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ORIGINAL

July 8, 2002

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

Dear Mrs. Bayo:

RE: Docket No. 001305-TP
Supra's Motion to Stay Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP Pending Appeal Pursuant to Rule 25-22.061, Florida Administrative Code

Enclosed is the original copy of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion to Stay Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP Pending Appeal Pursuant to Rule 25-22.061, Florida Administrative Code. Supra claims confidential treatment of portions of the Motion and Exhibit B 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. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Brian Chaiken/AHS

MK 2.5.03 See DN 01218-03

Brian Chaiken
General Counsel

DECLASSIFIED CONFIDENTIAL

This notice of intent was filed in a docketed matter by or on behalf of a "telco" for *Confidential* DN 06983-02. The confidential material is in locked storage pending staff advice on handling.

DOCUMENT NUMBER-DATE
06983 JUL-8 02
FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery or by Federal Express Mail on this 8th day of July, 2002, to the following

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Florida Public Service Commission
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By: Brian Chaiken/atts
BRIAN CHAIKEN, ESQ.

009191

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.	)	Docket No. 001305-TP Filed: July 8, 2002

SUPRA'S MOTION TO STAY COMMISSION ORDER NOS. PSC-02-0413-FOF-TP AND PSC-02-0878-FOF-TP PENDING APPEAL PURSUANT TO RULE 25-22.061, FLORIDA ADMINISTRATIVE CODE

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel and pursuant to Rule 25-22.061(2), Florida Administrative Code, hereby files this its motion to stay the final orders previously entered in this docket, namely Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP, and in support thereof states as follows:

I. BRIEF INTRODUCTION

Supra is seeking review of Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP before the Florida Supreme Court. Pending the appeal in the Florida Supreme Court, Supra seeks a stay of Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP, on the following grounds:

a. Likelihood of prevailing on appeal.

b. Likelihood of Irreparable harm.

c. Delay will not cause substantial harm or be contrary to public interest.

II. BACKGROUND

1. On October 5, 1999, Supra adopted the Interconnection Agreement ("Current Agreement") entered into by BellSouth and AT&T of the Southern States, such Current

Agreement having been approved by the Commission. The Current Agreement also was reviewed by the United States Federal District Court for the Northern District of Florida for compliance with federal law, and found to be in such compliance. The Current Agreement provides for the term of the agreement, a termination date, and a process for the negotiations of a "Follow-On Agreement." The Current Agreement also includes an **"evergreen"** clause, which provides that "[u]ntil [a] Follow-on Agreement becomes effective, BellSouth shall provide Services and Elements pursuant to the terms, conditions and prices of this Agreement that are then in effect." Interconnection Agreement, GTC, § 2.3.

2. The basis for the review to be sought in the Florida Supreme Court involves issues regarding state law, including grounds that Supra's procedural due process rights were violated in Docket No. 001305-TP. Supra is also seeking review of Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP before the United States District Court for the Northern District of Florida, for compliance with federal law, including the Telecommunications Act of 1996 and federal due process.

3. On August 9, 2000, BellSouth filed a complaint with the Commission seeking to resolve a billing dispute with Supra. The Commission docket number assigned to this complaint was 001097-TP.

4. Shortly thereafter, on September 1, 2000, BellSouth filed a second complaint with the Commission seeking to arbitrate certain issues in a Follow-On Agreement between the parties pursuant to 47 U.S.C. § 252(b). The Commission docket number assigned to this second complaint was 001305-TP.

5. On May 2, 2001, on the eve of the evidentiary hearing in Docket No. 001097-TP, Kim Logue (the Commission's Supervisor for Carrier Services) improperly provided Nancy Sims (BellSouth's Director of Regulatory Affairs) with cross-examination questions to be asked of both BellSouth and Supra witnesses at the next day's evidentiary hearing. Supra was neither advised of this incident at the time, nor was consulted about these questions. In fact, Supra was not advised of this incident until five (5) months later, after the two evidentiary hearings on both pending matters, Docket Nos. 001097-TP and 001305-TP, had taken place.

6. On July 31, 2001, the Commission, by unanimous vote, entered a final order in Docket No. 001097-TP, which denied Supra any credits. On August 18, 2001, Supra filed a motion for reconsideration of the final order previously entered on July 31, 2001 in Docket No. 001097-TP. On September 20, 2001, the Staff filed a recommendation denying Supra's Motion for Reconsidertaion.

7. On August 20, 2001, a confidential source informed Beth Salak (the Commission's Assistant Director, Division of Competitive Markets and Enforcement), that Kim Logue had sent cross-examination questions to BellSouth.

8. On August 20, 2001, a meeting of the Division of Competitive Markets and Enforcement was called to discuss ethics in dealing with regulated companies.

9. Beth Salak informed Walter D'Haeseleer (the Commission's Division Director of Competitive Markets and Enforcement) and Sally Simmons (the Commission's Bureau Chief, Market Development) of Kim Logue's actions.

10. Walter D'Haeseleer informed Mary Bane (Deputy Executive Director of the Commission) of Kim Logue's actions.

11. D'Haeseleer wished to handle the situation "**internally.**" Inspector General John Grayson's personal notes state: "Walter/Beth > **minimize damage.**"

12. Prior to September 6, 2001, Mary Bane asked Salak to conduct a search of Logue's computer e-mails going back to November 2000.

13. Salak made her initial request for a CD-ROM of Logue's e-mails on September 6, 2001, from Karen Dockham (the Commission's Systems Project Administrator). On September 12, 2001,[1] Karen Dockham provided Salak with the CD-ROM.

14. On September 20, 2001, the Commission's telecommunications and legal Staff filed a recommendation in Docket No. 001097-TP, which recommended a denial of Supra's motion for reconsideration.

15. On September 20, 2001, Dockham provided Salak a second CD-ROM containing more Logue e-mails.

16. On or before September 21, 2001, Mary Bane had a "**conversation**" with Marshal Criser (BellSouth, Vice-President Regulatory Affairs) regarding Kim Logue's actions in sending cross-examination questions to BellSouth.

17. On Friday, September 21, 2001, a meeting took place between Mary Bane (Deputy Executive Director), Walter D'Haeseleer (Division Director, Competitive Markets and Enforcement), Beth Salak (Assistant Director, Division of Competitive Markets and Enforcement) and Sally Simmons (Bureau Chief, Market Development) –

[1] The 5:39 pm e-mail on May 2, 2001, is contained in this first CD-ROM; this CD also contains the other transmissions between Logue and Sims that Supra was never told about.

these individuals discussed (a) "how to handle the situation"[2] and (b) what to do about Kim Logue.[3]

19. There is a large volume of e-mails demonstrating that Logue continued to act in the same supervisory capacity as she had been on all her dockets – including Docket No. 001305-TP - despite the September 21, 2001, meeting taking place.

20. The decision to allow Logue to continue to act in the same capacity in all of her dockets – including Docket No. 001305-TP – is in stark contrast to the public comments of John Grayson, Commission Inspector General. John Grayson was quoted by the South Florida Business Journal, on June 7, 2002, as stating the following:

> "**For a while** it was a mistake that happened – no damage was done, it was going to be **handled internally**," Grayson recalled Simmons saying [during her interview]. "**After that [Sept. 21st] meeting**, it appears there was a **heightened level of importance**, which is what she [Simmons] is telling me." (Bold and underline added for emphasis).

21. Despite this admitted "heightened level of importance" felt by the participants in the September 21, 2001, meeting, Logue would not be reassigned or removed from any of her responsibilities – including Docket No. 001305-TP. More importantly, Supra would not be notified of Logue's actions until October 5, 2001.

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[2] D'Haeseleer's and Salak's admitted to John Grayson that they wished to handle Logue's actions "internally" and with the goal to "minimize damage." The idea of notifying Supra *prior* to the evidentiary hearing in Docket No. 001305-TP scheduled for the following week was rejected. Supra would not be notified of Logue's actions for another fourteen (14) days.

[3] E-mail communications from Sally Simmons to Kim Logue on October 18, 2001, demonstrate that Logue was expected to resign if her active duty orders were not submitted to the Commission by October 10, 2001. Simmons writes: "**On 10/10**, we did receive your orders, which covered a period of two weeks. I know you indicated that the orders would be coming in two parts. **Walter advised** me to hold your **letter of resignation and the copies** until we receive your second orders. **We are otherwise proceeding according to plan**." *See also* e-mail sent on On October 29, 2001, at 3:24 pm, from Simmons to Logue: "Thanks for the fax and your explanation re. 10/26, 10/29, and 10/30 (my oversignht). **Your letter and copies** went out in this afternoon's mail, to your parent's address."

22. Commissioner Jaber in Order No. PSC-02-0773-PCO-TP, argued that: "the events of September 11, 2001 removed this employee [Logue] entirely from the PSC sphere." The totality of the voluminous amounts of e-mails later obtained by Supra via its public records requests demonstrate by any reasonable standard that Kim Logue was **not** "removed entirely from the PSC sphere."

23. On September 21, 2001, Bane, D'Haeseleer, Salak and Simmons, all had actual knowledge (1) that Logue had not been called to active duty, (2) that Logue might not be called to active duty anytime soon, (3) that Logue had provided BellSouth with cross-examination questions, and (4) that Marshall Criser, III (BellSouth's Vice-President for Regulatory Affairs) had discussed Logue's actions with Bane.

24. On September 26 - 27, 2001, the Commission held an evidentiary hearing in Docket No. 001305-TP.

25. On the morning of October 5, 2001, Harold McLean sent an e-mail to Mary Bane at approximately 9:29 am – which Bane opened at 9:43 am - attaching a "draft" of the letter McLean intended on sending to Supra that afternoon. In this "draft," there is no mention of "when" Logue's actions were first discovered – despite Bane's actual knowledge that Logue's actions were uncovered well in advance of the evidentiary hearing in Docket No. 001305-TP.

26. At approximately 4:37 pm, on October 5, 2001, Harold McLean sent his "official" letter to Supra regarding Logue's actions, via facsimile. The final version of the McLean's October 5, 2001 letter makes no mention of "when" Logue's actions were uncovered.

27. On October 29, 2001, over one month after the evidentiary hearing in Docket 001305-TP, the Commission's lead staff attorney, Wayne Knight, initiated a communication with BellSouth's legal counsel, Mr. Twomey, for the purpose of informing Mr. Twomey that BellSouth had **failed** to meet a substantive deadline by failing to include a position for Issue B in its Post-Hearing Brief in this Docket. BellSouth's omission was significant. Issue B was one of Supra's most important issues in this Docket because it dealt with whether BellSouth's standard agreement or the AT&T/BellSouth agreement was the starting point for all revisions.

28. On February 18, 2002, Supra filed in this Docket a motion seeking a new hearing based upon the fact that Ms. Logue was the Commission Staff supervisor responsible for Docket No. 001305-TP and that her actions as well as BellSouth's decision to remain silent about Logue's actions created an appearance of impropriety in Docket No. 001305-TP. At the time Supra filed its Motion, Supra was still unaware that all of Logue's superiors had actual knowledge of her wrongdoing well in advance of the evidentiary hearing in Docket No. 001305-TP.

29. Supra filed three separate motions for Recusal and Disqualification on April 17, 2002; April 26, 2002; and June 5, 2002. The motion for recusal involved two Commissioners and the motion for disqualification involved the Commission staff.

III. MEMORANDUM OF LAW

STAY REQUEST UNDER RULE 25-22.061, FLA. ADMIN. CODE

30. Supra seeks a stay of Order Nos. PSC-02-0413-FOF-TP (issued on March 26, 2002) and PSC-02-0878-FOF-TP (issued on July 1, 2002), pending judicial review in accordance with Rule 25-22.061(2), *Florida Administrative Code.* In determining whether to grant a stay under Rule 25-22.061(2), the Commission may consider the

following: **(a)** whether the petitioner is likely to prevail on appeal; **(b)** whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and **(c)** whether the delay will cause substantial harm or be contrary to the public interest. See Rule 25-22.061(2). Additionally, the Commission may condition a stay upon the posting of a corporate bond or corporate undertaking, or both. Id.

i. Likelihood of Prevailing on Appeal

31. Supra will be seeking review of this Commission Order before the Florida Supreme Court and believes that this Commission's Orders denying Supra's request for a new hearing based upon violations of Supra's procedural due process rights as well as this Commission's other Orders denying Recusal and Disqualification will be reversed.

32. Supra believes that it will prevail on the appeal with respect to a new hearing on the issue of violations of Supra's procedural due process rights.

33. The undisputed facts demonstrate that Senior Management of the Commission had actual knowledge of Logue's actions in advance of the evidentiary hearing in Docket No. 001305-TP and concealed this information from Supra. Quasi-judicial bodies have a duty to safeguard against violation of procedural due process. The United States Supreme Court has stated that: "A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision maker **constitutionally unacceptable** but our system of law has always endeavored to prevent even the probability of unfairness." *Hithrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). (Emphasis added).

