



1311 Executive Center Drive, Suite 200
Tallahassee, FL 32301-5027

Telephone: (850) 402-0510
Fax: (850) 402-0522
www.supratelecom.com

February 21, 2002

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

**RE: Docket No. 001097-TP - Motion To Compel and Overrule Objections To
Supra's First Set of Admissions, Second Set of Interrogatories, and Second
Set of Request For Production.**

Dear Mrs. Bayo:

Enclosed are the originals and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Notice of Service Motion To Compel and Overrule Objections To Supra's First Set of Admissions, Second Set of Interrogatories, and Second Set of Request For Production to BellSouth Telecommunications, Inc. in the above-referenced docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

Brian Chaiken
General Counsel

DOCUMENT NUMBER DATE

02090 FEB 21 08

FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery and/or Federal Express this 21st day of February, 2002 to the following:

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

Nancy B. White, Esq.
James Meza III, Esq.
c/o Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL. 32301
(850) 222-1201 (voice)
(850) 222-8640 (fax)

J. Henry Walker, Esq.
1155 Peachtree Street, N.E.
Suite 1700
Atlanta, GA 30309
(404) 249-2720 (voice)
(404) 249-5664 (fax)

T. Michael Twomey, Esq.
R. Douglas Lackey, Esq.
E. Earl Edenfield Jr., Esq.
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0710

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4248
Facsimile: (305) 443-9516

By: Brian Chaiken/aks
BRIAN CHAIKEN, ESQ.
KIRK DAHLKE, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth	}	
Telecommunications, Inc. against Supra	}	Docket No. 001097-TP
Telecommunications and Information	}	
Systems, Inc., for Resolution of Billing	}	Filed: February 21, 2002
Disputes.	}	
	}	

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.'S
MOTION TO COMPEL AND OVERRULE
OBJECTIONS TO SUPRA'S FIRST SET OF ADMISSIONS AND SECOND SET OF
INTERROGATORIES, AND SECOND SET OF REQUEST FOR PRODUCTION

Pursuant to Order Setting Matter For Rehearing and Establishing Procedure (Order No. PSC-02-0143-PCO-TP) dated January 31, 2002, Rule 28-106.204(1) and 28-106.206, Florida Administrative Code, and Rule 1.380(a), Florida Rules of Civil Procedure, Supra Telecommunications & Information Systems, Inc. ("Supra") by and through its undersigned counsel, hereby moves for the entry of an order compelling BellSouth Telecommunications, Inc. ("BellSouth") to respond to Supra's First Set of Admissions and Second Set of Interrogatories and Second Set of Request for Production of Documents. In support of this Motion, Supra states as follows:

1. BellSouth made numerous general objections, many of which were repetitive and not applicable to the individual admissions, interrogatories or request for production. Supra seeks an order overruling BellSouth's objections and compelling answers to Supra's request for admissions and interrogatories.
2. Supra's discovery requests are relevant to the issues in this cause and are reasonably calculated to lead to the discovery of admissible evidence concerning the issues in this proceeding. *See* Rule 1.280(b)(1), Florida Rules of Civil Procedure. This Commission established a list of specific issues to be decided by

this Commission. As explained below, Supra's discovery requests are well within the scope of and are reasonably calculated to lead to the discovery of admissible evidence as the information sought thereby pertains to the specific issues listed in the Commission's Order Setting Matter for Rehearing and Establishing Procedure.

REQUEST FOR ADMISSION

3. The Request for Admissions are specifically designed to "expedite the resolution of this proceeding."
4. As stated by BellSouth on page 5 of its Response: The **purpose behind** requests for **admissions is to expedite** the trial of **the action** and to **relieve the parties** of the **time and expense** entailed in **proving** the genuineness of documents or the **truth of matters of fact** which the adverse party does not intend to litigate or **which can be ascertained by reasonable inquiry.**" *See Fla. R. Civ. P. 1.370, Author's Comment – 1967*. (Emphasis added).
5. Given the above quoted rule, it is evident that the purpose behind admissions is to expedite the proceeding by relieving a party [Supra in this instance] from the time and expense of "proving" the "truth of matters of fact . . . which can be ascertained by reasonable inquiry."
6. BellSouth's main objection to the request for admissions is that the information sought is "a matter of public record" and "is . . . easily accessible." *See pg. 4, last paragraph of BellSouth's Response*. This of course is an admission by BellSouth that answering these specific and relevant questions would not be overly

burdensome, or expensive or time consuming as alleged in paragraph 9 of its Response.

