

J. PHILLIP CARVER
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0710

February 6, 2001

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

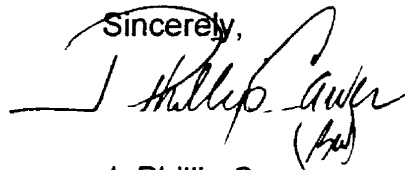
**Re: Florida Docket No. 001305-TP
Petition for Arbitration between BellSouth and Supra**

Dear Ms. Bayó:

Enclosed is an original and 15 copies of BellSouth Telecommunications, Inc.'s Response in Opposition to Supra Telecommunication and Information Systems, Inc.'s Motion to Dismiss, 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,



J. Phillip Carver

Enclosures

cc: All parties of record
Marshall M. Criser, III
Nancy B. White
R. Douglas Lackey

DOCUMENT NUMBER-DATE

01692 FEB-6 01

FPSC-RECORDS/REPORTING

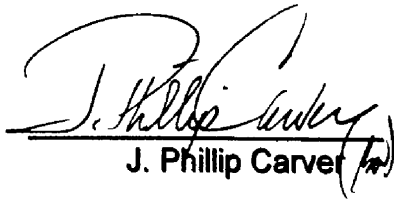
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
FACSIMILE and U.S. Mail this 6th day of February, 2001 to the following:

Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Supra Telecommunications and
Information Systems, Inc.
1311 Executive Center Drive
Koger Center - Ellis Building
Suite 200
Tallahassee, FL 32301-5027
Tel. No. (850) 402-0510
Fax. No. (850) 402-0522
mbuechele@stis.com

Supra Telecommunications and
Information Systems, Inc.
Brian Chaiken/Kelly Kester
2620 S. W. 27th Avenue
Miami, FL 33133
Tel. No. (305) 476-4248
Fax. No. (305) 443-1078
bchaiken@stis.com


J. Phillip Carver (for)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:)	
)	
Petition for Arbitration of the Interconnection)	Docket No. 001305-TP
Agreement Between BellSouth)	
Telecommunications, Inc. and Supra)	
Telecommunications and Information)	
Systems, Inc., Pursuant to Section 252(b))	Filed: February 6, 2001
of the Telecommunications Act of 1996.)	
_____)	

**BELLSOUTH'S RESPONSE IN OPPOSITION TO
SUPRA TELECOMMUNICATIONS AND INFORMATION
SYSTEMS, INC.'S MOTION TO DISMISS**

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files, pursuant to Rule 25-22.037(b), Florida Administrative Code, its Response in Opposition to the Motion to Dismiss of Supra Telecommunications and Information Systems, Inc.'s ("Supra"), and states the following:

1. Supra's Motion should be denied because it fails to provide any basis upon which this Commission could find that it lacks subject matter jurisdiction over the arbitration of the Interconnection Agreement between the parties. All other grounds for bringing the Motion are untimely under the Florida Rules of Civil Procedure. Moreover, even if Supra's Motion were timely, it still fails to state a legally sufficient basis to grant a dismissal.

2. BellSouth sent to Supra a request for negotiation by letter dated March 29, 2000. The Petition in this matter was filed September 1, 2000. Thus, BellSouth did, in fact, file the Petition in the timeframe provided in Section 252(b)(1) of the

Telecommunications Act, i.e., between the 135th and 160th day after the request for negotiation. Supra initially responded to BellSouth's Petition by requesting additional time, until October 2, 2000, to file its response. Supra subsequently filed its Response on October 16, 2000. Supra again attempted to delay this proceeding by filing on December 20, 2000, a Motion to postpone the Issue Identification conference set for January 8, 2001. This Motion was denied by the Prehearing Officer. Supra's Motion to Dismiss is nothing more than another dilatory tactic.