34. Florida has a plethora of case law also providing that a fair trial in a fair tribunal is a basic requirement of due process. *See Rucker v. City of Ocala*, 684 So.2d

836, 841 (1st DCA 1996) (It is well established that "[i]t is fundamental that the constitutional guarantee of [procedural] due process, . . . extends to every proceeding," also for an administrative hearing "[t]o qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive"). Administrative agencies sitting in a quasi-judicial capacity have a duty not to "shut its eyes to constitutional issues that arise in the course of administrative proceedings it conducts." *Communications Workers of America, Local 3170 v. City of Gainesville,* 697 So.2d 167, 169 (1st DCA 1997). The "notion that the constitution stops at the boundary of an administrative agency's jurisdiction does not bear scrutiny." *Id. See* also *Jennings v. Dade County* 589 So. 2d 1337, 1340, (3d DCA 1991) ("Certain standards of basic fairness must be adhered to in order to afford due process"); *See also Miami-Dade County v. Reyes*, 772 So.2d 24, 29 (3d DCA 2000) ("Due process envisions a law that hears before its condemns, proceeds upon inquiry, and renders a judgment only after proper consideration of issues advanced by adversarial parties") (Emphasis added).

35. Supra also believes that it will prevail on the appeal of the recusal orders. If the Court determines, based upon a review of the record before the agency, that the Motions for Disqualification were legally sufficient, the Court will declare that the Commission was disqualified from hearing any matters in Docket 001305-TP.

36. Supra filed its motions to disqualify on April 17, 2002; April 26, 2002; and June 5, 2002. The only issue for the Commission's determination with respect to Recusal and Disqualification was whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair or impartial hearing. *See* Rogers v. State, 630 So.2d 513, 515-16 (Fla. 1993).

37. On June 7, 2002, Chairman Jaber and Commissioner Palecki issued orders declining to recuse themselves from this docket. The problem with the two Commission Orders is that the Commissioners attempt to dispute the factual allegations of Supra's motion. This Commission was under a duty to accept the allegations as true and to view the allegations from Supra's perspective. *See* Rogers, 630 So.2d at 515, and Smith v. Santa Rosa Island Auth., 729 So.2d 944, 946-47 (Fla. 1st DCA 1998) (where the court writes: "It is not a question of how the judge feels; it is a question of what feelings resides in the movant's mind, and the basis of such feelings."). Florida law is well settled that the facts in a motion for disqualification must be taken as true. See MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978) (noting that "a judge who is presented with a motion for his disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.'"). **The mere fact that the Commissioners comment upon or attempt to refute Supra's allegations of fact, is sufficient in itself to support disqualification**.

38. As a matter of procedure, the Commission was required to address and resolve Supra's motions for disqualification prior to ruling on any other substantive matters. The Commissioners, who adjudicate issues in administrative proceedings much like a judge would in a trial, should not wait to decide motions for recusal, but rather must rule upon them immediately. See Fuster-Escalona v. Wisotsky, 781 So. 2d. 1063 (Fla. 2000)(trial judge must rule upon motion for recusal immediately and with dispatch); Stimpson Computing Scale Co.,Inc. v. Knuck, 508 So.2d. 482 (Fla. 3d DCA 1987) (a judge faced with a motion for recusal should first resolve that motion before making additional rulings in a case).

39. In Loevinger v. Northrup, 624 So. 2d. 374, 375 (Fla. 1st DCA 1993), the Court reiterated the long-standing rule that "[a] judge faced with a motion for recusal should first resolve that motion before making any other rulings in a case." In Loevinger, Judge Davey of the Second Judicial Circuit ruled upon a motion to disqualify one of the party's attorneys prior to ruling on the defendant's motion to disqualify the judge. Judge Davey received and ruled upon the motion to disqualify counsel before he received the motion for his own disqualification, despite the fact that the motion for disqualification was filed with the clerk's office first. The Court explained that once the motion to disqualify Judge Davey was filed with the clerk, the Judge was without authority to rule on any other pending matters, even though he was not personally aware of the motion seeking his disqualification. Id.

40. Similarly, the Commission was without authority to rule on any other pending matters once the motions for disqualification were filed on April 17, 2002. Despite this, the Commission issued Order PSC-02-637-PCO-TP on May 8, 2002; and Orders PSC-02-700-PCO-TP, PSC-02-701-PCO-TP, and PSC-02-702-PCO-TP on May 23, 2002. Accordingly, Supra is very likely to prevail on appeal.

ii. Likelihood of Irreparable Harm

41. On October 5, 1999, Supra adopted the Interconnection Agreement ("Current Agreement") entered into by BellSouth and AT&T of the Southern States, such Current Agreement having been approved by the Commission. The Current Agreement includes an **"evergreen"** clause, which provides that "[u]ntil [a] Follow-on Agreement becomes effective, BellSouth shall provide Services and Elements pursuant to the terms,

conditions and prices of this Agreement that are then in effect." Interconnection Agreement, GTC, § 2.3.

42. The evergreen provision governs the terms and conditions of the parties' business relationship until the Follow-On Agreement is approved by this Commission. Once a new hearing is ordered, BellSouth will argue that the prior agreement has completely expired and the parties at best can only operate under the new Follow-On Agreement while a new hearing is arbitrated. In order to maintain the status quo and the most equitable position for the parties, it is necessary to require the parties to continue to operate under the evergreen provision of the current agreement until the Supreme Court decides whether a new hearing is warranted.

43. The evergreen language is contained in a contract negotiated by BellSouth at arms length. This provision allows the parties to continue to operate under the status quo until the issue of a new hearing is resolved. BellSouth is not prejudiced by temporarily continuing to operate under a provision freely negotiated by the company itself.

44. The parties' interconnection agreement governs the highly complex way in which the parties interconnect and conduct business. If the Florida Supreme Court finds that a new hearing is warranted, then the parties can continue to operate under the current agreement pursuant to the "evergreen" provision. The status quo can be maintained while the parties conduct another evidentiary process. The interconnection agreement arbitrated in the new evidentiary process can then be implemented seamlessly.

45. It is incalculable how a Follow-On Agreement that is the product of a fair and impartial process will differ from the present Follow-On Agreement ordered by the Commission in Docket No. 001305-TP.

46. Forcing Supra into the present Follow-On Agreement with the prospect that the Florida Supreme Court will likely order a new hearing, places Supra in an untenable position. No amount of money damages could adequately compensate Supra since the extent of such damage inflicted by this Commission – in forcing Supra to operate under a new agreement that the Supreme Court found is the product of an unfair and biased process - would be impossible to measure accurately. See Spiegel v. City of Houston, 636 F.2d 997 (5th Circuit 1981) (where the possibility of customers being permanently discouraged from patronizing one's business equated to a substantial threat of harm that could not be undone through monetary remedies); Tally-Ho, Inc., v. Coast Community College District, 889 F.2d 1018 (11th Cir. 1990) (injury to a business' reputation and revenues equated to irreparable injury).

47. For example, unlike the new Follow-On Agreement, the Current Agreement requires BellSouth to provide Supra direct access to its Operational Support Systems (OSS).[4] This requirement was based upon the finding made by a panel of independent Commercial Arbitrators on June 5, 2001, pursuant to the dispute resolution process contained in the parties' Current Agreement. It is the electronic OSS which allows a telephone company to order and provision services to customers. If one company is able to provision services in a more timely fashion than another company, such is a competitive advantage.

[4] While the 1996 Federal Telecommunications Act ("FTA") does not mandate direct access to BellSouth's OSS, the FTA, also, does **not** prohibit Incumbent Local Exchange Companies ("ILEC") from agreeing to provide direct access to its OSS. Likewise, nothing in the FTA prohibits a state utilities commission from ordering direct access to an ILEC's OSS. Allowing competitive carriers direct access to the **same** electronic OSS that BellSouth's own retail division utilizes is the **only true way** to implement the spirit of the 1996 FTA – anything less is to leave a competitive advantage in the hands of the former monopoly.

48. The Order of the Commercial Arbitrators was affirmed in Federal Court on October 31, 2001 in the Southern District of Florida in Civil Action No. 01-3365-CIV-KING. The proceedings before the Southern District were conducted under seal with the exception of the Court's October 31, 2001 Order. In this publicly filed Order, Judge King wrote the following with respect to Supra's right to direct access to BellSouth's OSS:

> "Defendant BellSouth challenges the portion of the arbitration award in which the Arbitral Tribunal ordered BellSouth to provide Supra with non-discriminatory **direct access** to its **Operational Support System ("OSS")** and **to cooperate with and facilitate Supra's ordering of services** by no later than **June 15, 2001**. The Arbitral Tribunal found that **BellSouth did not provide Supra with OSS that is equal to or better than the OSS BellSouth provides to itself or customers in non-compliance with its contractual obligations**." (Emphasis added). *See* Oct. 31st Order attached hereto as Exhibit A.

49. As Judge King noted, BellSouth was ordered to provide Supra direct access to its OSS no later than June 15, 2001. Despite this explicit Order, as of this writing, BellSouth has refused to allow Supra direct access to its OSS. It is incalculable the number of customers Supra has lost and will continue to lose, because of BellSouth's intentional and willful refusal to allow direct access to the same OSS utilized by BellSouth's retail division for provisioning service to customers. Moreover, Supra's nearly four hundred thousand Florida customers are denied the same level of customer service and satisfaction as BellSouth's customers.

51. BellSouth is now racing to implement the new Follow-On Agreement – which is the product of the unfair and biased hearing process – to avoid implementing what was previously ordered.

50. If a new hearing is ordered, the most equitable position in which to leave the parties would be the present status quo: the present way in which the parties conduct business.

51. Another provision in the Current Agreement that the parties continue to operate under requires BellSouth to provide Supra with meet point billing in the UNE-combination environment. This provision allows Supra to bill third parties for access revenues. The new Follow-On Agreement does not contain this same provision. If the status quo is not maintained, upon the ordering of a new hearing, Supra will be denied millions of dollars that it otherwise would have been permitted to bill for under the Current Agreement.

52. Another provision in the Current Agreement that the parties continue to operate under prohibits BellSouth from disconnecting the services to Supra's nearly four hundred thousand Florida customers during a pending billing dispute. The new Follow-On Agreement does not contain this same provision. Under BellSouth's reading of the new agreement, BellSouth is allowed to disconnect the public's telecommunications service if Supra does not pay disputed bills. BellSouth's reading of the new agreement, would also allow BellSouth to disconnect the public's telecommunications service even while BellSouth, itself, refuses – as it has done for the past two years - to provide Supra with essential billing data. It must also be noted that the current dispute resolution process was the product of "negotiation" by BellSouth. These new contract provisions are a product of an arbitration process at the Florida Public Service Commission. It is incalculable the number of customers Supra will lose as a result of BellSouth's newly conferred power to unilaterally disconnect services. See Spiegel v. City of Houston, 636

F.2d 997 (5th Circuit 1981) (where the possibility of customers being permanently discouraged from patronizing one's business equated to a substantial threat of harm that could not be undone through monetary remedies); Tally-Ho, Inc., v. Coast Community College District, 889 F.2d 1018 (11th Cir. 1990) (injury to a business' reputation and revenues equated to irreparable injury). The above noted circumstances describe precisely the type of irreparable harm a stay is designed to protect against, as defined by the standards set forth in the case law noted herein.

53. If a stay is not granted and the status quo is **not** maintained while the parties arbitrate a new interconnection agreement, BellSouth will be permitted to renew, once again, its anti-competitive efforts against Supra and its customers.

54. On June 5, 2001, an independent panel of three (3) Commercial Arbitrators made the following findings:

> "The evidence shows that BellSouth breached the Interconnection Agreement in material ways and did so with the **tortious intent to harm Supra**, an upstart and litigious competitor. **The evidence of such tortious intent was extensive**, including BellSouth's **deliberate delay and lack of cooperation** regarding UNE Combos, switching Attachment 2 to the Interconnection Agreement before it was filed with the FPSC, **denying access to BellSouth's OSS and related databases**, refusals to collocate any Supra equipment, and deliberately cutting-off LENS for three days in May 2000.
>
> . . . . .
>
> **The Tribunal does not make this finding of "tortious intent" lightly**, but the full record belies BellSouth's witnesses' mantra-like testimony that BellSouth's aim was to profit from Supra's success. **BellSouth attempted to give the appearance of cooperating with Supra, while deliberately delaying, obfuscating, and impeding Supra's efforts to compete.**" *See* June 5th Award attached hereto as Exhibit B.

55. As already noted at the outset, the evergreen provision of the Current Agreement between the parties governs the terms and conditions of the parties' business

relationship until the Follow-On Agreement is approved by this Commission. Once a new hearing is ordered BellSouth will argue that the prior agreement has completely expired and the parties at best can only operate under the new Follow-On Agreement while a new hearing is arbitrated. In order to maintain the status quo and the most equitable position for the parties, it is necessary to require the parties to continue to operate under the evergreen provision of the current agreement until the Supreme Court decides whether a new hearing is warranted.

iii. A Stay Will Not Cause Substantial Harm or Be Contrary to Public Interest

56. Staying this Commission's Order will not cause substantial harm to either Supra or BellSouth or be contrary to public interest. There simply is no harm to the public should the status quo be maintained.

57. Section 112.311(6), Florida Statutes, reads that public officials "are bound to observe, in their official acts, the highest standards of ethics . . . regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern." Consistent with this express legislative duty, requiring the parties to continue to operate under the status quo – pursuant to a contract freely negotiated by BellSouth - while the Supreme Court decides if a new hearing is warranted can only be characterized as an act which demonstrates that promoting the public interest and maintaining the respect of the people in their government is of the foremost concern of this Public Service Commission.

iv. A Bond Is Not Required

58. Because the orders do not award any monies to a party or otherwise require certain monies to be paid or refunded to a party, there is no need for a security bond.

