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June 28, 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. 000121A-TP –
Supra's Motion to Dismiss BellSouth's Expedited Petition for Temporary Relief of Order No PSC-01-1819-FOF-TP

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 Expedited Petition for Temporary Relief of Order No PSC-01-1819-FOF-TP 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/AHS

Brian Chaiken
General Counsel

CERTIFICATE OF SERVICE
Docket No. 000121A-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 28th day of June, 2002 to the following:

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By: Brian Chaiken/ATS
BRIAN CHAIKEN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies.	)	Docket No: 000121A-TP Filed: June 28, 2002

MOTION TO DISMISS

SUPRA TELECOMMUNICATIONS & INFORMATIONS SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, hereby files this MOTION TO DISMISS BellSouth's Expedited Petition for Temporary Relief of the Requirements of Order No. PSC-01-1819-FOF-TP, pursuant to Rule 28-106.204, Florida Administrative Code, in the above referenced matter and states the following in support thereof:

On June 4, 2002 BellSouth filed its petition for relief pursuant to Rules 28-106.204 and 25-22.036, Florida Administrative Code. Neither of these two rules contemplate nor permit this type of pleading to be filed with the Commission. Furthermore, this Commission lacks the subject matter jurisdiction to determine whether BellSouth is in fact owed "any" monies under the parties' current interconnection agreement. Accordingly, BellSouth's petition must be dismissed for (1) lack of subject matter jurisdiction and (2) failure to state a cause of action pursuant to the rules cited by BellSouth.

The certificate of service attached to BellSouth's filing indicates that it was served by mail (i.e. federal express). BellSouth, however, never served Supra with a copy of its Petition. Supra first received notice of BellSouth's petition after receiving BellSouth petition for confidential classification on June 25, 2002. Notwithstanding the foregoing, Rule 1.090(e), Florida Rules of Civil Procedure, provides that when a party serves a

document by mail, five (5) days shall be added to the prescribed period in which to respond. BellSouth's filing was made on June 4, 2001. The above referenced rule would require Supra to file its response no later than Saturday, June 29, 2002. And, because the filing due date falls on a Saturday, Supra is permitted to file either a motion to dismiss or a responsive pleading the following Monday, July 1, 2002. Accordingly, Supra's Motion to Dismiss is timely. Furthermore, a party may challenge subject matter jurisdiction at any time.

LACK OF SUBJECT MATTER JURISDICTION

Supra and BellSouth are parties to an Interconnection Agreement ("Agreement") which has been in effect since October 5, 1999. The Agreement provides that the parties shall continue to operate under the terms and conditions of the Agreement until a Follow-on Agreement is approved by the Florida Public Service Commission ("Commission"). Paragraph 16 of the General Terms and Conditions of the present Agreement contains a dispute resolution provision, which reads as follows:

> "16. Alternative Dispute Resolution
>
> **16.1 All disputes, claims or disagreements (collectively "Disputes") arising under or related to this Agreement or the breach hereof shall be resolved in accordance with the procedures set forth in Attachment 1, except: (i) disputes arising pursuant to Attachment 6, Connectivity Billing . . . Disputes involving matters subject to the Connectivity Billing provisions contained in Attachment 6, shall be resolved in accordance with the Billing Disputes section of Attachment 6. In no event shall the Parties permit the pendency of a Dispute to disrupt service to any AT&T [Supra Telecom] Customer contemplated by this Agreement. . ."**

Attachment 6 to the current Agreement provides a procedure for resolving billing disputes under paragraph 14. Subparagraphs 14.1, 14.1.1 and 14.1.2 of Attachment 6, provide for an informal dispute resolution process in which the parties progressively escalate the dispute up to the fourth level of management within each respective

company. Subparagraph 14.1.3 of Attachment 6 states in pertinent part that "[i]f the dispute is not resolved within one hundred and fifty (150) days of the Bill Date, the dispute will be resolved in accordance with the procedures set forth in Section 16 of the General Terms and Conditions of this Agreement and Attachment 1." Attachment 1 to the current interconnection agreement provides for Alternative Dispute Resolution. Paragraph 2 of Attachment 1 states in pertinent part that "**[n]egotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between BellSouth and AT&T [Supra Telecom] arising under or related to this Agreement including its breach . . .**"

Commission lacks jurisdiction

BellSouth's expedited petition involves a request that this Commission relieve BellSouth of its legal obligations under Commission Order No. PSC-01-1819-FOF-TP. This Commission Order requires BellSouth to make payments to ALECs for Tier 1 and Tier 2 non-compliance for the month in which the obligation arose, by the 30th day following the due date for the performance measurement report.

