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March 24, 2003

BY HAND DELIVERY

Ms. Blanca Bayó, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 030200-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of AT&T Communications of the Southern States, LLC are an original and fifteen copies of AT&T Communications of the Southern States, LLC's Response to Motion to Dismiss in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,



Tracy W. Hatch

TWH/amb
Enclosure

cc: Michael Henry, Esq.
Virginia Tate, Esq.
Parties of Record

DOCUMENT NUMBER 030200-TP

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency Petition of AT&T)
Communications of the Southern States,)
LLC for Cease and Desist Order against)
Supra Telecommunications)
_____)

Docket No.: 030200-TL
Filed: March 24, 2003

**AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC.'S RESPONSE
TO SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS
MOTION TO DISMISS**

COMES NOW, AT&T Communications of the Southern States, LLC ("AT&T") pursuant to Rule 28-106.204, Florida Administrative Code, and hereby files this Response to the Motion to Dismiss AT&T's Emergency Petition Requesting a Cease and Desist Order and Other Sanctions ("Motion to Dismiss") filed by Supra Telecommunications and Information Systems, Inc.'s ("Supra") on March 17, 2003. In support of its Response, AT&T states as follows:

1. On February 24, 2003, AT&T filed its "Emergency Petition of AT&T Communications of the Southern States, LLC Requesting a Cease and Desist Order and Other Sanctions Against Supra Telecommunications" ("Emergency Petition"). AT&T's Emergency Petition contains extensive allegations regarding Supra's actions during and after a switched access billing dispute between AT&T and Supra that constitute violations of Florida law and Florida Public Service Commission ("Commission") Rules and that has harmed AT&T and its relationship with its customers. AT&T's Emergency Petition requested that the Commission exercise its jurisdiction under Florida law, conduct appropriate evidentiary proceedings and enter appropriate Orders to require Supra to comply with Florida law and Commission Rules

in order to address the harm that has already occurred as well as and to stop the harm from continuing.

2. On March 17, 2003, Supra filed its Motion to Dismiss. Supra argues in its Motion to Dismiss that. (1) AT&T lacks associational standing; (2) AT&T's Emergency Petition does not present any actual case or controversy; (3) AT&T seeks an unlawful advisory opinion; (4) AT&T's Emergency Petition fails to comply with Rule 28-106.201, Florida Administrative Code and (5) AT&T's Emergency Petition fails to state any rule, statute or order that Supra has violated.

Standard of Review

3. The standard of review governing the Commission's consideration of Supra's Motion to Dismiss is well settled. In its consideration of Supra's Motion to Dismiss AT&T's Emergency Petition, the Commission must determine if there are sufficient allegations in AT&T's Emergency Petition to state a cause of action. The Commission's consideration is to be limited to the four corners of the Emergency Petition. Rohatynsky V. Kalogiannis, 763 So. 2d 1173 (Fla. 4th DCA 2000), and the Commission is required to treat all the allegations in the Emergency Petition as true for purposes of disposing of the Motion to Dismiss. Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000). Accordingly, a motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the Emergency Petition itself, without reference to any defensive pleadings or evidence in the case. Barbado v. Breen & Murphy, PA, 758 So. 2d 1173 (Fla. 4th DCA 2000). Reviewed in the light of these well settled standards, Supra's Motion to Dismiss must be denied.

Standing

4. Supra's Motion to Dismiss asserts that AT&T lacks standing to bring its Emergency Petition because it is not an association and hence can not file a claim on behalf of its customers. This argument completely misses the point of AT&T's Emergency Petition. AT&T has neither alleged nor sought associational standing. AT&T's Emergency Petition was filed on its own behalf and not on behalf of its customers. AT&T's Emergency Petition seeks, *inter alia*, to have the Commission exercise its jurisdiction under Florida law, conduct appropriate evidentiary proceedings and enter appropriate Orders to require Supra to comply with Florida law and Commission Rules in order to prevent the continuation of the harm that AT&T has suffered and continues to suffer as a result of Supra's improper actions in denying or otherwise interfering with AT&T's customers' ability to choose AT&T as their preferred long distance carrier. AT&T clearly has standing to petition the Commission to enforce Florida law and Commission Rules and for redress of the harm Supra's actions have caused AT&T by denying customer access to AT&T. Accordingly, Supra's arguments regarding AT&T's standing is misplaced and must be rejected.

No Case or Controversy

5. Supra argues that AT&T's Emergency Petition presents no case or controversy although Supra does not explain how the allegations in AT&T's Petition, if taken as true, fail to state a claim upon which relief can be granted. In the course of its argument, Supra makes several conclusory allegations which even taken together do not establish a lack of case or controversy. First, Supra claims that AT&T agreed to pay for past due amounts for switched charges and, therefore, AT&T's Petition is nothing more than a request for an "advisory opinion" (emphasis supplied by Supra) "so that it can continue to pay lawful past

due access charges owed to hundreds of LECs”. (Supra Motion to Dismiss at pg. 2). AT&T’s Emergency Petition contains no such request. Furthermore, the recital of the facts surrounding the dispute between AT&T and Supra regarding switched access billings provided in Paragraphs 17 and 18 of the AT&T Emergency Petition was simply to provide the background to the actions that Supra later took in violation of Florida law and Commission Rules. As the AT&T Emergency Petition recites, the billing dispute between AT&T and Supra was settled on February 6, 2003. The AT&T Emergency Petition seeks no Commission action with regard to that matter.