7. In fact, the request for admissions are consistent with Rule 1.370, Fla. R. Civ. P., which provides that this discovery device is available to Supra to prove the truth of matters of fact which can be ascertained by reasonable inquiry by BellSouth.
8. All of the Admission falls into one of two categories. Admission that will permit Supra to file a Motion for Summary Proceeding, in effect a Motion for Summary Judgment, and Admissions that will permit Supra to file an additional Motion To Dismiss for Lack of Subject Matter Jurisdiction.
9. BellSouth makes an incorrect assertion with respect to both federal and Florida law involving a litigant's ability to file a Motion To Dismiss for Lack of Subject Matter jurisdiction. On page 7, of their Response, BellSouth states: "The Commission has already determined that it has jurisdiction over these issues in both the Order on Motion To Dismiss and the Order on Reconsideration. Supra should not be allowed to revive those arguments through improper discovery."
10. BellSouth improperly suggests that once a litigant raises a single objection with respect to subject matter jurisdiction, that the litigant is therefore foreclosed from objecting to subject matter jurisdiction on other grounds. BellSouth's suggestion is completely false, as it is well-established law that a lack of subject matter jurisdiction may be raised at any time. Merely because the Commission rejected one argument does not mean that Supra cannot raise a different argument, never before ruled upon and based on a different theory, on the basis of lack of subject matter jurisdiction.

11. Order No. PSC-00-2250-FOF-TP was limited to Supra's objection to the Commission's subject matter jurisdiction on only one ground: The Commission lacked jurisdiction because of the dispute resolution provision contained in the agreement executed by Supra on October 5, 1999. The Commission agreed with Supra that the arbitration provision did apply prospectively, but that it did not apply for Supra's alleged "failure to pay for services received under the present [1997 Resale] agreement." No other jurisdictional ground was asserted or ruled upon by the Commission.
12. Curiously enough, the Commission characterized the dispute in this Docket as a breach of contract dispute. In other words, Supra has a duty and Supra allegedly has failed to comply with its duty. This characterization is directly relevant to many of the admissions requested. Because BellSouth did not claim, in its initial Petition, that BellSouth is due and owing any money from before October 5, 1999. In the initial Petition, BellSouth simply requests a "declaratory statement" from the Commission that BellSouth did in fact bill Supra correctly. This statement in its initial Petition is an admission that Supra did in fact pay all monies due and owing. Also, it must be noted that, BellSouth admitted in the first evidentiary hearing that it cannot prove that Supra failed to pay for any services. **See Admission Nos. 36 through 49.**
13. The Commission is prohibited from ruling – or as BellSouth wishes, issue a declaratory ruling that BellSouth did bill Supra correctly - on the dispute in 001097-TP, if the Commission cannot first determine that BellSouth has proven its case that Supra failed to pay for services prior to October 5, 1999.

14. The questions with respect to the applicable law for breach of contract is necessary and relevant so as to prevent BellSouth from arguing that some other standards applies. BellSouth's illegitimate arguments simply cause delay and are overly burdensome. If BellSouth simply admits to the elements necessary for proving a breach of contract dispute, there would be no argument as to the law the Commission is to apply when ruling on Supra's Motion for Summary Proceeding. Of course, BellSouth does not wish to answer these admissions because BellSouth wishes to delay the process and thereby create greater and unnecessary expense for Supra.
15. **Admission No. 24**, is very relevant. It asks whether BellSouth is seeking any damages. If BellSouth says yes, then BellSouth has the burden of first alleging that damages are due and owing prior to October 5, 1999. The problem for BellSouth is that it has failed to make this allegation. The second burden BellSouth has, if it makes this admission, is that it has the duty to prove the damages that are owed. The problem for BellSouth is that it cannot prove what, if any, money is due and owing before October 5, 1999.
16. **Admission Nos. 36 through 49** are necessary and relevant to this specific issue of proof. If BellSouth makes these admissions, then BellSouth would be admitting that it cannot prove its initial case in chief for alleged breach of contract. Likewise, this means that the Commission would be required to grant Supra's Motion for Summary Proceeding.

