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June 20, 2002

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket No. 020493-TP – Supra's Motion to Dismiss BellSouth's Complaint

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion to Dismiss BellSouth's Complaint 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/ATS

Brian Chaiken
General Counsel

CERTIFICATE OF SERVICE
Docket No. 020493-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery and/or U.S. Mail this 20th day of June, 2002 to the following:

Beth Keating, Esq. (for)
Staff Counsel
Division of Legal Services
Florida Public Service Commission
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SUPRA TELECOMMUNICATIONS
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By: Brian Chaiken/BHS
BRIAN CHAIKEN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. regarding the Regulatory Assessment Fees Paid by Supra Telecommunications And Information Systems, Inc., for The years 2000 and 2001.	)	Docket No.: 020493-TP Filed: June 20, 2002

MOTION TO DISMISS

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

BellSouth filed a Complaint on June 6, 2002. This Complaint must be dismissed because BellSouth lacks standing to file its complaint.

LACK OF STANDING

BellSouth's Complaint was filed pursuant to Rules 28-106.201, Florida Administrative Code and 25-22.036(2), Florida Administrative Code. Neither rule can be properly cited as a basis for the filing of BellSouth's complaint. As such, BellSouth's complaint must be dismissed for improperly relying on the above referenced rules.

Rule 28-106.201, Florida Administrative Code

Under Rule 28-106.201, F.A.C., a person may file a petition for a Section 120.569 or 120.57, Florida Statutes, formal hearing, *only after* the person has received notice of the Florida Public Service Commission's ("Commission") "proposed agency action." BellSouth's complaint does **not** in any way address any "proposed agency action" taken

by this Commission. The complaint cannot rely upon Rule 28-106.201, F.A.C., as a proper basis for the filing of BellSouth's complaint.

Support for the proposition that the rule is legally inapplicable can be found under Rule 25-22.029, F.A.C. This rule is entitled "**Point of Entry Into Proposed Agency Action Proceedings.**" (Bold in original). This rule reads in relevant part:

> "(1) **After agenda conference**, the Division of the Commission Clerk and Administrative Services shall issue written notice of the proposed agency action (PAA), advising all parties of record that they have 21 days after issuance of the notice in which to file a request for a Section 120.569 or 120.57, Florida Statutes, hearing.
>
> . . . . . .
>
> (3) One whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a Section 120.569 or 120.57, Florida Statutes, hearing, in the form provided by **Rule 28-106.201, F.A.C.**" (Bold and underline added for emphasis).

The first observation that must be made is that Rule 25-22.029, F.A.C., presumes that the Commission has taken some "proposed agency action" at a Commission "agenda conference."[1] In this case, BellSouth does not allege, nor can it allege, that the "action" which is the subject of its complaint is the result of a Commission "agenda conference." Likewise, BellSouth does not allege, nor can it allege, that the "action" which is the subject of its complaint is a "proposed agency action" issued by the Commission. These two events, described above, are absolutely essential elements for the filing of a complaint by BellSouth pursuant to Rule 25-22.029, F.A.C.

The second critical observation that must be made with respect to Rule 25-22.029, F.A.C., is the rule's cross reference to **Rule 28-106.201, F.A.C**. Subsection (3) of Rule 25-22.029, outlined above is clear: "One whose substantial interests may or will be

[1] *See* Title of rule as well as subsection (1) of Rule 25-22.029, F.A.C.

affected by the Commission's proposed action may file a petition for a Section 120.569 or 120.57, Florida Statutes, hearing, in the form provided by **Rule 28-106.201, F.A.C.**" The plain meaning of the language utilized in this regulation prohibits BellSouth from citing Rule 28-106.201, F.A.C., as authority for the filing of its complaint – unless BellSouth is filing its complaint *after* the issuance of some "proposed agency action" by this Commission, which it is not.

Further support for the proposition that BellSouth cannot rely on Rule 28-106.201, F.A.C., can be found in the body of Rule 28-106.201, F.A.C. Subsection (2)(c) of Rule 28-106.201, F.A.C., *expressly* requires that BellSouth's petition (as opposed to a complaint) contain: "a statement of when and how the petitioner received notice of the agency action." BellSouth has not alleged, nor can it allege, "when" and "how" it "received notice of the agency action." BellSouth cannot meet this legal threshold for the simple reason that no such "proposed agency action" exists. As such, BellSouth's reliance on this rule as the basis for its complaint is legally improper.

