leading up to the execution of the October 23, 1997 Supra/BellSouth Interconnection Agreement; (2) testimony concerning the unbundling network element (UNE) provisions of the October 23, 1997 Supra/BellSouth Interconnection Agreement; (3) testimony regarding the circumstances leading up to Supra's adoption of the AT&T/BellSouth Interconnection Agreement in 1999; and (4) testimony concerning the private arbitration arising under the adopted AT&T/BellSouth Interconnection Agreement.

1. Testimony regarding 1997 Supra/BellSouth Interconnection Agreement

a. Direct Testimony of Olukayode Ramos (page 4, line 1 through page 6, line 13 and page 7, line 21 through page 8, line 12)

BellSouth alleges that the direct testimony of Olukayode Ramos (Page 4, Line 1 through Page 6, Line 13 and Page 7, Line 21 through Page 8, Line 12) regarding the events leading up to the execution of the 1997 Supra/BellSouth Interconnection Agreement is irrelevant. BellSouth states that the portions which challenge the validity of the 1997 Supra/BellSouth Interconnection Agreement are without merit and beyond the scope of any issue in this proceeding. Further, BellSouth states that even if the 1997 Supra/BellSouth Interconnection Agreement was presumed invalid, such a finding would have no impact on whether certain charges were properly billed under the 1997 Supra/BellSouth Resale Agreement.

BellSouth argues that it cannot be rationally argued that circumstances leading up to the execution of the Supra/BellSouth Interconnection Agreement has any bearing on an issue in this proceeding. BellSouth states that we stated on page 2 of the Order Setting Matter for Rehearing and Establishing Procedure that "[t]he scope of this proceeding shall be limited to the issues raised by the parties in . . . the first Prehearing Order . . . unless modified by the Commission." Absent our approval to expand the current list of issues, BellSouth contends that Mr. Ramos' testimony (page 4, line 1 through page 6, line 13 and page 7, line 21 through page 8, line 12, together with Exhibits KR-2, KR-3, and KR-4) should be stricken.

BellSouth further notes that BellSouth witness Patrick Finlen filed direct testimony addressing the issue of the circumstances leading up to the adoption of the Supra/BellSouth Interconnection Agreement and recognizes that if the Commission grants BellSouth's Motion, then page 4, line 14 through page 13, line 7 of Mr. Finlen's testimony should also be stricken.

b. Direct Testimony of David Nilson (page 41, line 1 through page 43, line 03 and page 49, line 11 through page 50, line 8)

BellSouth contends that based on the same grounds as stated above for the testimony of Mr. Ramos, the testimony of Mr. Nilson should also be stricken. BellSouth again asserts that there is nothing in the circumstances leading up to the execution of the 1997 Supra/BellSouth Interconnection Agreement that is relevant to this proceeding. Thus, BellSouth maintains that Mr. Nilson's testimony (page 41, line 1 through page 43, line 03 and page 49, line 11 through page 50, line 8, together with Exhibits DN-21, DN-22, DN-24, and DN-25) should be stricken.

2. Testimony Concerning the Unbundling Network Element (UNE) Provisions of the October 23, 1997 Supra/BellSouth Interconnection Agreement.

a. Direct Testimony of Olukayode Ramos (Page 6, Line 15 through Page 7, Line 9).

BellSouth states that in this portion of his testimony, Mr. Ramos discusses the UNE provisions in the 1997 Supra/BellSouth Interconnection Agreement and their supposed impact on the provisions of the Supra/BellSouth Resale Agreement. BellSouth again contends that Supra is attempting to expand the issues beyond those delineated by us. BellSouth contends that the ability, or inability, of Supra to exercise its rights under the provisions of the 1997 Supra/BellSouth Interconnection Agreement has no relevance to whether BellSouth properly billed Supra under the provisions of the Supra/BellSouth Resale Agreement. Thus, the testimony of Mr. Ramos (page 6, line 15 through page 7, line 19, together with Exhibit KR-5) should be stricken.

b. Direct Testimony of David Nilson (Page 32, Line 16 through Page 40, Line 17; Page 50, Line 10 through Page 58, Line 15; Page 65, Line 6 through Page 69, Line 4; and Page 70, Lines 5-13)

