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January 7, 2003

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
And Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 021249-TP
Complaint of Supra Telecommunications Systems, Inc. Against BellSouth Telecommunications, Inc. for Non-Compliance with Commission Order No. PSC-02-0878-FOF-TP

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss Complaint and Opposition to Request for Expedited Relief, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

James Meza III (KA)

James Meza III

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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CMP
COM
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SEC 1
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CERTIFICATE OF SERVICE
Docket No. 021249-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 7th day of January, 2003 to the following:

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James Meza III (KA)
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Supra Telecommunications, Inc. Against BellSouth Telecommunications, Inc. for Non-compliance With Commission Order No. PSC-02-0878-FOF-TP	Docket No. 021249-TP Filed: January 7, 2003

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS COMPLAINT AND OPPOSITION TO REQUEST FOR EXPEDITED RELIEF

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Motion to Dismiss the Complaint and Request for Expedited Relief ("Complaint") filed by Supra Telecommunications and Information Systems, Inc. ("Supra") on the grounds that: (1) the Complaint fails to state a claim for which the Florida Public Service Commission ("Commission") may grant relief; (2) Supra's Complaint is premature; and (3) the Commission lacks subject matter jurisdiction over the matters alleged in the Complaint.

I. INTRODUCTION

BellSouth sells both a federally-regulated wholesale DSL transport service and a non-regulated retail DSL-based Internet access service, known as FastAccess. BellSouth offers the tariffed wholesale DSL transport service through BellSouth's Special Access F.C.C. Tariff No. 1. This tariffed DSL service is designed for use by Internet service providers ("ISPs"), such as AOL, EarthLink, MSN and BellSouth's own ISP operations as a component of their Internet access services.

BellSouth's retail FastAccess service uses the regulated DSL transport service as an input. FastAccess is an "enhanced, nonregulated, nontelecommunications Internet access service." *See* Final Order on Arbitration, *In Re: Petition by Florida*

Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996, Docket No. 010098-TP, at p. 8. (June 5, 2002) ("the FDN Arbitration Order") (citing *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations*, (Computer II Final Decision), 77 FCC 2d 384 (1980)). During the FDN arbitration proceedings (to which the Complaint makes repeated reference), this federally-tariffed wholesale DSL service was analogized to the pipe through which Internet and other enhanced services can flow.

In the FDN Arbitration Order, the Commission resolved certain disputed issues between BellSouth and FDN, including whether BellSouth was required to continue to provide its FastAccess service to a BellSouth customer who converts from BellSouth to FDN voice service. The Commission answered this question in the affirmative. Both FDN and BellSouth asked the Commission to reconsider and/or clarify its decisions in FDN Arbitration Order. Specifically, BellSouth requested that the Commission clarify how BellSouth was supposed to provision the Commission's decision.

Subsequent to the filing of the motions for reconsideration, the Commission *sua sponte* imputed its ruling in the FDN Arbitration Order regarding BellSouth's FastAccess service to the Supra/BellSouth arbitration proceeding (Docket No. 001305-TP) in its Order resolving BellSouth's and Supra's motions for reconsideration, Order No. PSC-02-0878-FOF-TP, issued on July 1, 2002. Pursuant to the Commission's decision, BellSouth and Supra included the Commission's ruling in the Supra/BellSouth new interconnection agreement, which the Commission approved on August 22, 2002 ("New Agreement"). BellSouth appealed the Commission's decision in the Supra/BellSouth

arbitration proceeding regarding FastAccess to the United States District Court, which is still pending. Once the FDN proceeding becomes final and appealable, BellSouth intends to appeal this decision as well.

On October 21, 2002, the Commission resolved BellSouth's and FDN's motions for reconsideration in Order No. PSC-02-1453-FOF-TP ("FDN Recon Order"). On December 18, 2002, Supra filed the instant complaint against BellSouth.