59. For all the above reasons discussed herein, Supra requests that the Commission stay Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP.

WHEREFORE, Supra respectfully requests the following:

A. The Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP be stayed.

B. For all such further relief as is deemed equitable and just.

RESPECTFULLY submitted this 8th day of July, 2002.

SUPRA TELECOMMUNICATIONS &
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Brian Chaiken/ATS
BRIAN CHAIKEN, ESQ.

Exhibit - B

BEFORE THE CPR INSTITUTE FOR DISPUTE RESOLUTION ARBITRAL TRIBUNAL

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Claimant,

v. Arbitration I

BELLSOUTH
TELECOMMUNICATIONS INC.,

Respondent.

****

BELLSOUTH
TELECOMMUNICATIONS INC.,

Claimant and
Counterclaim Respondent,

v. Arbitration II

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.,

Respondent and
Counterclaimant.

AWARD OF THE TRIBUNAL IN CONSOLIDATED ARBITRATIONS

ARBITRAL TRIBUNAL

M. SCOTT DONAHEY
JOHN L. ESTES
CAMPBELL KILLEFER

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AWARD OF THE TRIBUNAL IN CONSOLIDATED ARBITRATIONS

I. Introduction

This Award resolves two arbitration proceedings arising out of and relating to the Interconnection Agreement between Supra Telecommunications & Information Systems, Inc. ("Supra") and BellSouth Telecommunications, Inc. ("BellSouth") effective on October 5, 1999. In accordance with the dispute resolution provisions of the Interconnection Agreement, Supra and BellSouth appointed three neutral arbitrators to decide various disputes: M. Scott Donahey of the law firm Tomlinson Zisko Morosoli & Maser LLP; John L. Estes of the law firm Locke Liddell & Sapp; and Campbell Killefer of the law firm Venable, Baetjer, Howard & Civiletti, LLP. The three arbitrators designated Mr. Donahey to serve as chairman.

This award begins with a summary of the procedural history of the two arbitration proceedings. The award then provides a description of the legal authorities that govern the arbitration proceedings, including the Telecommunications Act of 1996, relevant federal court decisions, and rulings by the Federal Communications Commission ("FCC") and Florida Public Service Commission ("FPSC"). A short description of the relationship between Supra and BellSouth before the effective date of the Interconnection Agreement is provided to give context to the discussion of the arbitration issues. The majority of this award covers the many claims and counterclaims between Supra and BellSouth in the two arbitrations and then concludes with a discussion of damages and other relief.

II. Procedural History

This section summarizes the procedural history of the two arbitrations, including descriptions of rulings by the Tribunal that governed both arbitrations. Some rulings also may govern possible future disputes between Supra and BellSouth (e.g., whether

consequential damages may be recovered under the Interconnection Agreement). Both Supra and BellSouth vigorously litigated the many issues between them, which led to many discovery rulings by the Tribunal as well as legal rulings on various provisions of the Interconnection Agreement. The arbitrations were conducted under the Rules for Non-Administered Arbitration of the CPR Institute for Dispute Resolution.

A. Arbitration I

Supra initiated the first arbitration with its Notice of Arbitration and Complaint served on October 25, 2000. Supra's Complaint argued that the disputes between the parties were "disputes affecting service" within the meaning of Section 9.1 of Attachment 1 – Alternative Dispute Resolution – to the Interconnection Agreement and therefore must be resolved on an even more expedited basis than a "normal" dispute, which must be decided within 90 days of the filing of the Complaint. After the parties served legal memoranda and a conference call for oral argument was conducted, the Tribunal unanimously ruled by Order dated November 16, 2000 (attached hereto as Annex A and incorporated herein by reference), that Supra had failed to carry its burden to show that its claims were "disputes affecting service" and the arbitration would therefore proceed on a normal schedule. Then BellSouth timely filed its Answer to Supra's Complaint.

The Tribunal set a schedule for written discovery, depositions and the filing of direct and rebuttal testimony in advance of the arbitration hearing. The hearing in Arbitration I was originally scheduled to occur on January 18-20 and 22-23, 2001. By agreement of both parties to waive the 90-day decision requirement under the Interconnection Agreement (*see,* Revised Memorandum Re: Scheduling dated January 17, 2001, at 2, ¶1, attached hereto as Annex B and incorporated herein by reference), the dates for the hearing were extended several times. The first extension of the hearing schedule was in connection with Supra's motion for leave to file an amended complaint

to add a claim expressly asserting a contractual breach concerning BellSouth's providing nondiscriminatory access to its Operational Support Systems ("OSS") for Supra's pre-ordering and ordering of telecommunications services from BellSouth. Supra's motion was granted and Supra duly served its Amended Complaint and BellSouth served its Answer.

The parties presented many discovery disputes to the Tribunal, which were briefed by the parties and ruled upon after conference calls for oral argument. One major discovery dispute related to Supra's request to conduct a videotape deposition of knowledgeable BellSouth witnesses while operating the OSS and related databases. A simulated demonstration was conducted at the suggestion of the Tribunal to settle the discovery dispute without intruding in the BellSouth OSS and databases operating in a production environment. The Tribunal understands that the demonstration by BellSouth and for the benefit of Supra included the OSS, various electronic interfaces to databases, and related functionality.

A major legal issue decided before the hearing in Arbitration I was whether Supra could recover consequential damages, including alleged future lost profits, under the Interconnection Agreement. BellSouth served a motion to strike Supra's demand for consequential damages. The parties were directed to serve simultaneous opening and reply memoranda on the issue. In preparation for a conference call on the damages issue, Arbitrator Killefer prepared and served a four-page legal memorandum on the damages issues on February 14 to help focus the paries' arguments. The conference call was conducted as scheduled on February 19, 2001.

The Tribunal unanimously ruled on February 21, 2001, that consequential damages are recoverable under the Interconnection Agreement if a party can prove that a contractual breach is "willful or intentional misconduct," i.e., with tortious intent to harm

the other party (the Order Re: Damages, dated February 21, 2001, is attached hereto as Annex C and is incorporated herein by reference). BellSouth served a Motion for Reconsideration and for Preservation of Error on March 2 , 2001. The parties were directed to file simultaneous briefs on the issue and a conference call for oral argument was conducted on March 13, 2001. The Tribunal unanimously issued a "Clarification of Order re: Damages" on March 15, 2001, that held as follows:

> The Panel concludes that "willful or intentional misconduct" is broad terminology which embraces willful or intentional breach of contract to the extent that it is done with the tortious intent to inflict harm on the other party to the contract. The panel's interpretation of this phrase is supported by judicial authority, including *Metropolitan Life Insurance Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504, 506-508 (N.Y. 1994) and *Wright v. Southern Bell Tel. & Tel. Col., Inc.*, 313 S.E.2d 150 (Ga. App 1984).
>
> Accordingly the Tribunal unanimously finds that **to the extent that Supra can prove that BellSouth intentionally or willfully breached the Agreement at issue in this case with the tortious intent to inflict harm on Supra, at least in part through the means of such breach of contract**, and that as a direct and foreseeable consequence of that breach Supra suffered damages in an amount subject to proof, Supra can recover consequential damages in this action.

March 15 Order at ¶¶ 1-2 (emphasis added). (The Clarification of Order Re: Damages is attached hereto as Annex D and is incorporated herein by reference).

The parties timely filed their respective direct and rebuttal testimony with exhibits as well as Prehearing Statements. Page and line designations of deposition testimony were also served by Supra and BellSouth.

The hearing in Arbitration I was scheduled for six days, but was concluded in four days on April 16-19, 2001, at the Westin Peachtree Plaza Hotel in Atlanta, Georgia. Post-hearing briefs were served by the parties on May 14, 2001.

B. Arbitration II

On January 31, 2001, BellSouth initiated a second arbitration regarding billing and payment disputes under the parties' Interconnection Agreement. On February 20, 2001, Supra timely filed its Notice of Defense and Counterclaim.

On March 12, 2001, BellSouth filed a motion to dismiss Supra's Counterclaim. Supra filed its opposition on March 19, 2001, and BellSouth filed its reply in support of the motion on March 26, 2001. On March 29, 2001, a conference call was held to discuss various issues in Arbitration II, including BellSouth's motion to dismiss Supra's counterclaim.

During the March 29 conference call, the Tribunal ordered that Supra and BellSouth submit legal memoranda on the issue of the Tribunal's jurisdiction to decide certain disputes relating to the parties' Interconnection Agreement in light of ongoing proceedings between Supra and BellSouth in (1) federal district court in Miami, Florida in Case No. 99-1706-CIV-SEITZ, and (2) before the Florida Public Service Commission. Supra and BellSouth timely filed their legal memoranda on April 2, 2001.

On April 5, 2001, the Tribunal unanimously ruled in a seven-page Order that the Tribunal has jurisdiction to decide issues only as expressly authorized by the terms of the Interconnection Agreement and well settled case law under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* The Tribunal was very concerned that Supra and BellSouth notify the Tribunal of any legal proceedings that conflict or overlap with the jurisdiction being exercised by the Tribunal:

> This tribunal is not aware of any such FPSC proceeding relating to post-October 5, 1999 billing disputes, but the parties are ordered immediately to notify this tribunal in writing of such FPSC proceedings if any exist presently or arise in the future. This tribunal will scrupulously avoid exercising jurisdiction that would conflict or overlap with FPSC, federal district court, or other legal proceedings.

April 5 Order, at 5. Accordingly, the Tribunal granted in part and denied in part BellSouth's Motion to Strike Supra's counterclaim in Arbitration II:

> (1) No recovery may be awarded for pre-October 5, 1999 acts or omissions;
> (2) No recovery may be awarded for claims over which the FPSC or any federal district court retains jurisdiction;
> (3) No recovery may be awarded in Arbitration II for those Supra claims that are presented for the Arbitration I hearing on April 16-21, 2001; and
> (4) The parties agree, and the tribunal orders, that lost profits might be recoverable as consequential damages, but "lost revenues" is an improper measure of damages.

April 5 Order, at 6. The Tribunal also ruled that, as the Tribunal had forewarned the parties, "[b]asic fairness suggests that the tribunal's award in Arbitration I either be issued before Arbitration II or be set off against the Arbitration II award if warranted by the evidence." *Id.* (The Order Regarding BellSouth's Motion to Dismiss Supra's Counterclaims and Related Issues, dated April 5, 2001, is attached hereto as Annex E and incorporated herein by reference). In a conference call held on April 10, 2001, the parties agreed to waive the provision in the Interconnection Agreement that requires an award to be issued within 90 days of filing, and agreed that the award in Arbitration II would be issued no later than June 5, 2001. (A copy of a letter dated April 11, 2001, confirming the new agreed schedule is attached hereto as Annex F and incorporated herein by reference).

In advance of the hearing in Arbitration II, the Tribunal ruled on various discovery disputes. Less than a week before the scheduled start of the Arbitration II hearing, on April 26, 2001, the Tribunal conducted a conference call regarding various issues. The Tribunal issued an unanimous order that same day. That order denied Supra's motion to strike the rebuttal damages testimony of BellSouth expert witness Freeman and allowed Supra to file sur-rebuttal damages testimony of Supra expert

witness Wood under specified conditions. The April 26, 2001 Order also ruled that a "reasoned award" as opposed to a "naked award" would be issued in both arbitrations pursuant to the Rules for Non-Administered Arbitrations of the CPR Institute for Dispute Resolution. (A copy of the Order Regarding Supra's Motion to Strike Rebuttal Testimony of Professor Freeman and Other Matters Discussed During April 26 Conference Call is attached hereto as Annex G and is incorporated herein by reference).

The hearing in Arbitration II was scheduled to be conducted over six days. In fact, the hearing concluded in only four days beginning Sunday, April 29, 2001, and finishing Wednesday, May 2, 2001, at the Georgian Terrace Hotel in Atlanta, Georgia. The parties served simultaneous post-hearing memoranda on May 14, 2001. The Tribunal committed to a June 5, 2001 deadline for issuance of an award in both arbitrations.

III. The Radical Revision of Telecommunications Law

In 1996, the United States Congress passed the Telecommunications Act of 1996 (the "1996 Act"), a statute which was intended to revolutionize the telecommunications industry. In its First Report and Order, released August 8, 1996, FCC 96-325, the Federal Communications Commission ("FCC") characterized the sweeping changes heralded by the Act in the following language:

> The Telecommunications Act of 1996 fundamentally changes telecommunications regulation. In the old regulatory regime government encouraged monopolies. In the new regulatory regime, we and the states remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition using tools forged by congress. Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone

> companies from competition, the 1996 Act requires telephone companies to open their networks to competition.

Id., at 7.

The effect of this legislation was to require the existing monopolistic regional telecommunications providers, now known as Incumbent Local Exchange Carriers ("ILECs") to assist would-be competitors to compete against them in the telecommunications marketplace, in part by providing potential competitors with access to the monopolists' equipment and services. The 1996 Act has three principal goals:

> (1) Opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition.

Id.