3. Rule 1.140, Fla. R. Civ. Pro. provides that all defenses, including a defense that would be a basis for dismissal, must be stated in the initial responsive pleading or motion. The Rule further provides that "any ground not stated shall be deemed to be waived except any ground showing that the Court lacks jurisdiction of the subject matter may be made at any time." Thus, if Supra's Motion is not sufficient to demonstrate that this Commission lacks subject matter jurisdiction over the arbitration of interconnection agreements, then Supra's Motion must be summarily denied. Supra has, in fact, completely failed to support such a contention.

4. Subject matter jurisdiction is vested in a particular tribunal by organic law. In other words, this jurisdiction exists pursuant to the state or federal constitution, or the pertinent statutory authority. This jurisdiction was defined by the Florida Supreme Court in Cunningham v. Standard Guaranty Insurance Co., 630 So. 2d 179, 181 (Fla. 1994) as "the power of the . . . [tribunal] . . . to deal with a class of cases to which a particular case belongs." The Supreme Court continued by noting the following long-standing definition of subject matter jurisdiction:

'Jurisdiction,' in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power lawfully existing

to hear and determine a cause. It is the power lawfully conferred to deal with the general subject involved in the action. It does not depend upon the ultimate existence of a good cause of action in the plaintiff, in the particular case before the court. 'It is the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case.' *Hunt v. Hunt*, 72 N.Y. 217.

(Id.).

Further, "the parties cannot stipulate to jurisdiction where none exists. (Id.).

Conversely, the parties cannot, by agreement, deprive a tribunal of subject matter jurisdiction that it possesses. See Manrique v. Fabbri, 493 So. 2d 437 (Fla. 1986).¹

In our case, this Commission's jurisdiction over the arbitrations of interconnection agreements is clear.

5. As set forth in BellSouth's Petition (p. 3), "pursuant to Section 252(b)(1) of the 1996 Act, which allows either party to the negotiation to request arbitration, this Commission is empowered to arbitrate any and all unresolved issues regarding Supra's interconnection with BellSouth's network." Supra has not disputed this Commission's subject matter jurisdiction under the Act, and the matters raised in Supra's Motion (even if otherwise meritorious) cannot legally divest this Commission of its jurisdiction. Therefore, Supra's Motion fails because it does not go to this Commission's jurisdiction over the subject matter, and all other grounds for dismissal have been waived due to Supra's failure to assert them in a timely manner.

6. Moreover, even if Supra's Motion to Dismiss did state some basis that went to the subject matter jurisdiction of this Court, the fact remains that, as to each

¹ In Manrique, the Florida Supreme Court noted that parties may express a choice of forum, and a court recognizing this choice may decline to exercise jurisdiction. However, the parties can not, by agreement, deprive a court of jurisdiction that otherwise exists (Id. at 440).

of Supra's bases for dismissal, Supra is simply wrong. Supra's first "jurisdictional argument" is premised upon the contention that 1) BellSouth cannot petition for arbitration until after a Inter-Company Review Board meeting has been held, and 2) there has been no such meeting. The most charitable comment that could be made about Supra's argument is that it is an extreme example of form over substance. Section 2.3 of the Agreement's general terms and conditions states the parties' agreement that, prior to filing a petition pursuant to this Section, they will utilize the informal dispute resolution process provided in Section 3 of Attachment 1. The attachment provides that the parties will attempt to resolve disputes by submitting them to a Inter-Company Review Board for discussion and negotiation, and that the Board will consist of representatives at a prescribed level of each company or other employees "at such lower level as each party may designate."

7. In other words, the requirements of the Agreement are very much like the requirements of the Act: parties are required to negotiate and attempt to reach an agreement before filing a Petition. BellSouth and Supra did engage in negotiations, a fact that Supra does not deny. Further, the negotiations were attended by the same representatives of each company that would negotiate in the context of an Inter-Company Review Board meeting. Apparently, Supra's contention boils down to the notion that because these negotiations were not designated as an official Inter-Company Review Board meeting, they cannot fulfill the requirements of the Agreement. Again, this is rather an extreme example of form over substance.