Subsection (2)(e) of Rule 28-106.201, F.A.C., also *expressly* requires BellSouth's petition to include the following: "a concise statement of the ultimate facts alleged, including the specific facts petitioner contends warrant reversal or modification of the agency's proposed action." BellSouth has not alleged, nor can it allege, a concise statement of the ultimate facts, including which facts warrant reversal or modification from the Commission's proposed agency action. Subsections (f) and (g) of Rule 28-106.201, F.A.C., also presume the Commission has taken some proposed agency action. Again, BellSouth cannot meet this legal threshold for the simple reason that no such "proposed agency action" exists. As such, BellSouth's reliance on this rule as the basis

for its complaint is legally improper. Accordingly, BellSouth's complaint must be dismissed to the extent that BellSouth relies on this rule.

Rule 25-22.036 is also limited to 120.569 and 120.57 hearings

All Commission promulgated regulations are followed by a provision entitled "*Specific Authority*" and "*Law Implemented.*" Rule 25-22.036, F.A.C., cited by BellSouth as a second basis for its complaint is no different.

Specific Authority

After the words "*Specific Authority*" Rule 25-22.036, F.A.C., includes two statutory citations: Sections 350.01(7) and 350.127(2), Florida Statutes. Section 350.01(7), F.S., is entitled "**Florida Public Service Commission; terms of commissioners; vacancies; election and duties of chair; quorum; proceedings.**" (Bold in original). Subsection (7) of Section 350.01, F.S., reads as follows:

> "This section does not prohibit a commissioner, designated by the chair, from conducting a hearing as provided under **ss. 120.569 and 120.57(1)** and the rules of the commission adopted pursuant thereto." (Bold added for emphasis).

This statutory section cited as *Specific Authority* for the promulgation of Rule 25-22.036, F.A.C., *expressly* references ss. 120.569 and 120.57, F.S.

Sections 120.569 and 120.57, F.S., are also *expressly* referenced under Rule 25-22.029, F.A.C. [entitled "**Point of Entry Into Proposed Agency Action Proceedings**"] As noted earlier, this Rule reads in relevant part:

> "(1) After agenda conference, the Division of the Commission Clerk and Administrative Services shall issue written notice of the proposed agency action (PAA), advising all parties of record that they have 21 days after issuance of the notice in which to file a request for a **Section 120.569 or 120.57, Florida Statutes, hearing**.
>
> . . . . . .

> (3) One whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a **Section 120.569 or 120.57, Florida Statutes, hearing**, in the form provided by Rule 28-106.201, F.A.C." (Bold and underline added for emphasis).

Rule 25-22.029, F.A.C., cited immediately above, makes clear that petitions for hearings pursuant to ss. 120.569 or 120.57, F.S., can only be filed *after* the issuance of "proposed agency action" by the Commission. This same limitation exists for Rule 25-22.036, F.A.C. – the rule cited by BellSouth as a basis for filing its complaint.

The plain reading of Section 350.01(7), F.S., allows the chair of the Commission to designate a Commissioner to conduct a hearing as provided under ss. 120.569 and 120.57, F.S., and the rules adopted pursuant to these sections. As noted above, the rule promulgated pursuant to Section 350.01(7), F.S., was Rule 25-22.036, F.A.C. – the rule cited by BellSouth as the basis for its complaint. (*See* citation of Section 350.01(7), F.S., immediately following the words "*Specific Authority*" implemented). BellSouth has not alleged, nor can it allege, that its complaint addresses some "proposed agency action" taken by the Commission. As such, BellSouth's reliance on this rule as the basis for its complaint is legally improper.

The next statutory citation the Commission cites immediately after the words "*Specific Authority*" is Section 350.127(2), F.S. This latter statutory provision is entitled "**Penalties; rules; execution of contracts.**" Subsection (2) reads as follows:

> "The commission is authorized to adopt, by affirmative vote of the majority of the commission, rules pursuant to ss. 120.536(1) and 120.54 to implement provisions of law conferring duties upon it."