BellSouth alleges that the testimony of Mr. Nilson should be stricken based on the same grounds as stated above for the testimony of Mr. Ramos. BellSouth contends that there is nothing about the provisioning of the UNEs, or lack thereof, under the terms of the 1997 Supra/BellSouth Interconnection Agreement that is relevant to the issues as framed in this proceeding. Thus, BellSouth maintains that Mr. Nilson's testimony (page 32, line 16 through page 40, line 17 and page 50, line 10 through page 58, line

15 and page 65, line 6 through page 69, line 4 and page 70, lines 5-13, together with Exhibits DN-5, DN-6, DN-7, DN-8, DN-9, DN_10, DN-11, DN-12, DN-13, DN-14, DN-15, DN-16, DN-17, DN-18, DN-19, DN-20 (with all subparts), DN-26 (with all subparts), DN-27, DN-28, DN-29, DN-30, DN-31, DN-32, DN-33, DN-34, DN-35, DN-36, DN-37, DN-38, DN-39, DN-40) should be stricken.

3. Testimony Regarding the Circumstances Leading up to Supra's Adoption of the AT&T/BellSouth Interconnection Agreement in 1999.

BellSouth states that it does not dispute that the provisions of the AT&T/BellSouth Interconnection Agreement are relevant to this proceeding to the extent that we need to determine whether the rates and charges in the AT&T/BellSouth Interconnection Agreement apply to the bills at issue in this proceeding. BellSouth states that it has no objection to that testimony.

BellSouth states that it does, however, object to the testimony of Mr. Ramos that discusses events leading up to the adoption of the AT&T/BellSouth Interconnection Agreement. BellSouth maintains that Supra has not challenged the validity of the AT&T/BellSouth Interconnection Agreement. On the contrary, BellSouth states that Supra relies on the AT&T/BellSouth Interconnection Agreement as the basis for its testimony that BellSouth improperly billed Supra. In light of that reliance, BellSouth contends that Mr. Ramos' testimony is irrelevant. BellSouth further contends that Mr. Ramos' testimony is unfairly, and inaccurately, designed solely to try and paint BellSouth in a bad light and it does not pertain to the billing issues in this proceeding. Thus, BellSouth maintains that Mr. Ramos' testimony (page 8, line 17 through page 11, line 7, together with Exhibits KR-6, KR-7, KR-8 and KR-9) should be stricken.

4. Testimony Concerning the Private Arbitration Arising under the Adopted AT&T/BellSouth Interconnection Agreement.

BellSouth references David Nilson's testimony page 30, line 15 through page 32, line 2 and page 43, line 12 through page 49, line 9 and page 58, line 17 through page 64, line 17. BellSouth indicates that this testimony, which refers to the private arbitration proceedings between Supra and BellSouth under the

AT&T/BellSouth Interconnection Agreement, should be stricken for two reasons.

First, BellSouth alleges that this testimony relates to issues we have previously determined should be addressed in private arbitration. BellSouth states that in our Order on Motion to Dismiss, we ruled:

> . . . we find that the dispute resolution provisions in each of the agreements should be strictly followed.
>
> Accordingly, we find that Supra's Motion to Dismiss should be granted as to the portion of the Complaint alleging Supra's failure to pay for services received under the present agreement, because of the exclusive arbitration clause.

Order No. PSC-00-2250-FOF-T.P. at p. 4. BellSouth states that we have already determined that the proper forum for Supra to address these issues is private arbitration, not this proceeding. Therefore, BellSouth maintains that this testimony is not relevant to any issue in this proceeding.

Secondly, BellSouth maintains that we should strike Mr. Nilson's testimony, specifically page 43, line 12 through page 48, line 15, because these lines relate to activities associated with the arbitration proceeding and are confidential. BellSouth states the AT&T/BellSouth Interconnection Agreement (Section 14.1 of Attachment 1) states:

> BellSouth, [Supra], and the Arbitrator(s) will treat any arbitration proceeding, including the hearings and conferences, discovery, or other related events, as confidential, except as necessary in connection with a judicial challenge to, or enforcement of, an award, or unless otherwise required by an order or lawful process of a court of governmental body.