17. It is important to reiterate that the Commission already characterized this dispute as Supra's alleged "failure to pay for services received under the present [1997 Resale] agreement." *See* Order No. PSC-00-2250-FOF-TP.
18. This of course begs the questions as to why BellSouth would continue to refuse to answer the questions regarding whether BellSouth is in fact seeking damages in this Docket. Again, if BellSouth says yes, then BellSouth is under a duty to substantiate its claim with documentation. But, we know by testimony of BellSouth Witness Claude P. Morton, that BellSouth cannot prove that any money is owed. *See Admission Nos. 36 through 49.*
19. If BellSouth wishes the Commission to issue a declaratory statement, then the appropriate vehicle for that is Section 120.565, Florida Statutes, and not the administrative provisions BellSouth cites in its Petition for the Commission's jurisdiction.
20. The admissions with respect to whether BellSouth is seeking a "declaratory statement" from the Commission, are included in Supra's request because BellSouth states so clearly, in its Petition, that BellSouth wants the Commission to issue a declaratory statement. *See Request for Admission No. 9.* Supra wants to have BellSouth admit this fact so as to avoid BellSouth from obfuscating and attempting to confuse the Commission on this legitimate issue of law and fact. The point is simple. BellSouth filed its Petition under Rule 25-22.036(2), Florida Administrative Code and Rule 28-106.201, Florida Administrative Code. Neither of these two Rules can be utilized to seek a declaratory ruling from the Commission. An admission to this question, will permit Supra to file a Motion

To Dismiss, based upon BellSouth's incorrect citation of administrative law as the basis for the Commission's jurisdiction. Requiring BellSouth to answer these admissions will permit the Commission to avoid an expensive and unnecessary hearing.

21. The reason neither of the two cited administrative sections can be utilized by BellSouth comes from the "plain" language of the Rules themselves. First, these two administrative sections are the only two regulatory provisions regarding the Initiation of a Proceeding before the FPSC. Both of these rules were promulgated when the Commission regulated telecommunications carriers in a monopoly environment. These rules were never designed to apply to actions involving an alleged breach of contract involving previously approved interconnection agreements. Rule 25-22.036, and Rule 28-106.301, Florida Administrative Code both limit the filing of a petition to the circumstance involving the violation of a rule, statute or agency action. A claim for breach of an interconnection agreement cannot be considered a violation of a rule or statute.
22. To the extent that BellSouth wants to argue, now, that the Order approving the interconnection agreement is "agency action," then BellSouth's petition with respect to any dispute is limited to the time limits for protesting "agency action." By not filing within the prescribed time limits, BellSouth has waived its right to protest. This argument, if made by BellSouth, is nonsense because Section 252(6)(e) requires all protests of arbitrations to go to federal court. Therefore, as stated above, neither of these two regulatory provisions can be cited as the basis for bringing a dispute over a previously approved interconnection agreement.

23. In Order No. PSC-00-2250-FOF-TP, the Commission did cite, as its only basis for jurisdiction, Section 364.07(2), Florida Statutes. The Order correctly states that s. 364.07(2) deals only with interexchange service contracts. This section does not in any way deal with previously approved interconnection agreements. Supra must also note that the “quasi-judicial authority” delegated to the Commission in Section 364.07(2), is limited to that section. See *Southern Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm’n*, 453 So.2d 780 (Fla. 1984) (requires that “quasi-judicial authority” must be expressly delegated by the Florida legislature).
24. In addition to the obvious substantive distinguishing fact that the 1997 Resale Agreement, involved in Docket No. 001097-TP, is not an interexchange service contract, there is also the fact that neither of the two administrative rules cited by BellSouth permits the Commission to “adjudicate disputes.” In fact, if you examine each rule with respect to the *Specific Authority* for the rule and the *Law Implemented* for each rule, one will find that Section 364.07(2), Florida Statutes, is not one of those sections.
25. If the Commission is relying on Section 364.07(2), Supra is well within its rights to raise the impropriety of such in a Motion To Dismiss. The rules for reconsideration only apply to the issue involving the arbitration clause and not the substantive jurisdictional issue involving s. 364.07(2) and its clear inapplicability to previously approved interconnection agreements. And, of course, there is also BellSouth’s incorrect reliance upon two administrative rules that simply do not confer any jurisdiction on the Commission to either hear a breach of contract dispute involving interconnection agreements, nor do the rules allow the

Commission to issue a declaratory statement through these rules. It should also be noted that s. 364.07(2), also cannot be cited as a basis for the Commission to issue a declaratory statement.