The plain meaning of this language allows the Commission to promulgate rules to implement duties conferred upon it by statute. As described earlier herein, Section

350.01(7), F.S., confers upon the chair of the commission the power to designate a Commissioner to conduct a hearing pursuant to ss. 120.569 and 120.57, F.S. The Commission itself cited Section 350.127(2), F.S., as its authority for promulgating Rule 25-22.036, F.A.C., to carry out or "implement provisions of law [s. 350.01(7)] conferring duties upon it." Given this explicit authority, Rule 25-22.036, F.A.C., can only be cited by a party if the party is seeking a formal hearing pursuant to ss. 120.569 and 120.57, F.S. And, as repeatedly noted above, a formal hearing pursuant to either Sections 120.569 and 120.57, F.S., can only be requested *after* the issuance of "proposed agency action"[2] – no such proposed agency action exists in the matter raised by BellSouth.

It must be noted that Rule 25-22.036, F.A.C., does not cite to any other statutory provisions, other than the two sections noted here: ss. 350.01(7) and 350.127(2), F.S. BellSouth cannot cite to any competent legal authority for the proposition that Rule 25-22.036, F.A.C., can be cited as a basis for filing its complaint against Supra. As such, BellSouth's reliance on this rule as the basis for its complaint is legally improper. Accordingly, BellSouth's complaint must be dismissed to the extent that BellSouth relies on this rule.

Laws Implemented

Immediately following the words "*Laws Implemented*" found at the end of Rule 25-22.036, F.A.C., the Commission *expressly* cites to ss. 120.569 and 120.57, F.S.

Section 120.569(1), F.S., reads in relevant part:

> "The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency . . . Parties **shall** be notified of any order, including a final order. Unless waived, a copy of the order **shall** be delivered or mailed to each party or the party's attorney or record at the address of record. Each notice **shall** inform the

[2] *See* Rule 25-22.029, F.A.C.

recipient of any administrative hearing or judicial review that is available under this section, s. 120.57 or s. 120.68." (Bold and underline added for emphasis).

The plain meaning of the above referenced language presupposes that the agency has issued an order: i.e. proposed agency action. The language expressly includes the reference that the parties "shall" be "notified of any order, including a final order." BellSouth in its complaint does not allege, nor can it allege, that its complaint is addressing some proposed agency action taken by the Commission. No such order exists. Again, this is further support for the proposition that it is improper for BellSouth to cite to Rule 25-22.036, F.A.C., as a basis for filing its complaint against Supra.

Section 120.57, F.S., outlines the procedures for the filing of a formal hearing after the Commission has taken some proposed agency action.

All of the other statutory citations the Commission cited after the words "*Laws Implemented*" focus on areas of regulatory oversight conferred upon the Commission. The problem for BellSouth, in relying on Rule 25-22.036, F.A.C. - is that ss. 120.569 and 120.57, F.S., require that the Commission *first* have taken some proposed agency action. And, as already repeatedly noted herein, no such proposed agency action has been taken, by this Commission, with respect to the matter raised in BellSouth's complaint.

BellSouth cannot cite to any competent legal authority for the proposition that Rule 25-22.036, F.A.C., can be cited as a basis for filing its complaint against Supra – in the absence of a Commission order reflecting some proposed agency action. Accordingly, BellSouth's complaint must be dismissed for improperly relying on Rule 25-22.036, F.A.C., and as such for a lack of standing.

SUBSTANTIAL INTERESTS

BellSouth's Complaint was filed pursuant to Rules 28-106.201, Florida Administrative Code and 25-22.036(2), Florida Administrative Code. Even if the Commission were to find that one of these two rules could be properly cited as authority for the filing of a complaint – in the absence of some proposed agency action taken by this Commission – BellSouth's complaint would still have to be dismissed on the grounds that BellSouth has failed to demonstrate how its substantial interests would be affected.

Rule 25-22.036(2), Florida Administrative Code

Both rules cited by BellSouth require that BellSouth identify how its substantial interests have been affected. BellSouth **fails** to allege how its substantial interests have been affected. As such, BellSouth's complaint must be dismissed for lack of standing.

Under Rule 25-22.036(2), F.A.C., a person may file a complaint for a formal hearing, if an act or omission by a person subject to Commission jurisdiction "affects the complainant's substantial interests." "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, F.S., hearing and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect." *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981), *reh. denied.* 415 So. 2nd 1359 (Fla. 1982). *See also* Commission Order No. PSC-01-1657-FOF-TL and PSC-01-0670-FOF-TX (both Orders citing *Agrico Chem. Co. v. Dept. of Environmental Regulation*).