In its first Report and Order the FCC established numerous rules to promote entry and competition in the telecommunications marketplace. This order was promptly challenged by ILECs and state utility commissions on the grounds that the FCC had exceeded its jurisdiction. These actions were consolidated in the United States Court of Appeals for the Eighth Circuit. That appellate court agreed with those who argued that the primary authority to implement the 1996 Act resided in the individual state commissions, and it vacated the FCC's order. *Iowa Utilities Board v. FCC*, 120 F. 3d 753, 800, 804, 805-806 (8th Cir. 1997). The case was thereafter appealed to the Supreme Court.

In *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 834 (1999), the United States Supreme Court largely reversed the appellate court and remanded the case. While the Supreme Court generally upheld the FCC's rule-

making powers and the rules that the FCC had established in its First Report and Order, the Court was not satisfied that the FCC had properly applied the "necessary and impair" standards in its promulgation of Rule 319.

Section 251(a)(2) of the 1996 Act provides:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the [FCC] shall consider, at a minimum, whether --
>
> (A) Access to such network elements as are proprietary in nature is **necessary**; and
>
> (B) The failure to provide access to such network elements would **impair** the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

Emphasis added. The statutory provision and Rule 319 deal with the obligation of the ILEC to make network elements available to Competitive Local Exchange Carriers ("CLECs").

Ultimately, the FCC set out to comply with the instructions of the United States Supreme Court in the Federal Communications Commission Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, Released November 5, 1999 ("Third Report and Order"). The FCC determined that "without access to unbundled network elements, a [CLEC] may choose not to enter a particular market because the cost and delays associated with deploying its own facilities would be too high given the revenues obtainable from the market and the relative attractiveness of other potential new markets." Third Report and Order, §13 at 8. The FCC defined a "necessary element" as "if, taking into consideration the availability of alternative elements outside the incumbent's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element would, as a practical, economic, and operational matter, **preclude** a requesting

carrier from providing the services it seeks to offer." *Id.*, at 9 (emphasis added). The FCC defined "impairs" as "if, taking into consideration the availability of alternative elements outside the [ILEC's] network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of that element **materially diminishes** a requesting carrier's ability to provide the service it seeks to offer. *Id.*, at 9-10 (emphasis in original).

Applying those definitions, the FCC determined that ILECs must unbundle and make available the following network elements: 1) Loops, including high-capacity, xDSL-capable loops, dark fiber, and inside wire owned by [ILECs]; 2) subloops, or portions thereof; 3) Network Interface Devices ("NIDs"); 4) local circuit switching, except for local circuit switching used to serve end users with 4 or more lines in access density zone 1 in the top 50 Metropolitan Statistical Areas ("MSAs"), provided that ILECs provide non-discriminatory, cost-based access to the enhanced extended link throughout zone 1; 5) Packet Switching, only in the limited circumstances in which ILECs have placed digital loop carrier systems in the feeder section of the loop or have DSLAM in a remote terminal; 6) dedicated interoffice transmission facilities, or transport; 7) signaling links and signaling transfer points; and 8) Operations Support Systems ("OSS"). Id., at 11-13.

Focusing on one key unbundled network element, the ILEC's OSS, the FCC found that "[ILECs] must offer unbundled access to their operations support systems. OSS consists of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an [ILEC's] databases and information. The OSS element includes access to all loop qualification information contained in any of the [ILEC's] databases or other records, including information on whether a particular loop is capable of providing advanced services." *Id.*, at 13. *See, also, id.*, §425 at 189. The FCC

determined that OSS is not proprietary, and therefore it did not have to be analyzed under the "necessary" standard. In performing the "impair" analysis required by the Supreme Court, the FCC concluded that "lack of access to the [ILEC's] OSS impairs the ability of requesting carriers to provide the services they seek to offer." Id., §433 at 192.

IV. Supra's and BellSouth's Relationship Before the October 5, 1999 Effective Date of the Interconnection Agreement

Supra and BellSouth had experienced over two years of dealing with one another by the time they entered into their Agreement effective October 5, 1999, which adopted and incorporated by reference the Agreement between BellSouth and AT&T Communications of the Southern States, Inc. effective on June 10, 1997 ("Interconnection Agreement"). The Tribunal already has ruled that "[n]o recovery may be awarded for pre-October 5, 1999 acts or omissions" in these arbitrations (April 5, 2001 Order, at 6), but a summary of the parties' relationship leading up to the Interconnection Agreement will provide helpful context for the discussion of both liability and damages issues.

As set forth in greater detail in the preceding Section III regarding the "Radical Revision of Telecommunications Law," Supra and BellSouth may have been pre-ordained to suffer an inherently adversarial relationship. In accordance with the 1996 Act and implementing orders of the FCC, BellSouth was forced to allow Supra and other CLECs to lease equipment, facilities and services owned by BellSouth and use those very telecommunications elements to compete against BellSouth. At least in the early stages of the parties' relationship, essentially every new Supra telephone customer was won away from BellSouth, with a resulting decrease in BellSouth's revenues.

BellSouth and other ILECs exercised their legal rights and challenged the 1996 Act and implementing FCC orders. BellSouth won some litigation fights and lost others, most notably being compelled against its wishes to lease unbundled network elements ("UNEs") and UNE combinations ("UNE Combos") by the FCC First Report and Order, the United States Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), and the ensuing FCC Third Report and Order.

Supra's 1997 business plan (Arb. II, Supra Ex. 90) and hearing testimony show that Supra's competitive strategy involved beginning its telecommunications services as a reseller of BellSouth services, which enabled Supra to lease equipment with discounts off BellSouth's retail prices. After establishing a market presence, Supra planned to become what is known as a facilities-based UNE provider, which would enable Supra to lease UNEs and UNE Combos from BellSouth and to collect long distance telephone access and other charges not available to Supra while operating as a reseller of BellSouth services. Supra planned eventually to collocate Supra's own switches in BellSouth central offices and other facilities and offer Digital Subscriber Line ("DSL") and other advanced services. The final competitive stage, once Supra had gained sufficient residential and business customers and perhaps become a "carrier's carrier" -- providing services to other CLECs -- would be for Supra to build its own telecommunications network and expand operations into other states beyond Florida.

Testimony and exhibits in the two arbitration hearings show that Supra's and BellSouth's business relationship started on the wrong foot from the outset. Supra entered into a Resale Agreement with BellSouth effective May 19, 1997, that was executed on a take-it-or-leave-it basis. Mr. Olukayode Ramos, CEO of Supra, became aware of the Interconnection Agreement between AT&T and BellSouth during the summer of 1997. Ramos requested that BellSouth send a copy of the AT&T/BellSouth

Interconnection Agreement for Supra to opt into that agreement. Through miscommunication or by design, Mr. Patrick Finlen of BellSouth sent Ramos a "generic" Interconnection Agreement that did not reflect the terms negotiated by AT&T. Ramos promptly executed the "generic" agreement without the benefit of expert review by a telecommunications lawyer or consultant or of even checking the public files of the FPSC to ensure that Supra actually had the AT&T/BellSouth Agreement.

It is undisputed that, before the executed agreement was filed with the FPSC, Finlen compiled a different version with an Attachment 2 that deleted BellSouth's obligation to provide UNE Combos and a new signature page with mis-aligned paragraphs. It also cannot be disputed that the replaced Attachment 2 in Supra's agreement appeared only days after the Eighth Circuit Court of Appeals had ruled in *AT&T v. Iowa Utilities Board*, 124 F. 3d 934 (8th Cir. 1997) calling into question an ILEC's duty to provide UNE Combos to CLECs such as Supra.

Finlen of BellSouth testified that the replaced pages were an honest mistake and immaterial. Ramos of Supra testified that the switch was deliberate and intended to deprive Supra of the benefits of the "true" AT&T/BellSouth agreement.

In any event, the "switched" agreement episode led to an atmosphere of distrust and adversarial relations that is reflected in the contemporaneous documents submitted as exhibits and in the personal *animus* that was apparent during testimony of some witnesses at the hearings in these two arbitrations. Cathey of BellSouth described the relationship with Supra as "always tempered with suspicion and fear of reprisal." Arb. II, Tr., at 958, lines 16-17. "Of all the relationships, while none [were] completely perfect with the CLECs, not one approaches the awkwardness of the BellSouth/Supra relationship." *Id.* at lines 18-20.

Supra's and BellSouth's adversarial business relationship led to extensive battles in almost every conceivable forum even before these two arbitrations. Supra has pursued enforcement proceedings before the FCC, a variety of proceedings before the FPSC and one before the Georgia Public Service Commission, and antitrust and other claims against BellSouth in federal district court. *Supra Telecommunications & Information Services, Inc. v. BellSouth Telecommunications, Inc.*, No. 99-1706-CIV-SEITZ (S.D. Fla.).

While neither company can be faulted for zealously pursuing its available legal rights, the long running legal battles have contributed to a poisonous business relationship. That unfortunate relationship has contributed to poor communications between the companies and to both companies' adopting some extreme, unreasonable positions in these arbitrations.

V. Liability Issues

A. UNE Provider

Among the many claims between the parties, the most important may be whether Supra requested and BellSouth impeded Supra's operation as a facilities-based provider of UNEs and UNE Combos. Supra clearly stated its intent to order UNEs and UNE Combos as early as September 1997 and continuing to the present. Arb. II, Supra Ex. 96, 29, 32. Based on the 8th Circuit's 1997 decision in *Iowa Utilities Board*, BellSouth initially took the position that Supra was not entitled to order UNE Combos (Arb. II, BellSouth Ex. 30, 31, 34) despite the clear provisions to the contrary in General Terms and Conditions ("GTC") Sections 1, 1A, 1.1, 1.2, 29, and 30, and Attachment 2 to the Interconnection Agreement.

The United States Supreme Court reversed the Eighth Circuit, making clear as an FCC regulatory matter that CLECs such as Supra could order UNEs and UNE Combos. BellSouth then changed its position to argue that, although Supra **could** order UNEs and

UNE Combos, Supra had failed properly to request UNEs and UNE Combos. BellSouth maintained that position through testimony of its employees Finlen and Cathey at the second arbitration hearing.

The Tribunal finds that BellSouth failed for well over a year to provide Supra with the necessary instructions and information to order UNEs and UNE Combos using the Local Exchange Navigation System ("LENS") interface to BellSouth's ordering systems. In late 1999 and early 2000, BellSouth considered the UNEs and UNE Combos available to Supra to be "obsolete" because the Interconnection Agreement was due to expire at the end of its three-year term in June 2000. Arb. II, Tr., at 967, lines 18-25. AT&T had negotiated a separate so-called "UNE-P" agreement covering different UNEs and UNE combinations and different prices and BellSouth was focusing its marketing and service resources on the UNE-P marketplace. Arb. II, Tr., p. 968, lines 2-23.

BellSouth's ordering "profile" for Supra did not recognize a UNE-provider order for UNEs and UNE Combos under the Interconnection Agreement. There were no BellSouth written procedures in early 2000 for Supra to submit UNEs and UNE Combo orders through LENS. Arb. II, Tr., at p. 963, lines 13-19. After repeated requests from Supra, BellSouth processed four "test" orders for UNEs that were typed by BellSouth "directly into the system. There was no mechanical way we could determine for them to do that." Arb. II, Tr., p. 964, lines 21-23. Even the BellSouth team worked 5-6 days to complete the test orders. Arb. II, Tr., p. 983, lines 15-17.

Neither Cathey nor other BellSouth witnesses could satisfactorily answer the Tribunal's inquiry "[w]hy is it that when the AT&T interconnection agreement had an effective date of 1997, procedures had not been written by early 2000 to allow the ordering of UNE Combos?" Arb. II, Tr., p. 966, lines 3-6. In addition, BellSouth dragged its feet in providing Universal Service Ordering Code ("USOC") numbers for

ordering UNEs and UNE Combos. Arb. II, Supra Ex. 49 and 50. In fact, it took until October 2000 for Supra to be able to order a UNE successfully, and that was essentially by accident. An order to switch a customer "as is" to Supra was successfully processed electronically rather than manually because the customer was switched from IDS, another CLEC. Arb. II, Tr., p. 987, lines 6-19.

Cathey of BellSouth conceded at the second arbitration hearing, as he must, that "[j]ust because we don't have a particular procedure doesn't mean we don't have an obligation to help and assist a customer getting an order placed." Arb. II, Tr., p. 969, lines 11-13. Supra was far from perfect in the documentation of its inability to submit Local Service Requests ("LSRs") to order UNEs and UNE Combos electronically. But BellSouth took too long in responding to Supra's requests for assistance, rarely provided critical information or practical assistance, and repeatedly fell back on advice that would **not** work -- to wit, that Supra must submit a LSR.

BellSouth knew internally that a LSR from Supra would **not** work in summer 2000 because BellSouth "had no idea of how long it would take to get the USOC codes and I had no idea how long it would take to modify the LENS programming so that the LSRs could be submitted electronically." Arb. II, Supra Ex. 49. Yet BellSouth advised Supra in writing on July 14, 2000, that Supra must submit a LSR to convert the UNE Combos. Arb. II, Supra Ex. 50. Apropos of a dispute on a separate, but related, TAG interface issue, BellSouth was evasive and uncooperative because for "[t]his customer of all customers to communicate this lack of resource issue to [us] is very inopportune. Supra is so litigious, we endeavor to keep the ball in their court as much as possible." Arb. II, Supra Ex. 51. In the view of the Tribunal, BellSouth attempted to give the impression of responding to Supra in a substantive manner, without actually doing so, until just before the hearing in the second arbitration in April 2001.