ARGUMENT

I. Supra's Complaint Fails to State a Claim for Which Relief Can Be Granted.

Supra complains that BellSouth's proposals regarding how it intends to provision its FastAccess service to BellSouth customers who convert to Supra voice service violates the Commission's FDN Arbitration Order and the FDN Recon Order (collectively referred herein as the "FDN Orders"). In support, Supra cites to several statements made by the Commission in the FDN Orders that are not essential to the Commission's ultimate holding. Contrary to Supra's statements, the Commission refused to order any provisioning methodology in the FDN Orders. Indeed, the Commission expressly stated in the FDN Recon Order that "the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service was not addressed in the Commission's" FDN Arbitration Order. *See* FDN Recon Order at 7. Additionally, in resolving BellSouth's request for clarification, the Commission "expressly declin[ed] to impose how the FastAccess should be provisioned."

Accordingly, the Commission has refused to order any specific manner in which BellSouth is required to implement its decisions in the FDN Orders. Because the Commission "declined to impose how the Fast Access should be provisioned,"

BellSouth cannot be in violation of the subject orders by its proposals regarding how BellSouth intends to implement the Commission's decision. For this reason, Supra's Complaint should be dismissed because there is no violation of the FDN Orders. Therefore, Supra's Complaint fails to state a cause of action upon which relief can be granted.

II. Supra's Complaint Is Not Ripe.

The Supra Order is tied to, and dependent upon, this Commission's decisions in the FDN Docket. BellSouth should not be expected to provide FastAccess for Supra end-users other than in the same manner it provides FastAccess for FDN end-users. Supra acknowledges in the Complaint that BellSouth has offered Supra the same process it offered to FDN. *See,* Paragraph 46 of the Complaint; *see also*, Exhibits C and E to the Complaint. BellSouth and FDN have agreed to most of the terms that would govern the process for BellSouth to comply with the FDN Orders, but have been unable to reach complete agreement. FDN and BellSouth have submitted to the Commission an agreement containing the agreed upon language, and also containing each party's proposal for the disputed provisions. The Commission has not yet ruled on the party's submissions. Until the Commission rules on the process in the FDN docket, Supra's complaint is premature.

III. The Commission Lacks Subject Matter Jurisdiction.[1]

Assuming *arguendo* that Supra's Complaint stated a cause of action upon which relief can be granted (which is denied), the Complaint should still be dismissed because the Commission was without jurisdiction to issue the orders in question.

In order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. *See Keena v. Keena*, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). This Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant. *See, e.g.,* Order Granting Motion to Dismiss (PSC-01-2178-FOF-TP) in Docket No. 010345-TP (Nov. 6, 2001) (granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation."); Order Denying Complaint and Dismissing Petition (PSC-99-1054-FOF-EI) in Docket No. 981923-EI (May 24, 1999) (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved "a claim for

[1] BellSouth understands and appreciates the Commission's previous decisions in other proceedings, wherein it rejected this argument. BellSouth reraises this argument not to belabor the Commission but to inform the Commission of the jurisdictional deficiencies in its FDN Orders and to preserve BellSouth's rights on appeal.

monetary damages, an assertion of tortuous liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.").

The Commission, therefore, must determine whether the Legislature has granted it any authority to impose restrictions on the manner in which BellSouth offers a service that is not a telecommunications service. In making that determination, the Commission must keep in mind that the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. *See City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). Instead, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." *See Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977); *accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. 4th Dist. Ct. App. 1995) (noting that an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and that "as a creature of statue," an agency "has no common law jurisdiction or inherent power . . . .").

Moreover, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. *See Atlantic Coast Line R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909). Finally, "any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977). As explained below, Supra cannot make that showing.

A. The Commission Does Not Have Jurisdiction Over All of BellSouth's Operations – Instead, the Commission Only has Jurisdiction Over BellSouth's Provision of Services that are Regulated Under Florida Law.

For more than a century, courts in this country have recognized that the common law and statutory obligations of a public utility apply only to the extent that it is providing a regulated public service. Those obligations simply do not apply to the extent that a public utility engages in other, unregulated business. More than 125 years ago, for instance, the New York Court of Appeals stated that:

> The carrier . . . may carry on, in connection with his business of carrier, any other business, and may use his property in any way he may choose to promote his interests, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and except to the extent to which he has devoted it to public use, by the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons.
>
> * * *
>
> The passenger has the right to be carried and to enjoy equal privileges with others, or at least to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that in matters not falling within the contract of carriage, the carrier shall surrender in any respect, rights incident to his ownership of his property.