"The first aspect of the test deals with the degree of injury." *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d at 482. "The second deals with the nature of the injury." *Id.*

Degree of injury

Under the first prong of the *Agrico* test outlined above, the complainant "must allege that he has sustained" an injury in fact. *See, Village Park Mobile Home Association, Inc. v. State, Dept. of Business and Professional Regulation et al,* 506 So. 2d 426, 433 (Fla. 1st DCA 1987). "Injury in fact" has been defined as "a clear, direct effect on those concerned individuals being able to continue to earn their livelihood." *Id.* at 432. *See also, Cole Vision Corp. v. Department of Bus. & Prof. Reg.*, 688 So. 2d 404, 407 (Fla. 1st DCA 1997) *cited by Lanoue v. Florida Department of Law Enforcement*, 751 So. 2d 94, 99 (Fla. 1st DCA 1999) (where the Court found that appellants did have standing to challenge [a] rule: Because this rule purports to regulate appellants, and as a result potentially exposes them to legal action and monetary penalties."); *See also, State v. Benitez*, 395 So. 2d 514, 517 (Fla. 1981) (where the Court found that "a party subject to criminal prosecution clearly has a sufficient personal stake in the penalty which the offense carries.").

In the matter before this Commission, BellSouth **fails** to describe "how" Supra's alleged actions (1) have directly prevented BellSouth from continuing to earn its livelihood, (2) have exposed BellSouth to legal action or monetary penalties, and finally (3) have subjected BellSouth to criminal prosecution. Given the foregoing, BellSouth's Complaint must be dismissed because it fails to describe any direct injury in fact that it has sustained.

In addition to demonstrating an actual injury in fact, the first prong of the *Agrico* test allows a petitioner – in lieu of showing an actual injury in fact - to demonstrate that a petitioner is "**immediately** in danger of sustaining some **direct** injury as a result of the challenged agency's action." *Village Park Mobile Home Association, Inc. v. State, Dept. of Business and Professional Regulation et al,* 506 So. 2d 426, 433 (Fla. 1st DCA 1987) *citing, Agrico Chemical Co. v. Dept. of Environmental Regulation.* (Bold and underline added for emphasis). In the matter before this Commission, BellSouth not only fails to describe how Supra's alleged actions has resulted in an actual injury in fact, but BellSouth cannot describe that it is in "immediate danger of sustaining some direct injury." *Id.* In particular, BellSouth cannot describe how "in the immediate" future Supra's alleged actions (1) will directly prevent BellSouth from continuing to earn its livelihood, (2) will expose BellSouth to legal action or monetary penalties, and finally (3) will subject BellSouth to criminal prosecution. In sum, BellSouth's complaint **fails** to describe any "immediate and direct injury" as a result of some challenged proposed agency action taken by the Commission. As such, BellSouth's complaint must be dismissed for failing to demonstrate how Supra's actions have "affected BellSouth's substantial interests."

Nature of the injury

The second prong of the *Agrico* test involves the nature of the injury. In particular the threshold is described as follows: "that his substantial injury is of a type or nature which the proceeding is designed to protect." *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2nd DCA 1981). BellSouth's complaint must be dismissed for its **failure** to not only identify a substantial interest, but

its **failure** to identify any actual interest of the type or nature that Section 364.337(5), F.S., was designed to protect.

The first observation which must be made, again, is that no proposed agency action exists, and as such, BellSouth is not entitled to petition for a ss. 120.569 and 120.57, F.S., formal hearing. Because BellSouth is not entitled to petition for a formal hearing - pursuant to these statutory sections - BellSouth is legally precluded from arguing that its alleged "substantial injury" is of the type and nature that the formal hearing is designed to protect.