BellSouth maintains that Supra has not demonstrated an attempt to introduce this material into this proceeding under any of the confidentiality exceptions set forth in Section 14.1 of Attachment 1 of the AT&T/BellSouth Interconnection Agreement. Nor, BellSouth

maintains, has Supra attempted to protect this confidential material by redacting it from the public version of Mr. Nilson's testimony. Further, BellSouth alleges that Supra's disclosure of these confidential materials is not consistent with Supra's representations regarding the confidential nature of discovery materials in other proceedings.

BellSouth argues that we should not tolerate Supra's egregious conduct in attempting to introduce irrelevant and confidential materials into this proceeding. Therefore, BellSouth states that Mr. Nilson's testimony (page 30, line 15 through page 32, line 2 and page 43, line 12 through page 40, line 9 and page 58, line 17 through page 64, line 17, together with Confidential Exhibits DN-40, DN-41, and DN-42) should be stricken. BellSouth notes that as it has not seen the confidential testimony and exhibits, BellSouth assumes it is related to the private arbitration.

BellSouth further maintains that if BellSouth's Motion is granted in its entirety as to Mr. Ramos' testimony, his entire testimony should be stricken because the only remaining portions would be non-substantive testimony concerning Mr. Ramos' background and employment history.

B. Supra's Response

Supra states that it is BellSouth's position that the scope of this proceeding should be limited to billing disputes arising under the 1997 Supra/BellSouth Resale Agreement and that the testimony surrounding the October 23, 1997 Supra/BellSouth Interconnection Agreement is simply irrelevant. Supra contends that BellSouth's reliance on the Order on Motion to Dismiss, the Order on Reconsideration and the Final Order on Complaint is misplaced, since in issuing those orders, we did not address the applicability of the Supra/BellSouth Interconnection Agreement. In support of its argument, Supra points to the following statement in the Final Order on Complaint:

> The first matter which we shall address is the issue of whether the billing disputes before us are governed by the 1997 [Resale] agreement or by the 1999 adopted AT&T agreement.

> In Order No. PSC-00-2250-FOF-TP, issued November 28, 2000, we determined that the relevant agreement in this matter is the resale agreement entered into by BellSouth and Supra on June 26, 1997, approved by us on October 8, 1997, and effective June 1, 1997, through December, 1999. (Emphasis in Motion)

Order No. PSC-01-1585-FOF-T.P. at pages 3-4.

Supra contends that in relying on these orders to support its position, BellSouth fails to account for the fact that the billing issues, Issues 2-4, explicitly address BellSouth's ability to charge Supra for various fees pursuant to the "BellSouth/Supra Resale and Interconnection Agreement." Supra argues that if BellSouth's reasoning is accepted, no hearing or rehearing would be necessary because the 1997 Supra/BellSouth Resale Agreement would be controlling as opposed to the October 5, 1999, Supra/AT&T Agreement.

Supra states that the Ramos and Nilson testimony is relevant in laying the foundation for Supra's claim that the October 23, 1997 Supra/BellSouth Interconnection Agreement controls BellSouth's ability to have billed the charges which are at issue. Supra maintains that this testimony shows Supra's intentions to adopt the June 10, 1997 BellSouth/AT&T Interconnection Agreement. It also shows the efforts expended by Supra to acquire UNEs and UNE combinations as far back as September 1997 and BellSouth's failure to recognize Supra's attempts to do so. Supra maintains that if BellSouth allowed Supra to order UNEs under the 1997 Supra/BellSouth Interconnection Agreement, it could not have billed Supra for the charges it has assessed under the 1997 Supra/BellSouth Resale Agreement. Supra contends that it is undisputed that the 1997 Interconnection Agreement failed to contain certain provisions in Attachment 2 which when read in conjunction with other provision contained in the agreement imposed the obligation upon BellSouth to provide Supra with UNE combinations. Supra asserts that whether it had the ability to place orders for, and whether BellSouth could bill it for UNEs and UNE combinations is an issue which will determine whether Supra was billed correctly.