Barney v. Oyster Bay and Huntington Steamboat Co., 67 N.Y. 301, 302-03 (Ct. App. N.Y. 1876). *Accord Norfolk &Western Ry. Co. v. Old Dominion Baggage Co.*, 37 S.E. 784 (Va. 1901) (relying on various decisions by the common law courts of England, the Court rejected discrimination challenges to a railroad's decision to grant a single company the right to enter the railroad's station to solicit incoming baggage).

Florida decisions embrace these same principles, recognizing that "there is a distinction between the performance of public duties subject to regulation, and the

exercise of purely private rights in the management and control of [a telephone company's] property." *Twin Cities Cable Co. v. Southeastern Tel. Co.*, 200 So.2d 857, 857 (Fla. 1st Dist. Ct. App. 1967). Accordingly, in *Twin Cities Cable,* the Court ruled that Florida statutes grant the Commission no authority to require telephone companies to enter into pole attachment agreements with cable television companies. *Id.* More than a decade later, Congress granted the FCC the authority to regulate pole attachment agreements except where such matters are regulated by the state. *See Teleprompter Corp. v. Hawkins*, 384 So.2d 648, 649 (Fla. 1980). In response to this impending federal regulation, the Florida Commission entered an order "declaring that is has the authority to regulate pole attachment agreements." *Id.* The Supreme Court of Florida quashed the Commission's order, noting that:

> No reason was given for asserting jurisdiction other than to preempt the FCC from regulating pole attachment agreements. Although we share the concern about federal intervention in an area the state may be better equipped to handle, such concern is not enough to extend the Public Service Commission's jurisdiction. Only the legislature can do that.

Id. at 650. A decade later, the Florida courts reaffirmed that the Commission does not have jurisdiction over all of the operations of a telecommunications company, but instead, the Commission's jurisdiction extends only to those operations over which the legislature clearly has granted it authority. *See Southworth & McGill, P.A., v. Southern Bell Tel. & Tel. Co.*, 580 So.2d 628, 631 n.5 (Fla. 1st Dist. Ct. App. 1991)("There are no laws or rules with respect to the yellow page advertising directory with [the] exception of provisions with respect to allocation of gross profits from advertising in connection with establishing rates. It has been held that directory advertising is not within the scope of the telephone company's function as a regulated industry in Florida.").

B. No Statute Expressly or Impliedly Grants the Commission any Jurisdiction over Services (Like BellSouth's Retail FastAccess Service) that are not Telecommunications Services.

Contrary to the Commission's findings in the FDN and Supra Orders, neither the general provisions of Section 364.01 nor the more specific provisions of the other statutes contained in Chapter 364 grant the Commission any jurisdiction over BellSouth's FastAccess service. The Commission, therefore, had no authority to issue the FDN or Supra Orders, wherein it imposed restrictions on the manner in which BellSouth offers a non-telecommunications service like its retail FastAccess service.

1. Section 364.01 does not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess service.

Section 364.01 begins with the overarching limitation that the Commission "shall exercise over and in relation to telecommunications companies *the powers conferred by this Chapter.*" *Florida Statutes* §364.01(1)(emphasis added). The Section then provides that "[i]t is the legislative intent to give exclusive jurisdiction in all matters *set forth in this chapter* to the [Commission] in regulating telecommunications companies . . . ." *Id.* §364.01(2)(emphasis added). Subsection (4) goes on to provide that "[t]he Commission shall exercise its *exclusive jurisdiction* [in all matters *set forth in this Chapter*] to" accomplish various objectives.

It is clear, therefore, that Section 364.01(4) does not expand the Commission's jurisdiction. Instead, it gives the Commission guidance as to how to exercise the jurisdiction that the Legislature already has granted the Commission, and the Supreme Court of Florida has held that the Legislature has granted the Commission the "exclusive jurisdiction to regulate *telecommunications.*" *See Florida Interexchange*

Carriers Ass'n v. Beard, 624 So.2d 248, 251 (Fla. 1993)(emphasis added). The fact that Chapter 364 grants the Commission jurisdiction over only telecommunications services is clear not only from the text of the various statutes discussed in this Motion, but also from the statutory definitions set forth in Section 364.02. The Legislature, for instance, has defined "telecommunications company" in terms of an entity that offers two-way "telecommunications service" to the public for hire, *see* §364.02(12), and it has defined both ALECs and LECs in terms of companies that provides "local exchange telecommunications service." *Id.* at §364.02(1),(6). Similarly, both the terms "monopoly service" and "nonbasic service" apply only to "telecommunications service." *Id.* at §364.02(7),(8). The Commission, therefore, only has jurisdiction over the telecommunications services that are offered by a telecommunications company. It does not have jurisdiction over any other activities of a telecommunications company.