In summary, the Tribunal finds that BellSouth breached the Interconnection Agreement in not cooperating with and facilitating Supra's ordering of UNEs and UNE Combos.

B. Collocation

Supra contends that BellSouth has breached its obligations to allow Supra to collocate its equipment and unbundled elements to BellSouth's own network elements.

BellSouth initially took the position that insufficient space was available in BellSouth's central offices to provide for collocation. Nilson DT, Arb. II, at 28, line 1; Tr., Arb. II, 584, lines 3-13; Ex. S0234 Arb. II. The Florida Public Service Commission ultimately required BellSouth to collocate.

Next BellSouth took the position that Supra had been unable over a period of a year and a half to complete the necessary forms accurately, this despite the fact that a number of Supra's applications had been previously approved. Subsequent applications by Supra were routinely rejected by BellSouth.

Among other equipment, Supra wishes to collocate class 5 switches. BellSouth takes the position that Supra is required to produce evidence that Supra **owns** such switches. The Tribunal disagrees. Supra has presented evidence that it leases the switch. In any event, if BellSouth provides space for collocation of a switch, and Supra cannot produce a switch to collocate, BellSouth's obligation would be fulfilled.

A dispute has arisen between BellSouth and Supra as to the pricing of "make-ready" construction by BellSouth and of BellSouth services attendant to collocation.

Finally, BellSouth again objects to the Tribunal's jurisdiction over the collocation claims, despite two prior rulings by the Tribunal that it had jurisdiction of such claims that were based on events on or after October 5, 1999, the effective date of the Interconnection Agreement. The gravamen of BellSouth's objection is that since Supra

first raised this issue pursuant to the 1997 Collocation Agreement, which agreement has expired and been entirely replaced by the Interconnection Agreement, that the Tribunal is divested of jurisdiction to resolve claims concerning collocation for which applications were submitted prior to the effective date of the Interconnection Agreement.[1] Once again, the Tribunal disagrees and reasserts its proper jurisdiction over the collocation claims.

Attachment 3 of the Interconnection Agreement deals with collocation. It provides in pertinent part that

> BellSouth **shall** provide space, as requested by [Supra] to meet [Supra's] needs for placement of equipment, interconnection, or provision of service.

Interconnection Agreement, Attach. 3, §2.3.1 (emphasis added).

> 2) BellSouth **shall** provide interoffice facilities . . . as requested by [Supra] to meet [Supra's] need for placement of equipment, interconnection or provision of service.

Id., at §2.22 (emphasis added).

> 3) [Supra] may collocate the amount and type of equipment **[Supra] deems necessary** in its collocated space . . . . BellSouth shall not restrict the types of equipment or vendor of equipment to be installed. . . .

Id., at §2.2.4 (emphasis added).

The Interconnection Agreement grants to this Tribunal very broad jurisdiction:

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[1] The Tribunal believes BellSouth's objection to be disingenuous. By BellSouth's own logic, since Supra had objected to BellSouth's billing procedures prior to the effective date of the Interconnection Agreement, the Tribunal should be barred from deciding such disputes, which should proceed under one of the prior agreements that does not contain an arbitration provision. However, BellSouth aggressively pursues its billing claims before this tribunal. Moreover, in January 2000, when rejecting Supra firm orders for collocation, BellSouth stated: "[T]he Interconnection Agreement under which Supra operates does not contain an expedited dispute resolution process for space preparation charges assessed for physical collocation. The billing procedures for physical collocation are found in Attachment 6, Section 4 of the Interconnection Agreement." Ex. S0075, Arb. II.

Supra would have the Tribunal sanction BellSouth for their repetition of the same jurisdictional objections overruled twice previously, especially in light of BellSouth's admission that the Interconnection Agreement governs the dispute. While the Tribunal acknowledges that Section 7 of Attachment 1 empowers the Tribunal to issue such sanctions, the Tribunal declines to do so.

> Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between BellSouth and [Supra] arising under or related to this Agreement including its breach, except for: (i) disputes arising pursuant to Attachment 6, Connectivity Billing; and (ii) disputes or matters for which the Telecommunications Act of 1996 specifies a particular remedy or procedure. Except as provided herein, BellSouth and [Supra] hereby renounce all recourse to litigation and agree that the award of the arbitrators shall be final and subject to no judicial review, except on one or more of those grounds specified in the Federal Arbitration Act (9 USC §§1, et seq.), as amended, or any successor provision thereto.

Interconnection Agreement, Attach. 1, §2.1.

> If, for any reason, the Federal Communications Commission or any other federal or state regulatory agency exercises jurisdiction over and decides any dispute related to this Agreement or to any BellSouth tariff and, as a result, a claim is adjudicated in both an agency proceeding and an arbitration proceeding under this Attachment 1, the following provisions shall apply:
>
> To the extent required by law, the agency ruling shall be binding upon the Parties for the limited purposes of regulation within the jurisdiction and authority of such agency.
>
> The arbitration ruling rendered pursuant to this Attachment 1 shall be binding upon the Parties for purposes of establishing their respective contractual rights and obligations under this Agreement, and for all other purposes not expressly precluded by such agency ruling.

Id., at §§2.1.2, 2.1.2.1, and 2.1.2.2.

> The Arbitrators shall receive complaints and other permitted pleadings, oversee discovery, administer oaths and subpoena witnesses pursuant to the United States Arbitration Act, hold hearings, issue decisions, and maintain a record of proceedings. The Arbitrators shall have the power to award any remedy or relief that a court with jurisdiction over this Agreement could order or grant, including, without limitation, the awarding of damages, pre-judgment interest, specific performance of any obligation created under the Agreement, issuance of an injunction, or imposition of sanctions for abuse or frustration of the arbitration process, except that the Arbitrators may not: (i) award punitive damages; (ii) or any remedy rendered unavailable to the Parties pursuant to Section 10.3 of the General Terms and Conditions of the Agreement; or (iii) limit, expand, or otherwise modify the terms of this Agreement.

Id., at §7.

The contractual obligations concerning collocation are broad and far reaching. The disputes raised by Supra regarding denial of collocation arise under or are related to the Interconnection Agreement. Accordingly, this Tribunal properly takes jurisdiction of these claims.

BellSouth next interposes an objection to the Tribunal's jurisdiction over pricing of collocation to Supra.[2] Supra argues BellSouth could have taken the collocation rate dispute to the Florida Public Service Commission (the "FPSC"). However, BellSouth fails to argue or to demonstrate that Supra was obligated to take such disputes to the FPSC or that the FPSC has exclusive jurisdiction over such disputes. The Interconnection Agreement indicates that the Tribunal's jurisdiction may be concurrent with that of the FPSC. Interconnection Agreement, Attach. 1, §2.1.2.

Rates for certain collocations are set out in Table 2, pages 60 and 61, attached to the letter amendment of July 24, 1998, which AT&T and BellSouth incorporated into the Interconnection Agreement that Supra later adopted. To the extent that Supra objects to rates for "make-ready" work that are not covered by Table 2, the Interconnection Agreement provides that Supra may retain a contractor on BellSouth's certified list to perform such work at Supra's expense. Interconnection Agreement, Attach. 3, §7.4.4.

The Tribunal orders that BellSouth collocate forthwith all such equipment as Supra has included in all prior applications to BellSouth at the rates indicated in Table 2 attached to the July 24, 1998, letter incorporated into the Interconnection Agreement. To

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[2] In making this second jurisdictional objection, BellSouth states: "There is no dispute that Supra is entitled to collocation. There is also no dispute that BellSouth has offered collocation to Supra. The only dispute between the parties is Supra's allegation that the rates that BellSouth proposes to charge for collocation space were unreasonable." In light of BellSouth's repeated rejection of Supra's collocation applications and the fact that Supra has been unable to collocate a single piece of equipment in any BellSouth facility over a period of some four years, BellSouth's statement is nothing short of breathtaking.

the extent that the collocation involves "make-ready" work that may not be covered by Table 2, Supra may retain a contractor of its choosing from BellSouth's approved contractor list to perform such work at Supra's expense. To the extent that work or services by BellSouth are necessary to collocation and that such work or services are not covered by the rates set out in Table 2, the Tribunal instructs the parties to consult the Interconnection Agreement for guidance and to meet and confer regarding the applicable rates for such work or services. To the extent that the parties are unable to agree on such rates, the parties are to submit their differences over such rates to the Tribunal for resolution.

C. Access to OSS

Supra contends that it is entitled to direct access to BellSouth's OSS, because the FCC has mandated such access in its First Report and Order and in its Third Report and Order, because BellSouth's LENS was unable to perform the ordering function in real time and is inherently unreliable, suffering numerous malfunctions and excessive downtime, and because the contract effectively requires access to BellSouth's OSS.

In contrast, BellSouth argues that Supra, by adopting the Interconnection Agreement, effectively negotiated away the rights and interests it may have been entitled to under the 1996 Act. *See,* 1996 Act, §252(a)(1). BellSouth argues that Supra's rights under the 1999 agreement are not as broad as the rights granted under federal law. The Tribunal disagrees.

The evidence presented shows that Supra must submit local service requests through LENS, an electronic interface supplied by BellSouth. LENS cannot submit local service orders in real time. A local service request is processed through several interfaces (including manual introduction) before the local service request can be processed as an order and provisioned. Ramos DT, Arb. I, at 23, lines 1-15. The orders are subject to

"edit checks" which generate "clarification requests" which delay the process even further. Id., at lines 20-22; at 25, lines 16-18. LENS does not provide Supra with the capability to perform pre-ordering, ordering, provisioning, maintenance and repair and billing functions in real time or in a manner consonant with BellSouth's performance of the process. Arb. I, Exhibit 531; BellSouth Videotape, "This Ol' Service Order."

BellSouth witness Pate admitted that Supra could not place orders in the same manner as BellSouth. Testimony of Ronald Pate, Arb. I, Tr., at 570, line 10, to 573, line 8; at 577, line 24, to 578, line 9; at 578, lines 10-17; at 579, line 2, to 580, line 13; at 586, lines 11-19.

To establish a new account through LENS, Supra is required to first view the Firm Order Menu Screen and obtain the information from the customer and from various BellSouth databases to enable Supra to complete the screen. Supra must validate the customer's service address. If for any reason, Supra is unable to validate the address, Supra cannot complete the pre-ordering process. Supra thereafter selects a telephonic number for the customer. Because of the delay which ensues between the time Supra begins the pre-ordering process and the provisioning of the order (usually several days), Supra must wait to notify the customer of the telephone number assigned.

Next, Supra identifies the features and services the customer wants. However, LENS is frequently inaccurate in the feature selection process. Because of LENS system errors and system failures, the identification of class and services will fall out, resulting in the need to "clarify" the order causing additional delay. A "clarified" order is put on hold, and it must be resubmitted manually.

Following successful completion of identification of services, Supra must identify the type of directory listing selected by the customer. This requires accessing a separate database. In BellSouth's OSS, the database is integrated into the ordering process.

After all pre-ordering information has been entered, LENS will automatically calculate a due date. Supra has no ability to negotiate a due date. Frequently BellSouth overrides the due date provided, and returns the order at a later date with a different due date acceptable to BellSouth. Therefore, Supra has no ability to communicate to a customer a definite due date for the provisioning of service.

Once complete, the order enters BellSouth's Local Exchange Ordering System, a system which serves to edit the LENS generated orders. If errors are found, the order will be sent back to Supra. If the order is error free, it will be sent to be reformatted into a format acceptable to BellSouth's systems. If errors are found, the order is again sent back to Supra. If the orders are error-free, BellSouth representatives re-enter the information into the order entry system for provisioning. Ramos DT, Arb. I, at 26-34.

The time required and the number of possible interventions in this process are profoundly different from the BellSouth ordering process, where all information is entered into one system by the representative taking the call, where due date and telephone number can be provided on line, and where service can be provisioned the **same day**. It is literally impossible for Supra to provision service the same day an order is received, due to the unreliable systems made available to Supra by BellSouth.

The evidence is overwhelming that BellSouth has not provided Supra with Operations Support Systems that are equal to or better than those which BellSouth provides itself. Interconnection Agreement, GTC §30.10.4 ("[E]ach Network Element . . . provided by BellSouth to [Supra] shall be made available to Supra on a priority basis . . . that is equal to or better than the priorities that BellSouth provides to itself . . . .") The Interconnection Agreement provides that "BellSouth shall provide **real time** electronic interfaces for transferring and receiving service orders and provisioning data . . . ." Interconnection Agreement, Attach. 4, §5.1 (emphasis added). The evidence is

clear that LENS does not provide real time service order capability. The Interconnection Agreement provides that "BellSouth shall provide **real time** ability (i) to obtain information on all features and services available, in end-office where customer is provisioned; (ii) to establish if a service call is needed to install the line or service; (iii) to determine the due date and provide information regarding service dispatch/installation schedule, if applicable; (iv) . . . to provide an assigned telephone number; and (v) . . . to obtain a customer profile, including customer name, billing and residence address, billed telephone numbers, and identification of features and services subscribed to by customer." Id., §5.2 (emphasis added). The evidence is overwhelming that LENS does not provide all these capabilities in real time.