BellSouth falls short of identifying an injury, much less a "substantial" injury – as required by the *Agrico* test. BellSouth's attempt at identifying "an actual or immediate injury in fact" is the following claim: ". . . BellSouth [will be] **treated unfairly** . . ."[3]

BellSouth's next attempt at identifying an actual affected substantial interest is by the choice of language "indirect" and likewise "speculative." BellSouth writes in part: "This Commission [will be] financially affected, thereby affecting its regulation of BellSouth."[4] First, this statement alleges a speculative impact on the Commission's ability to carry out its functions. This statement, by its choice of language, then alleges an "indirect" and "speculative" impact on BellSouth: "thereby affecting [the Commission's] regulation of BellSouth." As noted earlier herein, "abstract injury is not enough." *Village Park Mobile Home Association, Inc. v. State, Dept. of Business and Professional Regulation et al,* 506 So. 2d 426, 433 (Fla. 1st DCA 1987). "The injury or threat of injury must be both real and immediate, not conjectural or hypothetical." *Id.*

[3] *See* BellSouth's Complaint, at page 4 and 5.
[4] *See* BellSouth's Complaint, at page 5.

The language chosen by BellSouth in describing its substantial interests, at best, can only be characterized as "conjectural" and "hypothetical."

There is **no** immediacy or reality to BellSouth's claim at most it is conjecture. Accordingly, BellSouth's complaint must be dismissed for lack of standing on the grounds that BellSouth has failed to identify how its substantial interests are affected. *See Id.* at 433 (where the Court states that "a petitioner's allegations must be of 'sufficient immediacy and reality' to confer standing.").

Section 364.337(5), F.S.

BellSouth cites to Section 364.337(5), Florida Statutes, as its authority for this vague and ambiguous "interest." BellSouth claims that Supra's actions will somehow impact on this amorphous interest: "treated unfairly." BellSouth, however, alleges no specifics. It is well settled that "remote, speculative abstract or indirect injuries are not sufficient to meet the 'injury in fact' standing requirement." *In re: Tampa Elec. Co.*, Docket No. 941173-EG, Order No. PSC-95-1346-S-EG, Nov. 1, 1995, 1995 WL 670147 at 2. *See also Agrico Chem. Co. v. Dept. of Environmental Regulation,* 406 So.2d at 482 (a party seeking "**standing must frame their petition for a section 120.57 formal hearing in terms which clearly show injury in fact to interests protected.**") The words "treated unfairly" do not in any way describe an actual or immediate injury in fact. This alleged interests, claimed by BellSouth, is too abstract and speculative as to its actual or immediate impact on the complainant.

The claim by BellSouth that it "could" be "treated unfairly" is not only indirect, speculative and one of conjecture, but the claim as it relates to regulatory assessment fees is not one that is designed to be protected by Section 364.337(5), F.S.

Section 364.337(5), F.S., is entitled **"Alternative local exchange telecommunications companies; intrastate interexchange telecommunications services; certification."** This sections reads as follows:

> "The commission shall have continuing regulatory oversight over the provision of basic local exchange telecommunications service provided by a certified alternative local exchange telecommunications company or a certified alternative access vendor for purposes of **establishing reasonable service quality criteria**, **assuring resolution of service complaints**, and **ensuring the fair treatment** of all telecommunications providers **in the telecommunications marketplace**." (Bold and underline added for emphasis).

The first observation to be made is that this statute focuses on "Alternative" local exchange companies. BellSouth is an "Incumbent" local exchange company. The plain meaning of the statute excludes BellSouth from claiming any type of "interest" under this provision.

The second observation that must be made involves the three (3) types of matters the Florida legislature *expressly* identified - within this provision - that this Commission shall have continuing regulatory oversight of: (1) **establishing reasonable service quality criteria**, (2) **assuring resolution of service complaints**, and (3) **ensuring the fair treatment** of all telecommunications providers in the marketplace. There is a well established principle of law that provides that: **"general terms following a series of more specifically enumerated terms refer to items similar in structure and function to the enumerated terms."** *See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 268 F.3d 1294, 1301 (11th Cir. 2001) *citing United States v. Sepulveda*, 115 F.3d 882, 886 n. 8 (11th Cir. 1997). (Emphasis added). Using this legal principle, the phrase "ensuring fair treatment" must be read as referencing activities "similar in structure and function." *Id.*

The first enumerated item is "establishing reasonable service quality criteria." The plain meaning of this phrase is evident: establishing service quality criteria does not involve, in any way, the filing of forms with respect to regulatory assessment fees. The second specifically enumerated item is "assuring resolution of service complaints." Again, the plain meaning of this phrase is evident: resolving service complaints does not involve, in any way, the filing of forms with respect to regulatory assessment fees.