Accordingly, Section 364.01(4) provides that the Commission "shall exercise its exclusive jurisdiction [*over telecommunications services*]" in order to:

> ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services," *see* §364.01(4)(b); *Complaint* at 5, ¶9;
>
> "[p]romote competition by encouraging new entrants into telecommunications markets . . ." *see* §364.01(4)(d); *Complaint* at p. 5, ¶9.
>
> "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior . . . ." *see* §364.01(4)(g); *Complaint* at p. 3, ¶1; p. 5, ¶9;

Nothing in this section grants the Commission any authority to address the manner in which any entity offers a service that is not a telecommunications service – even if the Commission believes that doing so would expand the range of consumer choice in the provision of telecommunications service, encourage new entrants into

telecommunications markets, affect the manner in which providers of telecommunications services are treated, or otherwise promote what the Commission may perceive to be admirable goals. As the Florida courts have noted, "[a]n administrative rule cannot be contrary to or enlarge a provision of a statute, no matter how admirable the goal may be." *Capeletti Brothers, Inc. v. Department of Transportation*, 499 So.2d 855, 857 (Fla. 1st Dist. Ct. App.), *review denied* 509 So.2d 1117 (Fla. 1987). *Cf. Deltona Corp. v. Mayo*, 342 So.2d 510, 512 n.4 (Fla. 1977)("Sections 367.081(2) and 367.121 . . . set forth the powers of the Commission in setting water and sewer rates. These provisions do not empower the Commission to set rates so as to right any wrong which it perceives regardless of its relationship two water and sewer services.").

As the Commission has noted, BellSouth's retail FastAccess service is not a telecommunications service. Instead, it is an "enhanced, nonregulated, nontelecommunications Internet access service." *See* FDN Arbitration Order at 8. Section 364.01(4), therefore, grants the Commission no more jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess service than it grants the Commission to impose restrictions on the manner in which any entity offers cable television service, lawn care service, or any other service that is not a telecommunications service.

2. Section 364.051(5) did not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess services

Likewise, Section 364.051(5) did not grant the Commission jurisdiction to issue the FDN or Supra Orders. Section 364.051(5)(b) provides, in part, that "[t]he

Commission shall have continuing regulatory oversight of nonbasic services for the purposes of . . . ensuring that all providers are treated fairly in the telecommunications market." By its own terms, this statute only grants the Commission jurisdiction over "nonbasic services," and the term "nonbasic service" is defined as "a *telecommunications service* . . . ." *See* §364.02(8). Accordingly, this statute grants the Commission no jurisdiction over BellSouth's retail FastAccess service, which the Commission has recognized is not a telecommunications service.

Similar, Section 364.051(5)(a) also provides no jurisdiction to the Commission. This statute allows a price-regulated company to deaverage prices, package nonbasic services together with basic services, use volume discounts and term discounts, and offer individual contracts in order to meet the offerings by any competitive provider of similar telecommunications services. The statute then provides that in doing so, the price-regulated company "shall not engage in any anticompetitive act or practice, or unreasonably discriminate among similarly situated customers." *See* §364.051(5)(a)(2). Clearly, this statute does not grant the Commission jurisdiction to hear any and every allegation of anticompetitive acts or practices. After all, Section 364.01(3) plainly states that "nothing in this chapter shall limit the availability to any party of any remedy under state or federal antitrust laws." Instead, this statute allows the Commission to hear allegations of anticompetitive acts or practices with regard to a price-regulated company's telecommunications offerings that are designed to meet offerings of its competitors. It does not give the Commission jurisdiction to hear allegations of anticompetitive acts or practices with regard to the offering of a non-telecommunications service by any company.

3. Sections 364.10, 364.03, and 364.08 do not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess services

Section 364.10(1) provides that "[a] telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." As noted above, however, Chapter 364 only grants the Commission jurisdiction over telecommunications services. Thus, if BellSouth were to offer voice lines only to customers that purchase its retail FastAccess service, that arguably would be a term or condition under which BellSouth offers a telecommunications service, and the Commission arguably would have jurisdiction to determine whether such a term or condition violates Section 364.10(1).