8. Further, even if Supra were correct that there must be a negotiation session that is formally designated as such, Supra has inexplicably failed to invoke

this provision of the Agreement either during negotiations or at any previous time during the five months since BellSouth filed its Petition. As with any other contractual right, by electing not to raise this issue sooner (or by simply neglecting to do so) Supra has waived any contractual right that it may have had to an Inter-Company Board meeting. It is well settled that rights that exist under a contract are waived if not asserted within a reasonable period of time. See Fort Walton Beach Lincoln Mercury, Inc. v. Pearson, 731 So. 2d 859 (Fla. 1st DCA 1999). Further in an analogous context, the Florida Supreme Court rejected an argument that is more like Supra's argument in our case. In Butler v. Allied Dairy Products, Inc., 151 So. 2d 279 (Fla. 1963), an employer claimed that the Commission in a workman's compensation proceeding lacked subject matter jurisdiction because the claim was barred by a statute that made hiring within the state a prerequisite to recovery. The Supreme Court held that the defense did not go to the subject matter jurisdiction of the Commission. The Court also ruled that the employer, by its past conduct, had waived the statutory requirement and was estopped from raising it as a defense.

9. Again, in substance, the requirement of an intercompany board meeting has been met. Moreover, even if Supra were correct in arguing the technicality that the negotiations that occurred were not actually designated as intercompany board meetings, this is, at most, a relatively minor requirement of the Agreement, which Supra has waived by its actions. Further, even if not waived, the lack of an intercompany board meeting does not divest the Commission of subject matter jurisdiction.

10. Supra's second "jurisdictional argument" is that BellSouth did not file the Petition for Arbitration within the filing window prescribed by Section 252(b)(1). In its Motion, Supra acknowledges receiving from BellSouth on March 29, 2000, "correspondence regarding negotiations." What Supra does not acknowledge is that this letter was a clear and unequivocal demand for negotiation. Further, the letter clearly states that it "serves as notification that BellSouth chooses to negotiate a new Interconnection Agreement rather than to extend the term of Supra's existing Agreement." (A copy of the letter is attached as Exhibit A).

11. Apparently Supra's theory is that at some point subsequent to this March 29, 2000 letter, Supra developed the purely subjective opinion that the then current agreement would be extended. Under Supra's theory, "negotiations" did not begin until it was disabused of this notion, and Supra (as opposed to BellSouth) requested negotiations on June 9, 2000, i.e., more than two months after negotiations had been opened by BellSouth. Even if Supra's factual contentions were correct (and they are not), Supra's position is that because negotiations concerned an extension rather than a new agreement, they were somehow not negotiations at all. Although Supra's theory is novel, there is no support, either in law or otherwise, for the notion that the nature of the negotiations (i.e., what was discussed) can somehow toll the running of the time under 252(b)(1), which began with the clear and unequivocal earlier request for negotiation by BellSouth.

12. In Supra's Motion, it also appears to imply (although it does not state directly) that BellSouth's request for negotiation is not effective because only an ALEC, such as Supra, can request negotiations. Assuming this is Supra's

contention, it has provided no support for this position. Moreover, Petitions for Arbitration have been filed by BellSouth, Verizon, and by Sprint before this Commission on a fairly routine basis over the past several years, and these arbitrations have been heard.

13. Further, Section 2.3 of the General Terms and Conditions (which Supra relies on so heavily for other purposes) states specifically that in the process of negotiating a new agreement, if “the parties are unable to satisfactorily negotiate new terms, conditions and prices, either party may petition the Commission to establish an appropriate follow-on agreement pursuant to 47 U.S.C. § 252.” Thus, if Supra is contending that only it can commence negotiations (and it is truly difficult to tell what Supra is arguing) then this argument must also fail.