26. A Motion To Dismiss for Lack of Subject Matter jurisdiction can be raised at any time and involve any ground not previously ruled upon by the Court or the Commission. *See* Rule 28-106.204(2), Florida Administrative Code, Rule 1.140(b), Florida Rules of Civil Procedure, and *Coto-Ojedo v. Samuel*, 642 So.2d 587, 588 (Fla. 3rd DCA 1994).
27. For BellSouth to argue that Supra is precluded from raising an argument regarding subject matter jurisdiction, which has not been previously made and ruled upon, is false and misleading.
28. In fact, Supra presently has a Motion To Dismiss for Lack of Subject Matter Jurisdiction pending in this Docket.
29. For these reasons, it is necessary and relevant to have BellSouth either admit or deny these statements. It will be evident, after BellSouth makes these admissions, that there are no material facts which remain at issue. As such, a Motion for Summary Proceeding would be in order at that time.
30. For these reasons, BellSouth must be ordered to admit or deny these statements.

SECOND SET OF INTERROGATORIES

31. The Second Set of Interrogatories contain definitions and instructions. Accordingly, BellSouth's objection in paragraph No. 4 of its Response has no applicability.

32. BellSouth does not include in its Response any specific objection to questions number 4, 5, and 6. Accordingly, Supra respectfully requests an Order directing BellSouth to answer these interrogatories.
33. Question No. 7, goes to the heart of BellSouth's claim. BellSouth states in its opening paragraph of its Petition that it has filed its Petition pursuant to Rule 25-22.036 and Rule 28-106.301, Florida Administrative Code. Both of these rules limit the filing of a petition to the circumstance involving the violation of a rule, statute or agency action. Accordingly, Supra would like to know which statute, rule or Commission Order does BellSouth allege has been violated. This is a simple, relevant issue.
34. Question No. 8 and No. 9 again go to the heart of BellSouth's allegation that Supra has allegedly violated some agency action. It is improper for BellSouth to cite an administrative rule as the basis for jurisdiction and then refuse to answer a question regarding which agency action BellSouth believes was violated.
35. Question No. 10, again goes to the heart of BellSouth's case. If the 1997 Agreement terminated on October 4, 1999, and BellSouth brought its dispute in August 2000, then how does BellSouth explain that it has raised a dispute regarding an agreement that has expired. A Motion To Dismiss for Lack of Subject Matter jurisdiction can be raised at any time and involve any ground not previously ruled upon by the Court or the Commission. *See* Rule 28-106.204(2), Florida Administrative Code, Rule 1.140(b), Florida Rules of Civil Procedure, and *Coto-Ojedo v. Samuel*, 642 So.2d 587, 588 (Fla. 3rd DCA 1994).

36. Order No. PSC-00-2250-FOF-TP, was limited to Supra's objection to the Commission's subject matter jurisdiction on only one ground: arbitration provision contained in the agreement executed by Supra on October 5, 1999. No other jurisdictional ground was asserted or ruled upon by the Commission. For BellSouth to argue that Supra is precluded from raising subject matter jurisdiction again is false and misleading.

SECOND SET OF PRODUCTION

37. BellSouth does not include in its Response any specific objection to Supra's Second Request for Production. Accordingly, Supra respectfully requests an order directing BellSouth to produce said documents.

WHEREFORE, Supra respectfully requests that the Commission grant Supra's Motion Ordering BellSouth to comply with Supra's discovery requests and overruling BellSouth's objections, as set forth herein.

Respectfully submitted, this 21st day of February 2002.

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4248
Facsimile: (305) 443-9516

By: _____
BRIAN CHAIKEN, ESQ.
KIRK DAHLKE, ESQ.

CERTIFICATE OF SERVICE
001097-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile and/or Hand Delivery or Federal Express this 21st day of February, 2002 to the following:

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

Nancy B. White, Esq.
James Meza III, Esq.
c/o Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL. 32301
(850) 222-1201 (voice)
(850) 222-8640 (fax)

J. Henry Walker, Esq.
1155 Peachtree Street, N.E.
Suite 1700
Atlanta, GA 30309
(404) 249-2720 (voice)
(404) 249-5664 (fax)

T. Michael Twomey, Esq.
R. Douglas Lackey, Esq.
E. Earl Edenfield Jr., Esq.
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0710

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4248
Facsimile: (305) 443-9516

By: Brian Chaiken / a7H
BRIAN CHAIKEN, ESQ.
KIRK DAHLKE, ESQ.