The Interconnection Agreement further provides that

> BellSouth shall provide the ability to enter a service order via Electronic Interface as described in Subsection 5.1 of this Section. The service order shall provide [Supra] the ability to: (i) establish service and order desired features; (ii) establish the appropriate directory listing; and (iii) order intraLATA toll and interLATA toll when applicable in a single, unified order.

Id., at §5.3. The evidence is clear beyond cavil that neither LENS, nor any of the other electronic interfaces offered by BellSouth has such ability. Only BellSouth's OSS has the capabilities set out above.

Because BellSouth has failed to meet its contractual obligations regarding electronic interfaces, and because BellSouth is obligated to provide Supra "network elements equal to or better than BellSouth provides to itself or its customers" (BellSouth's Post-Hearing Memorandum, at 15), the Tribunal finds that BellSouth is obligated to provide Supra nondiscriminatory direct access to BellSouth's OSS and orders that such access be provided by BellSouth to Supra no later than June 15, 2001.

D. LENS

1. LENS Downtime

The electronic interface chosen by Supra from those offered by BellSouth in order to perform the pre-ordering and ordering functions, among others, was the LENS. In the Interconnection Agreement, BellSouth undertakes an obligation to provide Supra with the same quality of services and elements as BellSouth provides itself and its end-users. Interconnection Agreement, GTC §12.1. Regarding the capability to input orders, the Interconnection Agreement provides:

> BellSouth shall provide [Supra] with the capability to have [Supra's] Customer orders input to and accepted by BellSouth's Service Order systems outside of normal business hours, twenty-four (24) hours a day, seven (7) days a week, the same as BellSouth's Customer orders received outside of normal business orders are input and accepted.

GTC, §28.6.10.1.

BellSouth witness Hendrix testified that BellSouth cannot place orders on a twenty-four hours a day, seven days a week basis, but he failed to testify as to how much downtime, if any, is scheduled for BellSouth's OSS. Arb. I, Hendrix DT, at 24. BellSouth's witnesses testified that LENS was down for scheduled maintenance three hours a day, Monday through Saturday from 1:00 a.m. to 4:00 a.m. and six hours on Sunday from 12:00 a.m. to 6:00 a.m. Arb. I, Pate DT, at 32; Arb. I, Pate Testimony, Tr., at 558. Thus, the scheduled downtime for the LENS system is twenty-four hours per week, an amount the Tribunal considers to be more than excessive.

In addition to the twenty-four hours each week for scheduled maintenance in which LENS is unavailable, LENS was down additional time due to malfunctions and failures. Arb. I, Mariki Testimony, Tr., at 154, lines 8 - 21; Arb. I, Pate Testimony, Tr., at 649, line 22, to 650, line 5; Arb. I, Supra Ex. 90.

It is clear that the LENS electronic interface is unstable and unreliable. The provision of such a system for pre-ordering and ordering of services is a breach of BellSouth's obligations under the Interconnection Agreement. The Tribunal believes that its order giving Supra direct access to BellSouth's OSS should render this issue moot in the future.

2. Cut Off of Supra's Access to LENS

On May 16, 2000, BellSouth disconnected Supra's access to LENS because Supra had failed to pay disputed billings. It is undisputed that Section 1.2 of the General Terms and Conditions prohibits BellSouth from "discontinu[ing] any Network Element, Ancillary Function, or Combination provided hereunder without the express prior written consent of Supra." Moreover, Section 16.1 of the General Terms and Conditions provides in pertinent par that "[i]n no event shall the Parties permit the pendency of a Dispute to disrupt service to any [Supra] Customer contemplated by this Agreement." BellSouth later acknowledged that "the Interconnection Agreement between BellSouth and Supra does not permit BellSouth to refuse Supra's orders for non-payment of undisputed charges." Arb. II, Ex. S0098. BellSouth's contention that it believed it was proceeding under a prior agreement which had long since expired and which had been entirely superceded by the Interconnection Agreement is not credible. Accordingly, the Tribunal regards BellSouth's act of cutting off Supra's access to LENS a deliberate breach done with the intent to harm Supra.

E. Dedicated Transport and Tandem Switching

Supra argues that BellSouth has breached various sections of the Interconnection Agreement in failing to provision dedicated transport lines between BellSouth tandem switches both between Local Access Transport Areas ("LATA") and within individual

LATAs. These two issues are related – inter-LATA and intra-LATA transport – but require different analysis and can best be discussed separately.

1. Inter-LATA Transport

BellSouth argues that it may not lease UNEs to Supra that would enable Supra to provide inter-LATA (i.e., long distance) telephone service to Supra's customers when section 271(a) of the 1996 Act bars BellSouth from providing inter-LATA service. BellSouth also argues that, if Supra wishes to provide certain specified DSI Interoffice Transport facilities that are in fact available under the Interconnection Agreement in a manner which would cross LATA boundaries, then Supra will need to order intra-LATA trunking from BellSouth and also order inter-LATA trunking from an IXC (long distance provider).

Supra argues at considerable length that, regardless of the fact that BellSouth cannot itself provide inter-LATA service, Supra can lease the UNEs and dedicated transport from BellSouth and then Supra, as a certificated IXC, would be deemed to provide the inter-LATA service rather than BellSouth. The major problem with Supra's argument is that Supra cites no convincing FCC or federal court authority in support of Supra's argument that Supra can lease UNE Combos and tariffed services from BellSouth which BellSouth cannot provide directly to its customers. The Tribunal therefore finds that Supra has failed to carry its burden of proof on the issue of inter-LATA service.

2. Intra-LATA Transport Between Tandem Switches

Supra devoted nine pages to the issue of "Feature Group-D Switched Access Service Between BellSouth Access Tandems" as described by Supra at pages 62-71 of its Post-Hearing Brief. BellSouth claims that Supra mis-describes both the service Supra seems to be seeking and the issues presented by its requests, which have not been submitted to BellSouth via a LSR. Unfortunately, the parties' testimony at the arbitration

hearing and their respective Post-Hearing Briefs provided scant assistance to the Tribunal's assessment of this issue.

The Tribunal finds that "Feature Group-D" is a switched access service provided by BellSouth to interexchange carriers ("IXCs") that can be ordered from the BellSouth Access Services tariffs filed with the FCC and the FPSC. BellSouth argues that "Feature Group D" is inherently a long-distance service, not local service available to Supra under the Interconnection Agreement.

To the extent Supra may be requesting interoffice trunking between BellSouth switches, Supra has failed to show that it owns and operates a local switch connected to BellSouth's network. BellSouth made the better arguments on this issue, including citations to relevant provisions of the Interconnection Agreement referring to the need for switches. The Tribunal therefore finds that Supra failed to carry its burden of proof.

F. Regional Street Address Guide ("RSAG") Download

Supra contends that BellSouth is contractually obligated to provide it with a download of RSAG, citing Attachment 15, Sections 7.2.1 and 7.2.2. Because of the incessant downtimes of LENS (*see*, Section V.D.1, above), Supra argues that without a download it does not have the same access to information as does BellSouth, which violates the Interconnection Agreement's "parity" provisions. *See, e.g.*, Interconnection Agreement, GTC, §30.10.4. Supra argues that BellSouth's Hendrix admitted that AT&T was entitled to receive a batch feed of the RSAG database as part of a unique interface that was to be created. Supra seeks an initial download of the RSAG database, followed by daily updates.

There is no dispute that the "unique interface" contemplated by the Interconnection Agreement was never developed. The burden for the development of the electronic interface falls equally on Supra and BellSouth. (*See,* Attach. 15, §§7.1.1 and

7.1.2) ("BellSouth and [Supra] agree to develop an interface . . ."; "[Supra] and BellSouth will establish a transaction-based electronic communications interface. . . ."). The provision of batch feeds was dependent on the unique interface which had not been developed. ("**When the interface is operational**, BellSouth will transmit the initial batch feed of the data . . . ." Interconnection Agreement, Attach. 15, §7.2.2 (emphasis added).)

The Tribunal finds that the obligation to develop the unique interface fell jointly on Supra and BellSouth. Supra produced no evidence which would suggest that the failure to develop the unique interface was entirely due to BellSouth's actions or inactions. Since the joint development of the unique electronic interface was a condition precedent to the obligation to provide the initial batch feed of RSAG, and since the condition precedent never occurred, the Tribunal finds that BellSouth had no contractual obligation to provide Supra with a download of RSAG. In any event, since the Tribunal has ordered BellSouth to provide nondiscriminatory direct access to the BellSouth OSS, Supra should have real time access to RSAG, including all updates.

G. 100 Number Blocks of Telephone Numbers

Supra argues that the Interconnection Agreement requires BellSouth to reserve up to 100 telephone numbers per NPA-NXX for Supra's exclusive use. Interconnection Agreement, GTC, §28.1.1.4. BellSouth does not dispute this. BellSouth contends that since LENS enables Supra to reserve up to 25 numbers in a single session, Supra can reserve 100 numbers in four such sessions. BellSouth contends that this satisfies the contractual requirement.

Supra argues that this sequential ordering is inadequate in that Supra is unable to use the 25 numbers in any manner of Supra's choosing. However, Supra also states that "[s]hould BellSouth be ordered to provide Supra with access to BellSouth's retail OSS

this issue becomes moot." Supra's Post-Hearing Brief, at 62. As the Tribunal has found that Supra is entitled to nondiscriminatory direct access to BellSouth's OSS (*see*, Section V.C, above), this issue is now moot.

H. QuickServe

QuickServe is the BellSouth name for the provision of expedited service in situations where the phone line at the customer's location is already connected for service (*i.e.*, has "soft dial tone") and only requires electronic intervention, as opposed to having to dispatch a service technician to the location. Pate DT, Arb. I, at 27.

BellSouth acknowledges that LENS could not in the past provide same-day service at QuickServe locations, but that a work around, executed at some unstated time, had been put in place. Pate, DT, Arb. I, at 29. Now, BellSouth asserts that LENS has been "recently updated" to provide QuickServe capability. Pate, Reb.T., Arb. I, 53-54.

The Tribunal finds that its order requiring BellSouth to provide Supra with nondiscriminatory direct access to BellSouth's OSS provides Supra with the same ability to provide QuickServe as has BellSouth. Thus, this issue is effectively moot.

I. Branding

General Terms and Conditions, Section 19, sets out BellSouth's obligations to brand services offered by Supra that incorporate services and elements made available under the Interconnection Agreement.

> The Parties agree that the services offered by [Supra] that incorporate Services and Elements made available to [Supra] pursuant to this Agreement shall be branded as [Supra] services, unless BellSouth determines to unbrand such Services and Elements for itself, in which event BellSouth may provide unbranded Services and Elements. [Supra] shall provide the exclusive interface to [Supra] Customers, except as [Supra] shall otherwise specify. In those instances where [Supra] requires BellSouth personnel or systems to interface with [Supra] Customers, such personnel shall identify themselves as representing [Supra], and shall not identify themselves are representing BellSouth. Except for

> material provided by [Supra], all forms, business cards or other business materials furnished by BellSouth to [Supra] Customers shall be subject to [Supra's] prior review and approval. In no event shall BellSouth, acting on behalf of [Supra] pursuant to this Agreement, provide information to [Supra] local service Customers about BellSouth products or services. BellSouth agrees to provide in sufficient time for [Supra] to review and provide comments the methods and procedures, training and approaches to be used by BellSouth to assure that BellSouth meets [Supra's] branding equipment. For installation and repair services, [Supra] agrees to provide BellSouth with branded material at no charge for use by BellSouth ("Leave Behind Material"). [Supra] will reimburse BellSouth for the reasonable and demonstrable costs BellSouth would otherwise incur as a result of the use of the generic leave behind material. BellSouth will notify [Supra] of material supply exhaust in sufficient time that material will always be available. BellSouth may leave a generic card if BellSouth does not have [a Supra] specific card available. BellSouth will not be liable for any error, mistake or omission, other than intentional acts or omissions or gross negligence, resulting from the requirements to distribute [Supra's] Leave Behind Material.

Supra produced evidence that it raised the branding issue with BellSouth concerning the Memory Call service (Arb. II, Ex. S0117) and in a more general context (Arb. II, Ex. S0119). There is no evidence that BellSouth ever concretely responded to these concerns. *See, e.g.*, Cathey Testimony, Arb. II, Tr., at 992, line 23, to 995, line 6.

The Tribunal finds that BellSouth breached it obligation to brand the services and elements provided under the Interconnection Agreement, and that such breach was willful and is continuous. Accordingly, the Tribunal orders that BellSouth shall provide by June 15, 2001, branding of services and elements provided to Supra under the Interconnection Agreement, including, but not limited to voice mail, operator services, and directory assistance, under the terms and conditions of and as required by General Terms and Conditions Section 19 of the Interconnection Agreement. The Tribunal further orders that such branding by BellSouth is to continue until such time as Supra is able to reproduce such elements and services with unbundled network elements and combinations thereof. To the extent that Supra seeks damages for such breaches, Supra

has failed to offer any proof as to the damages that resulted from these breaches by BellSouth. Accordingly, Supra's claim for damages is denied.