Supra argues that BellSouth's arguments that Supra should not be allowed to use the forum to pursue "general grievances" or that it must request expansion of the current list of issues in order to address this testimony belies the issues set out by this Commission. Further, Supra maintains that the Direct Testimony of Patrick Finlen on these issues, filed by BellSouth in this proceeding on February 8, 2002, was introduced into evidence at the Final Hearing, it should be allowed in this portion of the proceeding. Supra states that neither Mr. Ramos or Mr. Nilson's testimony on theses issues should be stricken.

Supra maintains the Ramos testimony regarding the circumstances leading up to Supra's adoption of the AT&T/BellSouth Interconnection Agreement in 1999 has a direct bearing on the issues in this case. Supra states it announced its intention to adopt the AT&T/BellSouth Interconnection Agreement in late 1997. Mr. Ramos believed it was this agreement he was signing when he actually signed the Supra/BellSouth Interconnection Agreement. Further, Supra contends that this testimony supports Supra's claim that BellSouth did not have, until 2000, written procedures by which Supra could order the UNEs under their 1997 Interconnection Agreement.

Supra maintains the Nilson's Direct Testimony is relevant in establishing: (1) Supra and BellSouth had an Interconnection Agreement, from October 1997, that provided for the acquisition of UNE combinations; (2) the deleted UNE combination provisions set forth in Attachment 2 of that agreement are material; (3) Supra requested UNEs and UNE combinations in September 1997 which BellSouth failed to provide; and (4) BellSouth did not have written procedures for ordering UNEs and UNE combinations.

Supra states that it redacted the material identified in BellSouth's Motion to Strike as page 58, Line 17 through page 64, line 14. Supra maintains that page 64, lines 15-17 are not confidential, but merely argument.

Supra acknowledges that page 31, line 5 through line 12, and page 43, line 12 through page 48, line 10 should have been redacted as confidential. Supra maintains that the remainder of the BellSouth's cited materials do not contain confidential information because, even though made part of private arbitration, the

information was obtained in the course of ordinary business dealings with BellSouth. Further, Exhibit DN-40 is the same as Exhibit DN-31 and is a copy of our Order No. PSC-98-0810-FOF-TP, issued June 12, 1998 in Docket No. 971140-TP. Supra asserts that exhibits identified in Section III of BellSouth's Motion cannot be construed as confidential, even if made part of the private arbitration, since the documents were originally obtained and/or developed by Supra in the ordinary coarse of its business dealings with BellSouth and/or matters of public record. Further, Supra argues that similarly, even if the testimony referenced in the Motion were somehow made a part of and/or relate to the private arbitration, it cannot be said that Supra's reiteration of facts known to it and acquired through the ordinary course of business dealings with BellSouth can be deemed confidential. Therefore, Supra requests that BellSouth's request to strike testimony and exhibits be denied.

C. Analysis

As noted previously, BellSouth identifies four separate areas of Supra's direct testimony that it believes should be stricken; the testimony regarding the 1997 BellSouth/Supra Interconnection Agreement; the testimony concerning the UNE provisions of the 1997 BellSouth/Supra Interconnection Agreement; the testimony regarding the circumstances leading up to the adoption of the AT&T/BellSouth Agreement; and the testimony concerning the private arbitration arising under the adopted AT&T/BellSouth Agreement.

BellSouth contends that Mr. Ramos and Mr. Nilson's testimony as it relates to the 1997 BellSouth/Supra Interconnection Agreement is irrelevant and beyond the scope of this proceeding. BellSouth also argues that Mr. Ramos and Mr. Nilson's testimony concerning the UNE provisions of the October 1997 BellSouth/Interconnection is beyond the scope of this proceeding and irrelevant. BellSouth argues that through our previous orders we limited the testimony only to the 1997 Resale Agreement. We disagree. We do not find that our previous orders issued in this docket require that we limit the testimony to only the 1997 Resale Agreement as BellSouth suggest. As noted by Supra, Issues 2-4 address "the BellSouth/Supra interconnection and resale agreements" as set forth in Order No. PSC-02-0143-PCO-TP, Order Setting Matter for Rehearing and Establishing Procedure. These Issues as written include a

reference to both the interconnection and resale agreements between BellSouth and Supra. It would be illogical to conclude that the issues as drafted limit the scope of the proceedings to only the resale agreement.