Supra must note that the amount BellSouth alleges is owed in its petition is a complete fabrication. Notwithstanding, in order for this Commission to grant BellSouth its requested relief, this Commission must make a finding of fact that BellSouth is actually owed money which accrued under the parties' present Agreement. The problem for BellSouth is that this Commission lacks the subject matter jurisdiction in order to make that determination. Pursuant to the parties' Agreement, the sole and exclusive remedy available to the parties with respect to billing disputes is private arbitration. Accordingly, any dispute arising under or related to the present interconnection Agreement must be brought before Commercial Arbitrators. In fact, the parties' disputes are presently before said arbitrators.

Commission Order No. PSC-00-2250-FOF-TP

This Commission made this same ruling regarding subject matter jurisdiction in Order No. PSC-00-2250-FOF-TP. In that matter, BellSouth sought the right to disconnect Supra – in contravention of the explicit terms of the interconnection agreement – while the parties arbitrated disputed bills. The Commission wrote:

> "In its Petition, BellSouth alleges that, under their present agreement, Supra currently owes BellSouth hundreds of thousands of dollars for resale services ordered by Supra, properly rendered, and billed by BellSouth, most of which is not disputed by Supra. According to BellSouth, Supra has failed to pay its bills under the present agreement, including the undisputed sums, since January 1, 2000. BellSouth continues to provide service to Supra pursuant to the current agreement and is requesting this Commission to order Supra to pay all outstanding balances on its account and pay BellSouth's bills in a timely manner on a going forward basis. In the alternative, BellSouth seeks our permission to disconnect Supra from BellSouth's ordering interfaces and to disconnect Supra's end users." (Underline added for emphasis).

The Commission rejected BellSouth's claim pursuant to the exclusive arbitration clause. The Commission wrote:

> " . . .we find that the dispute resolution provisions . . . should be strictly followed. . . . Accordingly, we find that Supra's Motion to Dismiss should be granted as to the portion of the Petition alleging Supra's failure to pay for services received under the present agreement, because of the exclusive arbitration clause. . . ." (Underline added for emphasis).

Following Commission precedent, any claim by BellSouth that it is owed money **must** be brought before the Commercial Arbitrators pursuant to the parties' present interconnection Agreement. Furthermore, as this matter is currently pending before commercial arbitrators, this Commission lacks jurisdiction to make any findings which would resolve the parties' present billing disputes. Because BellSouth cannot meet its own legal threshold – as a matter of law - set out in its own petition, BellSouth cannot invoke the subject matter jurisdiction of this Commission.

BellSouth also falsely claims that Supra has refused to pay undisputed amounts for services rendered in 2002. BellSouth is well aware that this is absolutely untrue. In fact, Supra recently made a payment to BellSouth covering undisputed amounts for the months of January through April 2002. Once Supra receives a proper May bill, it will pay the undisputed amounts for that month as well.

The law is well settled that arbitration provisions are to be interpreted liberally in favor of requiring the dispute to be arbitrated. See Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (Federal Arbitration Act establishes a federal policy in favor of arbitration); Collins, supra, 168 F.R.D. at 677; Roe v. Amica Mutual Insurance Co., 533 So.2d 279 (Fla. 1988) (arbitration is favored under Florida law); Ronbeck Construction Co., Inc. v. Savanna Club Corp., 592 So.2d 344 (Fla. 4th DCA 1992) (any doubts about the scope of arbitration should be resolved in favor of arbitration). Indeed, the federal courts have held that **"the FAA creates a presumption in favor of arbitrability; so, parties must clearly express their intent to exclude categories of claims from their arbitration agreement."** Brown v. ITT Consumer Financial Corp., 211 F.3d 1217, 1222 (11th Cir. 2000). Thus, unless expressly excluded by the language of the arbitration clause, statutory [and other] claims are subject to being arbitrated. Brown, supra, 211 F.3d at 1222.

Every billing dispute brought by Supra has been in accordance with the billing dispute resolution process that has been contractually agreed to by BellSouth and Supra. BellSouth is now unhappy with its present contract, and the results of previous billing disputes. BellSouth now asks this Commission to grant it relief from a provision that BellSouth itself negotiated. It is interesting to note that Supra has never been found to have brought an improper billing dispute against BellSouth.

BellSouth writes in paragraph five (5) of its Petition: "BellSouth requests that the Commission relieve BellSouth of the requirement in the Order to make payment for non-compliance of the Performance Assessment Plan to Supra until such time as (1) Supra demonstrates that it intends to make full and complete restitution to BellSouth; (2) Supra makes full and complete restitution to BellSouth; and (3) Supra remains current in its bills for at least six months." Said request is improper because BellSouth has not and cannot show – because of this Commission's lack of subject matter jurisdiction - that Supra (1) has been found to owe BellSouth anything, or (2) that Supra is not current in its bill.