J. TAG Interface Development

Supra alleges that it suffered damages in attempting to establish an interface to the TAG electronic interface provided by BellSouth. However, outside of bare assertions by Mariki in his rebuttal testimony, Supra produces no convincing evidence that BellSouth is responsible for Supra's failure to complete the interface. The exhibits cited by Supra wholly fail to establish that BellSouth is responsible for the failure of this project. Accordingly, Supra fails to carry its burden of proof on this issue.

K. Toll Free Number Database

Supra claims that BellSouth has failed to provide access to the BellSouth Toll Free Number Database as required under Section 13.5 of Attachment 2 to the Interconnection Agreement. BellSouth responds that it would be willing to provide access to Supra, but Supra does not own and operate a local switch that meets the interface technical requirements of § 13.5.1.2 and § 13.5.1.2 of Attachment 2 to the Interconnection Agreement. While there was conflicting evidence at the arbitration hearings on whether Supra has leased a local switch, there is no dispute that Supra does not presently operate its own local switch connected to BellSouth's network.

The Tribunal finds that Supra has failed to carry its burden of proof that it meets the contractual interface requirements for gaining access to the BellSouth Toll Free Number Database. In light of the Tribunal's order that BellSouth collocate Supra's equipment, including switches in BellSouth central offices (see Section V.B, above) and Supra's testimony that it has leased at least one switch, Supra's claim regarding the Toll Free Number Database may well become moot.

L. Same Services as BellSouth

Supra claims that BellSouth has failed to provide the same features, functions, and capabilities that BellSouth provides itself through its local switches in breach of Section 7 of Attachment 2 to the Interconnection Agreement. BellSouth responds that Supra failed to order the services properly as required under the Interconnection Agreement. The contested services are the following:

- Centrex
- ACD
- Data switching
- Frame relay services
- Basic and primary rate ISDN
- Dialing parity
- Voice service
- Fax transmissions
- Operator Services
- Switched and non-switched digital data services
- Video Services
- Coin (pay phone) services
- Frame relay and ATM
- Private line services

The only service listed above that Supra clearly requested from BellSouth was Centrex. Arb. II, Supra Ex. 113; BellSouth Ex. PCF-18. BellSouth faults Supra for not requesting Centrex or other services via a LSR, but as made clear in the section of this Award regarding UNE Provider (*see,* Section V.A, above), BellSouth impeded and

frustrated Supra's ability to order services via a LSR submitted through LENS. Regarding the Centrex service, however, Supra failed to prove any damages resulting from BellSouth's failure to lease Centrex services. As to all the other services listed above, Supra failed to carry its burden of proof that it had unequivocally requested the services. In any event, this claim should become moot in light of the Tribunal's order that BellSouth provide direct access to its OSS and that Supra be permitted to lease UNE and UNE Combos as required under the Interconnection Agreement.

M. Alleged Breach of 1996 Act

Supra seeks from the Tribunal a determination that BellSouth's conduct constitutes a breach of the Telecommunications Act of 1996. Supra contends that Paragraph 7 of Attachment 1 to the Interconnection Agreement creates the Tribunal's jurisdiction and constitutes the Tribunal's authority to make such a determination. That section provides:

> Duties and Powers of the Arbitrators
>
> The Arbitrators shall receive complaints and other permitted pleadings, oversee discovery, administer oaths and subpoena witnesses pursuant to the United States Arbitration Act, hold hearings, issue decisions, and maintain a record of proceedings. The Arbitrators shall have the power to award any remedy or relief that a court with jurisdiction over this Agreement could order or grant, including, without limitation, the awarding of damages, pre-judgment interest, specific performance of any obligation created under the Agreement, issuance of an injunction, or imposition of sanctions for abuse or frustration of the arbitration process, except that the Arbitrators may not: (i) award punitive damages; (ii) or any remedy rendered unavailable to the Parties pursuant to Section 10.3 of the General Terms and Conditions of the Agreement; or (iii) limit, expand, or otherwise modify the terms of this Agreement.

Nothing in this section expressly grants to the Tribunal the authority to determine breaches of the 1996 Act.

BellSouth contends that this Tribunal has no jurisdiction to determine that BellSouth has violated any provision of the 1996 Act, and states that such determinations might lead to inconsistent outcomes, citing Sections 2.1.2, 2.1.2.1, and 2.1.2.2 of Attachment 1. These sections provide:

> If, for any reason, the Federal Communications Commission or any other federal or state regulatory agency exercises jurisdiction over and decides any dispute related to this Agreement or to any BellSouth tariff and, as a result, a claim is adjudicated in both an agency proceeding and an arbitration proceeding under this Attachment 1, the following provisions shall apply:
>
> To the extent required by law, the agency ruling shall be binding upon the Parties for the limited purposes of regulation within the jurisdiction and authority of such agency.
>
> The arbitration ruling rendered pursuant to this Attachment 1 shall be binding upon the Parties for purposes of establishing their respective contractual rights and obligations under this Agreement, and for all other purposes not expressly precluded by such agency ruling.

It is clear from these sections that the parties anticipated that the Tribunal's jurisdiction could be co-extensive with that of regulatory agencies, and that the Tribunal's ruling would bind the parties with respect to their respective contractual obligations under the Interconnection Agreement. However, these sections neither establish nor preclude arbitral jurisdiction to determine breaches of the 1996 Act.

Neither party addresses section 2.1 of Attachment 1 which provides, in pertinent part:

> Negotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between BellSouth and [Supra] arising under or related to this Agreement including its breach, **except for: . . (ii) disputes or matters for which the Telecommunications Act of 1996 specifies a particular remedy or procedure.**

Emphasis added. Clearly, if a provision of the 1996 Act specifies a particular remedy or procedure, the Tribunal has no jurisdiction.

The Tribunal has grave doubts as to whether it has jurisdiction to determine that BellSouth has violated the 1996 Act. However, it need not determine that issue. Supra has not cited any particular provision that it alleges BellSouth has violated, nor what conduct by BellSouth violated the terms of such provision. The Tribunal cannot and will not proceed in a vacuum. Even assuming, *arguendo*, that the Tribunal has jurisdiction to determine particular violations of the 1996 Act, no violations have been alleged with sufficient specificity to permit the Tribunal to do so.

N. BellSouth Invoices

With respect to the claim of BellSouth on its unpaid invoices, BellSouth submitted evidence that the sum of $6,374,369.58 has been invoiced by BellSouth to Supra, and that Supra has failed to pay this amount.

The Tribunal finds that BellSouth presented a *prima facie* case as to this claim and this amount, subject to various offset claims and further subject to the results of the audit requested by Supra and ordered by the Tribunal elsewhere herein.

Accordingly, the Tribunal awards BellSouth the amount of $6,374,369.58, subject to offset in the amounts awarded Supra elsewhere in this Award and further subject to the results of the Audit ordered elsewhere herein (including the elimination of late charges).

O. Supra's Audit Request

Supra's claim that it be permitted to audit BellSouth's invoices, which was presented in Arbitration I, is closely tied to BellSouth's claim for unpaid invoices, which was presented in Arbitration II. In short, Supra has consistently challenged BellSouth's invoices since October 1999 and has refused payment since that time. Supra has demanded both Bill Accuracy Certification from BellSouth in accordance with section 12 of Attachment 6 of the Interconnection Agreement and an "audit" of BellSouth's billings

in accordance with Sections 11.1.1 and 11.1.3 of the General Terms and Conditions of the Interconnection Agreement.

The billing audit dispute boils down to the proper scope of documents and information reasonably necessary to assess the accuracy of BellSouth's invoices. Two sections of the General Terms and Conditions of the Interconnection Agreement provide clear guidance:

> Subject to BellSouth's reasonable security requirements and except as may be otherwise specifically provided in this Agreement, **[Supra] may audit BellSouth's books, records and other documents once in each Contract Year for the purpose of evaluating the accuracy of BellSouth's billing and invoicing.** [Supra] may employ other persons or firms for this purpose. Such audit shall take place at a time and place agreed on by the Parties no later than thirty (30) days after notice thereof to BellSouth.

Section 11.1.1 (emphasis added). The breadth of material subject to an audit is further explained:

> BellSouth shall cooperate fully in any such audit providing **reasonable access to any and all appropriate BellSouth employees and books, records and other documents reasonably necessary to assess the accuracy of BellSouth's bills.**

Section 11.1.3 (emphasis added).

BellSouth argues that its detailed monthly invoices transmitted both on paper and electronically in a Disk Analyzer Billing ("DAB") format are more than sufficient to allow Supra to audit BellSouth's billings. The Tribunal disagrees and finds BellSouth's position that Supra can "audit" BellSouth's invoices by intensively reviewing the bills themselves to be patently unconvincing.

The language quoted above from the parties' Interconnection Agreement contemplates access to "any and all appropriate BellSouth employees and books, records and other documents reasonably necessary to assess the accuracy of BellSouth's bills," which is a very broad audit provision. This conclusion is supported by the expert

testimony of Supra's certified public accountant, Stuart Rosenberg. He testified convincingly at the Arbitration I hearing that Supra must be permitted to conduct its requested audit in accordance with Generally Accepted Auditing Standards ("GAAS"). BellSouth utterly failed to rebut his testimony or Supra's commonsense position that Supra must be permitted to review sufficient records and information, including access to knowledgeable BellSouth employees, to evaluate the facts that give rise to BellSouth's billing (*e.g.*, verify that BellSouth's bill correctly starts on the date service actually began for each Supra customer, which cannot be determined by Supra from its local service requests).

Accordingly, the Tribunal orders BellSouth to fully cooperate with and to facilitate Supra's audit of BellSouth's invoices from October 1999 to the present under GAAS. The audit shall begin within ten (10) calendar days of this award (*i.e.*, no later than June 15, 2001) and be completed by July 31, 2001, which date may only be extended for good cause shown. Failure of BellSouth to timely cooperate in the audit process may be considered good cause. Supra will bear its own costs of the audit, unless the audit identifies adjustments greater than the two percent (2%) threshold set forth in Section 11.1.5 of the General Terms and Conditions of the Interconnection Agreement, in which case BellSouth will reimburse Supra's expenses of the audit.

Once the audit is completed and the necessary adjustments to BellSouth's invoices are identified (both reductions and increases), then the resulting adjustments will be offset against the amount to be recovered by BellSouth on its claim for unpaid invoices in Arbitration II. Copies of the audit report and calculations will be served on BellSouth and on the Tribunal.

VI. Damages

A. Introduction

This introduction to the Tribunal's assessment of damages makes three necessary points about the parties' approaches to alleged damages.

First, both parties pursued risky strategies on damages through their respective expert witnesses – Wood for Supra and Freeman for BellSouth. On the one hand, Supra's damages expert relied on unverified factual underpinnings (*e.g.*, a list of "lost customers" that was repudiated by Supra's fact witness), explained his damages assumptions and methodology only cryptically, and calculated extraordinarily high and speculative lost future profits of Supra through 2004 and in many states beyond Supra's existing service area of south Florida. BellSouth's expert witness Freeman correctly characterized Supra's alleged damages as "breathtaking."

On the other hand, BellSouth adopted an equally high-risk damages strategy of attacking Supra's methodology and numbers, but not providing any alternative calculations to the Tribunal. That damages approach was made infamous in the *Pennzoil v. Texaco* state court litigation in Texas regarding the takeover of Getty Oil to the tune of a $7 billion judgment against Texaco. Although BellSouth's expert effectively attacked large elements of Supra's damages, BellSouth's failure to provide alternative damages figures in the areas in which Supra prevailed on liability left the Tribunal with little choice but to grant Supra's requested damages in some areas.

Second, Supra failed to tie any damages to certain liability claims. For example, as described in Section V.L above, Supra **could** have recovered damages for BellSouth's failure to lease Centrex services, but Supra did not tie any damages specifically to that claim and therefore failed to carry its burden of proof.

Third, as discussed above in Section II regarding procedural history, the Tribunal ruled that consequential damages, including lost profits, could be recovered upon a particular showing:

> The Panel concludes that "willful or intentional misconduct" is broad terminology which embraces willful or intentional breach of contract to the extent that it is done with the tortious intent to inflict harm on the other party to the contract. The panel's interpretation of this phrase is supported by judicial authority, including *Metropolitan Life Insurance Co. v. Noble Lowndes Int'l, Inc.*, 643 N.E.2d 504, 506-508 (N.Y. 1994) and *Wright v. Southern Bell Tel. & Tel. Col., Inc.* 313 S.E. 2d 150 (Ga. App. 1984).
>
> Accordingly the Tribunal unanimously finds that **to the extent that Supra can prove that BellSouth intentionally or willfully breached the Agreement at issue in this case with the tortious intent to inflict harm on Supra, at least in part through the means of such breach of contract**, and as a direct and foreseeable consequence of that breach Supra suffered damages in an amount subject to proof, Supra can recover consequential damages in this action.

March 15 Order, at ¶¶ 1-2 (emphasis added). (The Clarification of Order Re: Damages is attached hereto as Annex D and is incorporated herein by reference).