That, however, is not what the FDN and Supra Orders were based on. Instead, the Commission's decisions were based on the belief that BellSouth offers its retail FastAccess service only to customers that purchase voice service from BellSouth. Accordingly, the FDN Orders clearly invoke condition under which BellSouth offers a service that is not a telecommunications service. The Commission, therefore, has no authority to determine whether this alleged term or condition violates Section 364.10(1).

This is clear from the holding of *Twin Cities Cable Co. v. Southeastern Tel. Co.*, 200 So.2d 857 (1st Dist. Ct. App. 1967), in which a telephone company refused to enter a pole rental agreement with two cable television operators. The cable television operators alleged that this refusal constituted a violation of Section 364.10[2] because the

[2] In 1967, Section 364.10 read as follows: "No telegraph company or telephone company shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." *See* Exhibit A.

telephone company had entered similar agreements with similar customers. The Court affirmed the dismissal of the complaints, noting that "there is a distinction between the performance of public duties subject to regulation, and the exercise of purely private rights in the management and control of [a telephone company's] property." *Id.* at 857. Recognizing decisions from other states that "telephone companies are not engaged in the business of renting poles" and that "the granting or withholding of permission by the [telephone] company for the antenna company to use its facilities does not involve any question of discrimination," the Court concluded that

> it appears that there is no legal duty of the [telephone company] to furnish this service and, therefore, F.S.A. 364.10 is inapplicable, and the complaint having alleged a set of facts from which it cannot recede and which taken in their entirety as true, do not state a legal liability, the Court was correct in granting the motion to dismiss.

Id. Similarly, BellSouth's decisions regarding its provision of its retail FastAccess service do not involve any question of discrimination, and they fall outside the jurisdiction of the Commission.

For similar reasons, Section 364.08(1) also does not provide the Commission any jurisdiction. To the extent that this section prohibits a telecommunications company from charging rates other than those specified in its tariffs, it is inapplicable because FastAccess is a non-regulated, non-telecommunications service that, quite properly, is not the subject of any Florida tariff. To the extent that this section prohibits a telecommunications company from providing special advantages or privileges, it is similar to the nondiscrimination provisions of Section 364.10. Thus, like Section 364.10,

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The substance of this language is identical to the substance of the language of Section 364.10(1) as it exists today.

Section 364.08(1) simply does not apply to an unregulated, nontelecommunicaitons service like BellSouth's retail FastAccess service.

4. Section 364.3381 does not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess services.

Finally, Section 364.3381, did not provide the Commission with any jurisdiction to issue the FDN and Supra Orders. Subsection (1) addresses the "price of a nonbasic *telecommunications service*," and subsection (2) provides that "a local exchange telecommunications company which offers both basic and nonbasic *telecommunications services* shall establish prices *for such services* that ensure that nonbasic *telecommunications services* are not subsidized by basic *telecommunications services.*" (Emphasis added).

Subsection (2) goes on to establish "the cost standard for determining cross-subsidization," and subsection (3) grants the Commission "continuing oversight jurisdiction over cross subsidization, predatory pricing, and other *similar* anticompetitive behavior . . . ." (Emphasis added). The only jurisdiction granted by this statute is the jurisdiction to determine whether the manner in which a company prices its telecommunications services results in cross-subsidization or constitutes predatory pricing or other similar anticompetitive behavior. This statute clearly does not grant the Commission jurisdiction to consider the Association's allegations regarding the terms and conditions under which BellSouth will provide a service that is not a telecommunications service.

C. The Commission has no Jurisdiction over BellSouth's Federally-Tariffed Wholesale DSL Service Because Exclusive Jurisdiction Over that Interstate Service Lies with the FCC.

The Complaint should be dismissed for the additional reason that the FCC, and not the Commission, has jurisdiction over BellSouth's DSL service. In fact, in an Order addressing GTE's DSL-Solutions-ADSL Service, the FCC found that "this offering, which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is *an interstate service* and is *properly tariffed at the federal level*." *See* Memorandum Opinion and Order, *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 F.C.C. rcd 22,466 at ¶1 (October 30, 1998)(emphasis added). The FCC, therefore, has exclusive jurisdiction over BellSouth's wholesale DSL service.