As already noted, using the well settled legal principle identified above, the phrase "ensuring fair treatment" can *only* involve a matter similar in structure and function to (1) service quality criteria, and (2) resolution of service complaints. The two specific enumerated items both involve "retail service." The general phrase regarding "fair treatment" must therefore – as a matter of statutory construction – also deal with "retail service." BellSouth's complaint in no way alleges any matter involving "retail service." Accordingly, BellSouth's attempts at identifying an interest in a provision dealing strictly with retail service falls far short of meeting the burden under *Agrico*.

If this were not enough, the Commission need only examine the last four (4) words of s. 364.337(5), F.S., which reads as follows: "**in the telecommunications marketplace**." The plain import of this phrase requires that the Commission focus its regulatory oversight authority on ensuring that the Commission imposes the same standards [i.e. fair treatment] with respect to "retail service" related matters "in the marketplace." BellSouth does not allege, nor can it allege, that the Commission has issued an order – i.e. some proposed agency action – in which Supra was permitted to utilize some substantially different "service criteria standard," or was permitted to implement a "complaint resolution process" that was substantially different from that

required by BellSouth. BellSouth's failure to allege any of the foregoing, legally precludes BellSouth from even suggesting that the Commission's non-existent proposed agency action – on these retail service related matters - has some how substantially affected BellSouth's position in the telecommunication's marketplace. As such, BellSouth's complaint must be dismissed for lack of standing.

In sum, Section 364.337(5), F.S., deals strictly with retail service related matters. BellSouth's attempts in utilizing this provision in identifying a "hypothetical" interest falls far short of meeting the burden under *Agrico*. BellSouth's complaint must be dismissed for its failure to not only identify a substantial interest, but its failure to identify any actual interest of the type or nature that Section 364.337(5), F.S., was designed to protect. As such, BellSouth's complaint fails to meet the second prong of the *Agrico* test. Accordingly, BellSouth's complaint must be dismissed for lack of standing on the grounds that it has failed to establish that its substantial interests have been affected by some proposed agency action taken by the Commission.

CONCLUSION

BellSouth's Complaint was filed pursuant to Rules 28-106.201, Florida Administrative Code and 25-22.036(2), Florida Administrative Code. Neither rule can be properly cited as a basis for the filing of BellSouth's complaint.

Both rules cited by BellSouth require that BellSouth identify how its substantial interests have been affected after the issuance of some proposed agency action taken by the Commission. In the matter before this Commission, no such proposed agency action has been taken. Notwithstanding this glaring fact, BellSouth has nevertheless filed a

complaint seeking a formal hearing under rules requiring a *predicate act* that the Commission has *first* issued some proposed agency action.

Despite the foregoing, under either rule cited by BellSouth, "[b]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, F.S., hearing and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect." ***Agrico Chemical Co. v. Dept. of Environmental Regulation***, 406 So.2d 478, 482 (Fla. 2nd DCA 1981).

"The first aspect of the test deals with the degree of injury." *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d at 482. "The second deals with the nature of the injury." *Id.*

With respect to the degree of injury, BellSouth's complaint must be dismissed because it **fails** to describe any "immediate and direct injury" as a result of some challenged proposed agency action taken by the Commission. The language chosen by BellSouth in describing its substantial interests, at best, can only be characterized as "conjectural" and "hypothetical." There is **no** immediacy or reality to BellSouth's claim.

With respect to the nature of the injury, BellSouth's complaint must be dismissed for its **failure** to not only identify a substantial interest, but its **failure** to identify any actual interest of the type or nature that Section 364.337(5), F.S., was designed to protect. BellSouth's complaint in no way alleges any matter involving "retail service." BellSouth does not allege, nor can it allege, that the Commission has issued an order – i.e. proposed agency action – permitting Supra to utilize some substantially different "service criteria standard," or was permitted to implement a "complaint resolution process" that was

substantially different from that required by BellSouth. Accordingly, BellSouth's attempts at identify a substantial interest – much less any actual interest - in a provision dealing strictly with retail service falls far short of meeting the burden under the second prong of the *Agrico* test.

For these reasons, Supra respectfully moves that this Commission dismiss BellSouth's complaint for lack of standing.

RESPECTFULLY submitted , this 20th day of June 2002.

SUPRA TELECOMMUNICATIONS &
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Brian Chaiken/ATS
BRIAN CHAIKEN, ESQ