In the course of these two arbitrations, the Tribunal has reviewed hundreds of pages of pre-filed direct and rebuttal testimony and thousands of pages of exhibits. The Tribunal also has judged the demeanor of witnesses during a total of eight days of live testimony in the hearings and has reviewed the transcripts of that testimony. The evidence shows that BellSouth breached the Interconnection Agreement in material ways and did so with the tortious intent to harm Supra, an upstart and litigious competitor. The evidence of such tortious intent was extensive, including BellSouth's deliberate delay and lack of cooperation regarding UNE Combos, switching Attachment 2 to the Interconnection Agreement before it was filed with the FPSC, denying access to BellSouth's OSS and related databases, refusals to collocate any Supra equipment, and deliberately cutting-off LENS for three days in May 2000.

The Tribunal does not make this finding of "tortious intent" lightly, but the full record belies BellSouth witnesses' mantra-like testimony that BellSouth's aim was to profit from Supra's success. BellSouth attempted to give the appearance of cooperating with Supra, while deliberately delaying, obfuscating, and impeding Supra's efforts to compete.

The major elements of Supra's damages are discussed in the following sections.

B. Supra's Damages

1. Incremental Net Income Operating As UNE Provider

As discussed in Section V.A, above, the Tribunal finds that BellSouth breached the Interconnection Agreement in not cooperating with and facilitating Supra's ordering of UNEs and UNE Combos. Supra's damages tied to this breach are set forth in two exhibits in Arbitration II of Supra damages expert Wood -- DJW-5 and DJW-6. Those exhibits show incremental net income to Supra for its residential and business customers, but must reflect the following necessary revisions: (1) the calculations of monthly damages for October 1997 through September, 1999 must be **deleted** to reflect the Tribunal's prior ruling that no recovery may be awarded for acts or omissions before the October 5, 1999 effective date of the Interconnection Agreement; and (2) the damages for October 1999 must be pro-rated to remove any October 1-4, 1999 recovery, which damages occurred prior to the effective date of the Interconnection Agreement. With those necessary revisions, Supra's damages for residential customers is $1,586,840.27 and for business customers is $517,066.26, for a sub-total of $2,103,906.40 of incremental net income if Supra had been permitted to operate as a UNE provider. No prejudgment interest is appropriate because Wood already included a present value calculation in the damages figure.

As part of the audit process, the auditor is directed to determine the number of Supra customers in April, 2001, and the number of the Supra customers in May, 2001, and to report those numbers to the parties and to the Tribunal. The Tribunal will thereafter calculate a revised damages calculation that includes April and May 2001 damages.

2. Supra's Alleged Lost Profits

There are two major areas of alleged lost profits that Supra seeks: (1) lost profits on allegedly "lost customers" who purportedly would have ordered advanced services such as DSL from Supra (described by Supra as Arbitration 2, Category 1 Damages); and (2) lost profits as far out as 2004 for BellSouth's impeding Supra's operations as a facilities based UNE provider by expanding throughout the remaining counties in Florida and using a "cookie cutter" approach into 17 additional states (described by Supra as Arbitration II, Categories 3, 4 and 6 Damages). For the following reasons, none of these alleged damages are awarded to Supra because they have insufficient factual support, are too speculative, and would lead to an unwarranted windfall to Supra.

Considerable fact and expert testimony focused on Supra's original list of allegedly "lost customers" (Supra Ex. 87A) produced in Arbitration I and then the updated list (Supra Ex. 87B) produced in Arbitration II. Supra's damages tied to "lost customers" rely on Supra Ex. 87A, which was repudiated by Supra witness Bentley. Supra expert witness Wood disclaimed any reliance on Supra Ex. 87B, which had almost as many infirmities as the initial "lost customer" list. For all of the reasons set forth at pages 88-93 of BellSouth's Post-Hearing Brief and the total lack of credibility surrounding Supra's Ex. 87A, no damages are awarded based on the Supra alleged "lost customers."

An appreciation of the "breathtaking" nature of Supra's alleged lost profits totaling over $510 million and running through the year 2004 should start with the fact that Supra has enjoyed only modest success as a CLEC operating in south Florida. Its financial survival may well have been due to the fact that Supra has not been paying its bills from BellSouth since October 1999. Based on its 1997 Business Plan and its proffered evidence of many BellSouth breaches of the Interconnection Agreement, Supra would have the Tribunal believe that, if BellSouth had only cooperated, then Supra would have become a telecommunications juggernaut, operating as a facilities-based UNE provider with its own switches, with an expanding network and facilities, and with increasingly profitable operations in 18 states. But nothing in Supra's actual track record suggests such meteoric success and the alleged $510 million in lost profits.

The Tribunal will not award damages based on wishful speculation. The Tribunal cannot grant hundreds of millions of dollars in damages tied to BellSouth's behavior from June 2001 until the end of 2004, when the reasonable assumption should be that BellSouth will forthwith comply with the Interconnection Agreement and this Tribunal's award. In addition, a new agreement that will govern the parties' future relationship is being arbitrated before the FPSC. The Tribunal cannot credibly accept Wood's speculative and unrealistically high "lost profit" dollar numbers for the reasons set forth above, and those set forth in the testimony of BellSouth expert witness Freeman and summarized at pages 95-108 of BellSouth's Post-Hearing Brief.

3. LENS Damages

a. LENS Downtime

Supra damages expert Wood testified to and calculated the damages suffered by Supra as a result of the excessive down time experienced by LENS. Wood's damages

calculation was based on the costs incurred by Supra to maintain its customer support staff in place during those times in which LENS was unavailable.

While this approach was criticized by BellSouth expert witness Freeman, he furnished no alternative damages calculation. Because the Tribunal is certain that Supra suffered damage and because no alternative damages calculation was offered by BellSouth, the Tribunal accepts the calculation offered by Wood (DJW-2) and awards Supra $669,153 in damages directly resulting from this breach by BellSouth.

b. Cut Off of Supra's Access

The Tribunal believes that the calculations of Supra's damages expert as to this issue was reasonable. *See,* DJW-24, and DJW-3, 2 of 2. Accordingly, the Tribunal awards Supra $55,488 as a direct result of the deliberate Cut Off of Supra's access to LENS, which the Tribunal finds was done with the intent to harm Supra.

C. BellSouth Invoices

BellSouth is awarded $6,374,369.58, less any sum awarded Supra herein and subject to the results of the Audit ordered herein.

VII. Other Relief

A. Supra's Request for Audit

As discussed in Section V.O above, the Tribunal orders BellSouth to fully cooperate with and facilitate Supra's audit of BellSouth's billings since October 1999. The audit will be conducted in accordance with GAAS, commence no later than June 15, 2001, and be completed by July 31, 2001, which may only be extended for good cause shown. The results of the audit (reductions or increases) will be offset against the amount of $6,374,369.58 to be recovered by BellSouth after offsets for Supra's damages awarded herein.

The auditor is also directed to determine the number of Supra customers in the month of April, 2001, and in the month of May, 2001, and report those figures to the parties and to the Tribunal. *See*, Section VI.B.1, above.

Finally, the Auditor is directed to remove all late charges assessed by BellSouth in its invoices. *See*, Section VII. E., below.

B. BellSouth's Request for an Injunction for Future Supra Non-Payment

Even with the Supra damages awarded herein and awaiting the results of the audit of BellSouth's billings, it appears likely that Supra will end up owing some net amount to BellSouth. In anticipation of that possible result, BellSouth has requested that the Tribunal order that BellSouth may terminate service provided to Supra if the net amount is not paid by Supra within 30 days of the net amount being calculated.

The Tribunal declines to issue such an injunction for several reasons. First, BellSouth's request has the flavor of an advisory opinion to be issued now about some future unknown scenario. Second, although the Tribunal may have the **authority** to issue an injunction, it is premature. Third, once this award is final and the net amount due to BellSouth is calculated with precision, should Supra fail to pay, then the proper enforcement mechanism is for BellSouth to file an action in a court of competent jurisdiction to enforce the Tribunal's award. The Tribunal therefore denies BellSouth's requested injunction.

C. Liquidated Damages

With respect to Supra's request that the Tribunal assess liquidated damages against BellSouth in the event BellSouth fails to comply with any order of the Tribunal, the Tribunal finds no authority in the Interconnection Agreement or in law to assess liquidated damages.

Liquidated damages are those agreed to by the parties where it is difficult, if not impossible, to assess actual damages. The Tribunal does not find any potential damages that may result from BellSouth's non-compliance with this Award to be impossible or difficult to assess.

Furthermore, Supra is essentially requesting the Tribunal to re-write or add to the Interconnection Agreement which the Tribunal is prohibited from doing by Section 7 of Attachment 1 of the Interconnection Agreement. Supra's request for liquidated damages is denied.

D. Pre- and Post-Judgment Interest

1. Pre-Judgment Interest

No pre-judgment interest is awarded to BellSouth because the gross amount awarded herein already includes interest. Furthermore, all setoffs awarded Supra herein already include interest.

2. Post-Judgment Interest

The ultimate net award shall bear interest at the post-judgment interest rate as provided under Florida law.

E. Late Charges

Pursuant to §14.2 of Attachment 6 of the Interconnection Agreement, late charges are not to be assessed in the event that a Party disputes charges and such dispute is resolved in favor of such Party. One of the disputes concerned Supra's claim that it was entitled to lease UNEs and UNE Combos and to be billed at those rates, rather than at resale rates. As Supra prevailed on that claim, late charges are inappropriate.

The Tribunal orders the Auditor (as ordered elsewhere herein) to remove such charges in the process of the Audit.

F. Special Master

Supra's request for the appointment of a Special Master is denied, as the Tribunal sees no necessity for such an appointment at this time.

G. Arbitration Costs and Expenses

Section 13.1 of Attachment 1 provides in pertinent part:

> The Arbitrator(s) fees and expenses that are directly related to a particular proceeding shall be paid by the losing Party. In cases where the Arbitrator(s) determines that neither Party has, in some material respect, completely prevailed or lost in a proceeding, the Arbitrator(s) shall, in his or her discretion, apportion expenses to reflect the relative success of each Party. Those fees and expenses not directly related to a particular proceeding shall be shared equally.

Moreover, the parties have agreed on the application of the CPR Institute for Dispute Resolution Rules for Non-Administered Arbitration. Interconnection Agreement, Attach. 1, §4. Rule 16.2 requires the Tribunal to fix in its award the costs of the arbitration, including the fees and expenses of the arbitrators, travel and expenses of witnesses, legal fees and costs, charges paid to CPR, and the costs of the transcript and any meeting and hearing facilities.

The Tribunal has determined that in a case such as this, where each side has prevailed on particular issues and where the value of the declaratory and injunctive relief granted is impossible to determine, the Tribunal cannot determine a "prevailing" party or a "losing" party, or even determine "the relative success" of each party. Accordingly, the Tribunal determines that each side shall bear the costs that each incurred in conjunction with this arbitration, including the specific categories of costs set out above.

H. All Other Relief Denied

To the extent that the parties have made additional claims and/or requested other relief than that which the Tribunal has expressly addressed in other portions of this Award, all such claims and requests for relief are hereby expressly denied.

I. Retention of Jurisdiction

The Tribunal expressly retains jurisdiction to insure completion of the audit ordered by the Tribunal, to calculate the final damages to be awarded based on the results of the audit, and to issue its Final Award on Damages.

VIII. Summary of Award

This final section summarizes the injunctive relief and damages that the Tribunal orders in these two consolidated arbitrations.

The Tribunal orders that **no later than June 15, 2001**, BellSouth shall:

- Facilitate and provision Supra's requests to provide UNEs and UNE Combos to Supra's customers at the contractually agreed prices in the Interconnection Agreement.
- Collocate all equipment as Supra has included in prior applications to BellSouth at the rates indicated in Table 2 attached to the July 24, 1998 letter incorporated into the Interconnection Agreement, and cooperate with and facilitate any new Supra applications for collocation, including but not limited to collocating any Class 5 or other switches in BellSouth central offices.
- Provide Supra nondiscriminatory direct access to BellSouth's OSS and cooperate with and facilitate Supra's ordering of services.
- Provide branded services and elements requested by Supra under the Interconnection Agreement, including but not limited to voice mail, operator

services and directory assistance, under the terms and conditions of section 19 of the General Terms and Conditions of the Interconnection Agreement.

- Fully cooperate with and facilitate Supra's audit of BellSouth's billings since October 1999 to the present in accordance with GAAS.

The Tribunal awards the following damages:

- BellSouth Invoices. Supra shall pay BellSouth $6,374, 369.58 on BellSouth's unpaid invoices, subject to the adjustments listed below;
- Audit Adjustments. Any adjustments in BellSouth's invoices found necessary by Supra's audit of BellSouth's billings, including the elimination of late charges, shall be reflected as necessary reductions or increases in those invoices to be paid by Supra; and
- Supra Damages Set-off. The following damages due to Supra will be adjusted according to the amount Supra will be required to pay on BellSouth's invoices **after** the audit adjustments and by the amount that the Tribunal calculates Supra is due in incremental net income operating as a UNE provider for the months of April and May, 2001, based on the number of Supra customers in those months as determined by the audit:

* Incremental net income operating as a UNE provider --	$ 2,103,906.40
* LENS-related lost productivity --	$ 669,153
* LENS cut-off	$ 55,488
Subtotals of Supra's Damages Set-off	$2,828,547.40

To the extent that either Supra or BellSouth has requested any other relief, all such relief is hereby denied.

DATED: June 5, 2001

John L. Estes

M. Scott Donahey

Campbell Killefer