The provision of BellSouth's wholesale DSL service is governed by BellSouth's Special Access FCC Tariff No. 1. That tariff states that BellSouth's provision of DSL requires the existence of an "in-service, Telephone Company [i.e., BellSouth] provided exchange line facility."[3] F.C.C. Tariff No. 1, Section 7.2.17(A). A UNE loop is not an "in-service [BellSouth] provided exchange line facility." Thus, if BellSouth were to place its tariffed DSL on a UNE loop, BellSouth would be in violation of its federal tariff.[4] The Commission clearly has no jurisdiction to alter that FCC Tariff, and the Commission was careful to note in its FDN Arbitration Order that it is not asserting jurisdiction over DSL. *See* FDN Arbitration Order at 8-9.

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[3] BellSouth has substantial operational reasons for this requirement, and BellSouth reserves the right to fully address these operations reasons if this Motion to Dismiss is denied.

[4] BellSouth also has no right to provide its own services over a UNE loop, as the CLEC, not BellSouth, has sole right to use the UNE loop.

Moreover, the FCC recently addressed BellSouth's practice of not providing its federally-tarriffed wholesale DSL service over a UNE loop in its Order addressing BellSouth's Georgia and Louisiana 271 applications. *See* Memorandum Opinion and Order, *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, Docket No. 02-35 (May 15, 2002). Parties to that proceeding raised issues that are similar to those raised by FDN, and the FCC addressed those issues accordingly:

> BellSouth states that its policy "not to offer its wholesale DSL service to an ISP or other network services provider [ ] on a line that is provided by a competitor via the UNE-P" is not discriminatory nor contrary to the Commission's rules. Commenters allege that BellSouth will not offer its DSL service over a competitive LEC's UNE-P voice service on that same line.[5] We reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities. Furthermore, a UNE-P carrier has the right to engage in line splitting on its loop. As a result, a UNE-P carrier can compete with BellSouth's combined voice and data offering on the same loop by providing the customer with line splitting voice and data service over the UNE-P loop in the same manner. Accordingly, we cannot agree with commenters that BellSouth's policy is discriminatory.

Id. at ¶157 (emphasis added). The FCC, therefore, was squarely presented with the issue of whether BellSouth's policy of not providing its federally tariffed, wholesale DSL telecommunications service over a UNE loop violates federal law. The FCC found no such violation. To the contrary, the FCC explicitly and unequivocally found that BellSouth's policy is not discriminatory and, therefore, does not violate section 202(a) of

[5]Commentators also claimed that "in order to prevent a customer from losing its billing telephone number (BTN) or change its established hunting sequence, the customer may be required to change the DSL service from the existing line to a "stand alone" line." *Id.* at ¶157 n. 561.

the Act. This Commission has no jurisdiction to disturb this finding by the federal agency that has exclusive jurisdiction over BellSouth's wholesale DSL service.

D. The Expedited Process Referenced in the Complaint Does Not Apply to the Claims Set forth in the Complaint.

To resolve the instant Complaint, Supra attempts to invoke an expedited procedure that is set forth in a June 19, 2001, internal Commission memorandum ("Memorandum"). This Memorandum establishes an internal process for the Commission to resolve "complaints arising from interconnection agreements approved by the Commission under Section 252 of the Telecommunications Act" in approximately 99 days. Keeping with its intent to only govern disputes arising out of interconnection agreements, the expedited complaint process is limited to issues of contract interpretation. *Id.*

In the instant matter, FCCA's Complaint is not a complaint "arising from an interconnection agreement" and is not limited to "issues of contract interpretation." Indeed, Supra recognizes this very fact in its Complaint. *See* Complaint at n.1. Accordingly, the instant dispute is not the type of dispute that would be governed by the expedited process established in the Memorandum. Therefore, it is inapplicable to FCCA's Complaint and the Commission's regular rules for the treatment and resolution of expedite complaints or requests should govern.

CONCLUSION

For the reasons set forth above, the Commission should dismiss Supra's Complaint. In the alternative, the Commission should not adopt the expedited process proposed by Supra.

Respectfully submitted this 7th day of January 2003.

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