While we agree that this proceeding is limited to billing disputes which arise out of the 1997 Resale Agreement, we find that this does not mean that the only relevant testimony concerns the Resale Agreement. Supra argues that its testimony regarding the other agreements is relevant in determining whether BellSouth billed it correctly under the 1997 Resale Agreement. We find that the testimony offered by Supra regarding the Interconnection Agreement and the UNE provisions of that agreement is relevant to Supra's arguments and is related to the issues presented in this docket.

We note that Issue 1 clearly states "Should the rates and charges contained (or not contained) in the 1997 AT&T/BellSouth Agreement apply to the BellSouth bills at issue in this Docket?" BellSouth agrees that Supra's testimony regarding the provisions of the AT&T/BellSouth Agreement is relevant. However, BellSouth argues that Mr. Ramos' testimony regarding the events leading up to the adoption of said agreement is irrelevant. Further, BellSouth contends that Mr. Ramos' testimony is unfair, inaccurate, and designed to place BellSouth in a bad light. We find that while the testimony may not be flattering to BellSouth, this is not sufficient grounds to strike the testimony. To the extent that BellSouth believes that the testimony is inaccurate or unfair, BellSouth has the opportunity to respond in its rebuttal testimony and cross-examination. We find that Mr. Ramos' testimony relating to adoption process of the AT&T/BellSouth Agreement is sufficiently related to the issues in this docket such that it should not be stricken.

BellSouth makes two separate arguments regarding the testimony relating to the private arbitration. First, BellSouth states that the testimony relates to matters which we previously determine should be addressed in private arbitration and thus is irrelevant. Second, BellSouth states that under the AT&T/BellSouth Agreement, Section 14.1 of Attachment 1, Supra failed to comply with the exceptions. BellSouth argues that we should not tolerate Supra's

egregious conduct in attempting to introduce irrelevant and confidential matters.

We note that Supra agrees that certain portions of David Nilson's testimony should have been redacted. Specifically, page 31, line 5 through line 12, and page 43, line 12 through page 48, line 10 should have been redacted as confidential. However, we find that while the identified portions of David Nilson testimony should have been redacted, the information is now public record in accordance with Chapter 119, Florida Statutes.

Supra argues that other than those portions of testimony identified above, the testimony and exhibits were developed through its ordinary course of business with BellSouth. Thus, Supra argues that even if this testimony and related exhibits were made a part of and are related to the private arbitration, facts made known to it through the ordinary course of business cannot be deemed to be confidential.

We agree that Section 14.1 of Attachment 1, does not preclude the use of testimony and exhibits developed by Supra through its ordinary business dealings with BellSouth. Further, it appears that Section 14.1 which states that BellSouth and Supra will treat as confidential any arbitration proceeding, including the hearings, conferences, discovery, or other related events "except as necessary in connection with . . . or unless otherwise required by an order or lawful process of a court of governmental body" anticipates the use of such materials in a proceeding before this Commission. Thus, we do not find that this clause precludes the use of information developed in the private arbitration from being used in this proceeding. Although, we note that such information may be subject to claims and request for confidentiality.

As stated previously, we find that the information relating to AT&T/BellSouth Agreement is relevant to this proceeding. We find that scope of this proceeding as defined by the Issues set forth in Order No. PSC-02-0143-PCO-TP include all relevant testimony regarding the agreements at issues.

For the foregoing reasons, BellSouth's Motion to Strike Portions of the Direct Testimony of Olukayode Ramos and David Nilson shall be denied in its entirety.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Extension of Time to Respond to Supra's Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby granted. It is further

ORDERED that Supra Telecommunications and Information Systems, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion to Strike Portions of the Direct Testimony of Olukayode Ramos and David Nilson is hereby denied in its entirety.

ORDER that this docket should remain open pending resolution of the complaint.

By ORDER of the Florida Public Service Commission this 8th Day of April, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.