14. Finally, Supra makes a variety of wild allegations to the effect that BellSouth has acted in bad faith. Even if these allegations were true (which they are not), they would provide no basis for dismissal. Supra relies heavily on a settlement of a case before the FCC in which it was alleged that BellSouth exercised bad faith during negotiations. If Supra actually had some basis for a claim to this effect, then it could bring its claim before the FCC. However, such a claim would not render the Petition in our case legally insufficient, nor would it provide any other legal basis to support dismissal. Again, Supra has failed to state a basis for dismissal, and has raised yet another matter that has absolutely nothing to do with subject matter jurisdiction.

15. Supra’s plea for dismissal with prejudice is unfounded, but it is noteworthy only that it demonstrates that Supra’s Motion is yet one more attempt to

“game” the process. Typically, if a petition were filed prematurely (as Supra alleges), the remedy would be to delay commencement of the proceeding until the window under 252(b)(1) actually opened. Supra has, instead, waited until after the window has opened and closed under the correct calculation of this time frame (and even under its own incorrect calculation) to raise as a basis for dismissal the contention that the Petition was filed prematurely. Thus, Supra has (apparently intentionally) delayed raising what it claims is a basis for dismissal, and is now requesting that the Petition be dismissed with prejudice, so that, presumably, there would never be arbitration between the parties. This request is as outlandish as it is untenable. Again, it simply shows the lengths to which Supra will go to delay this proceeding.

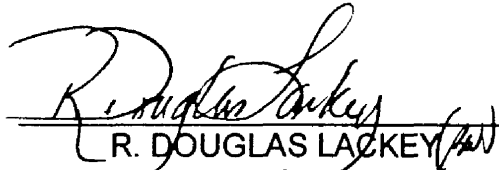
16. As mentioned previously, Supra's conduct throughout this proceeding has been characterized by extreme foot-dragging. Supra initially filed a motion that had the effect of delaying their response to the Petition. Then Supra attempted unsuccessfully to postpone the Issue Identification meeting. Now, Supra continues this pattern of dilatory behavior by filing this frivolous motion to dismiss the complaint. These tactics should not be rewarded. Instead, Supra's motion should be summarily denied.

WHEREFORE, BellSouth respectfully requests the entry of an Order denying Supra's Motion to Dismiss for the reasons set forth above.

Respectfully submitted this 6th day of February, 2001.



NANCY B. WHITE
Museum Tower
150 West Flagler Street
Suite 1910
Miami, Florida 33130



R. DOUGLAS LACKEY
J. PHILLIP CARVER
General Attorneys
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0710

COUNSEL FOR BELL SOUTH
TELECOMMUNICATIONS, INC.

245562

BellSouth Interconnection Services
14970 BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375

March 29, 2000

Olukayde Ramos
Supra Telecommunications & Information Systems, Inc.
2620 SW 27th Avenue
Miami, FL 33133

Dear Mr. Ramos:

On October 5, 1999, BellSouth Telecommunications, Inc. ("BellSouth") and Supra Telecommunications & Information Systems, Inc. ("Supra") entered into an Interconnection Agreement in the state of Florida (the "Agreement"). The expiration date for that Agreement is June 9, 2000. Please be advised that this correspondence serves as notification that BellSouth chooses to negotiate a new Interconnection Agreement rather than to extend the term of Supra's existing Agreement.

As such, pursuant to Section 2 of the General Terms and Conditions of the Agreement and in compliance with Section 251(c)(1) of the Communications Act of 1934, as amended ("Act"), BellSouth is hereby requesting that Supra commence good-faith negotiations with BellSouth to enter into a new Agreement.

In an effort to move the negotiation process along, an electronic copy of the BellSouth proposed Interconnection Agreement is enclosed for your review. Once you have had an opportunity to review the proposed agreement, please contact me with questions. If need be, we can begin scheduling meetings between the companies to address issues raised during your review.

Should you have questions regarding this, please do not hesitate to call me at 404-927-8389.

Sincerely,



Pat Finlen
Manager - Interconnection Services

Cc: Parkey Jordan, Esq.
Nancy White, Esq.

Enclosure

ATTACHMENT