All amounts claimed to be owed by BellSouth will have accrued under the present Agreement. BellSouth admits as much when it writes in paragraph four (4) of its petition: "For the last three years, BellSouth has been embroiled in a continuing struggle with Supra to obtain payment from Supra." This, too, is a false statement, as it is Supra, not BellSouth, who has raised the majority of disputes regarding BellSouth's improper bills and wrongful retention of access and wireless revenues.

It is clear that BellSouth's assertions regarding non-payment is a subject matter that can **only** be brought before the Commercial arbitrators pursuant to the parties' dispute resolution process. And, as already noted, Commission Order No. PSC-00-2250-FOF-TP has already determined that any allegations that Supra has failed to pay for services rendered under the present agreement cannot be raised before this Commission because of the exclusive arbitration clause. Accordingly, BellSouth's petition must be dismissed for the simple reason that this Commission lacks the subject matter jurisdiction

to determine whether BellSouth is in fact owed "any" monies under the parties' current Agreement.

FAILURE TO STATE A CAUSE OF ACTION

BellSouth's petition 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 petition. Both of the cited rules require the petitioner to identify two critical elements: (1) a showing that the petition is directed at some proposed agency action taken by the Commission and (2) a showing that the petition was filed timely. BellSouth cannot meet either threshold as required by the rules cited by BellSouth. As such, BellSouth's petition must be dismissed for BellSouth's failure to state a cause of action pursuant to 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 filing seeks relief from Order No PSC-01-1819-FOF-TP that was entered on September 10, 2001. The time period for filing a petition pursuant to Rule 28-106.201, F.A.C. is only twenty-one (21) days. BellSouth's present filing cannot rely upon Rule 28-106.201, F.A.C., as a proper basis for the filing of its expedited petition. As such, BellSouth's filing fails to state a cause of action in accordance with the legal requirements of the rule and must therefore be dismissed as untimely.

Further 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 expedited petition is a "proposed agency action" issued by the Commission within the last twenty-one (21) days. This event is an absolutely essential element for the filing of a petition 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 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 expedited petition –

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

unless BellSouth is filing its petition, however entitled, *after* the issuance of some "proposed agency action" by this Commission within the past twenty-one (21) days. BellSouth is not filing its petition within twenty-one (21) days of the issuance of a Commission proposed agency action. As such, its petition is untimely.

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 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 Order No. PSC-10-1819-FOF-TP is not some "proposed agency action" issued within the past twenty-one (21) days. BellSouth cannot identify a specific proposed agency action. As such, BellSouth cannot state a cause of action pursuant to this rule. As such, BellSouth's reliance on this rule as the basis for its expedited petition 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's expedited petition, again, **fails** to meet this burden. 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. As such, BellSouth's reliance on this rule as the basis

for its expedited petition is legally improper. Accordingly, BellSouth's petition must be dismissed for its failure to state a cause of action pursuant to the cited 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 petition 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. – pursuant to Rule 25-22.029 - 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 petition. As already noted earlier herein, the *Specific Authority* cited by the Commission immediately following Rule 25-22.036, F.A.C., are the exact two statutory citations which follow Rule 25-22.029, F.A.C.: ss. 350.01(7) and 350.127(2).

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 petition. BellSouth has not alleged, nor can it allege, that its petition addresses some "proposed agency action" taken by the Commission. As such, BellSouth's reliance on this rule as the basis for its petition is, like the foregoing rule, 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 ss. 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. As such, BellSouth's reliance on this rule as the basis for its petition, like the rule before, is legally improper. Accordingly, BellSouth's petition 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 some proposed agency action within the past twenty-one (21) days. The language expressly includes the reference that the parties "shall" be "notified of any order, including a final order" and each "notice shall inform the recipient of any administrative hearing . . ." BellSouth in its petition does not allege, nor can it allege, that its petition is addressing some proposed agency action taken by the Commission within the past twenty-one (21) days. Again, this is further support for the proposition that it is legally improper for BellSouth to cite to Rule 25-22.036, F.A.C., as a basis for filing its petition.

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.

Accordingly, BellSouth's petition fails to state a cause of action in accordance with the legal requirements of Rule 25-22.036, F.A.C., and must therefore be dismissed as untimely.

For these reasons, Supra respectfully moves that this Commission dismiss BellSouth's petition for (1) lack of subject matter jurisdiction and (2) failure to state a cause of action.

Respectfully submitted this 28th day of June, 2002.

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