6. Second, Supra argues there is no “case or controversy” because AT&T has not proffered a list of customers affected by Supra’s actions and, therefore, has presented no evidence of unauthorized change of carrier. Supra’s argument regarding “no case or controversy” is simply wrong. AT&T’s Emergency Petition requests that the Commission exercise its jurisdiction to enforce Florida law and Commission Rules, conduct an expedited evidentiary hearing and issue the appropriate remedial Orders after the evidentiary proceeding has been conducted. In its Emergency Petition, AT&T is not required to submit all the evidence that it could provide in support of its allegations and Supra’s allegations to the contrary do not provide a sufficient basis to support a motion to dismiss. In fact, AT&T’s Emergency Petition clearly provides factual allegations based on information and belief, supported by a sworn Declaration and evidence of correspondence between Supra and AT&T customers as well as a script prepared for Supra’s Customer Service representatives which support those factual allegations. These factual allegations clearly establish a live case and a very real controversy as to whether or not Supra is violating the Florida law and Commission Rules cited by AT&T in its Emergency Petition. Furthermore, AT&T’s Emergency Petition

clearly alleges that, based on information and belief, Supra's improper actions are continuing despite the settlement of the access billing dispute between Supra and AT&T. There can be no doubt that there is a case or controversy before the Commission as to whether Supra is violating Florida law and Commission Rules or that immediate action is needed by the Commission to stop the continuing harm.

Compliance with Rule 28-106.201

7. Supra argues in its Motion to Dismiss that AT&T's Emergency Petition is not in compliance with Rule 28-106.201(2), Florida Administrative Code. Rule 28-106.201(1) provides that: "Unless otherwise provide by statute, initiation of proceeding shall be made by written petition to the agency responsible for rendering final agency action." As one of the Model Rules of Procedure, this rule is applicable to proceedings before the Commission. Rule 28-106.201 (2) provides a "checklist" for the information that should be contained within a petition. Supra argues that AT&T's Emergency Petition is deficient because it fails to provide all the information for each item in the list. Supra argues that for each of the following items in Rule 28-106.201(2) that AT&T did not provide the requisite information:

- (2)(a) - name and address of each affected agency and its file number;
- (2)(b) - explanation of how petitioner's substantial interests will be affected by the agency determination;
- (2)(c) - statement of how petitioner received notice of the agency decision;
- (2)(d) - statement of disputed issues of material fact
- (2)(e) - concise statement of ultimate facts alleged that warrant reversal or modification of the agency's proposed action;
- (2)(f) - statement of rules or statutes that require reversal or modification of the agency's proposed action; and

(2)(g) - statement of relief sought by petitioner stating precisely the action petitioner wishes the agency to take with respect to agency's proposed action.

8. Rule 28-106.201 is the rule that governs the initiation of formal proceedings before an agency. The Rule generally contemplates that the initiation of an action before an agency will be in the context of a proposed agency action. This is frequently true before the Commission. However, in the context of AT&T's Emergency Petition, there is no proposed agency action for which AT&T seeks review before the agency. Rather, AT&T's Emergency Petition seeks action from the Commission based on the Commission's regulatory authority in Chapter 364, Florida Statutes to enforce Florida law and Commission Rules, through an expedited proceeding pursuant to Section 364.058, Florida Statutes. As a result, the information requested in each of the items 28-106.201(2) above is simply not applicable. Supra's Motion to Dismiss AT&T's Emergency Petition due to the lack of required information suggested in Rule 28-106.201(2) represents the ultimate argument of "form over substance." The omission of information that is not applicable to AT&T's Emergency Petition clearly cannot render that petition noncompliant with Rule 28-106.201. No relevant or applicable information was omitted from AT&T's Petition. In fact, AT&T's Emergency Petition sets forth the jurisdictional basis for the requested Commission action to enforce Florida law and Commission Rules, extensive factual allegations showing the probable violations of those laws and Commission Rules committed by Supra, a request for expedited evidentiary proceedings to test those factual allegations and a specific request for relief if violations are found. AT&T's Emergency Petition is in substantial compliance with Rule 28-106.201.

Failure to State a Cause of Action

9. Supra argues that AT&T's Emergency Petition fails to state a cause of action. In support, Supra argues that its actions during the dispute with AT&T concerning the access billings were authorized by its FCC Tariff No. 1¹ because AT&T did not properly dispute the access billings under that tariff. Therefore, Supra argues that its later actions and letters to AT&T customers were the appropriate action to take. Pretermitted whether Supra's access tariff could lawfully permit it to take these actions or shield Supra from Commission enforcement of Florida laws and Commission Rules if it did take these actions pursuant to its tariff, AT&T's Emergency Petition alleges at Paragraph 17 that AT&T did properly dispute certain of the access charges billed by Supra. Treating this allegation as true requires that Supra's Motion to Dismiss be denied.

10. Moreover, *assuming arguendo*, that Supra's tariff could somehow shield it from Commission enforcement for actions in violation of Florida laws and Commission Rules, its actions in violating such laws and Rules by the actions alleged in the AT&T Emergency Petition should have ceased on February 6, 2003, the date the access billing dispute was settled. As noted in AT&T's Emergency Petition, Supra's actions in violating Florida law and Commission Rules have continued.

47 U.S.C. §222(b)

11. Supra argues that AT&T's allegations do not support a cause of action under §222(b). Supra attempts to rationalize its violation by claiming that it is simply including itself on a list of available customers, which is commonly allowed. Supra is wrong. As

¹ It is worth noting that Supra's FCC Tariff No 1, attached as Exhibit A to its Motion to Dismiss, upon which all of Supra's tariff claims regarding the proper procedures for disputes rest, clearly shows that the tariff was not effective until September 5, 2002. The access billing dispute between AT&T and Supra covered the period retroactive to January 2002, a period during which the tariff was apparently not effective.

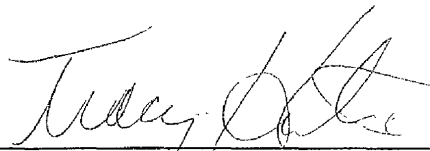
alleged in the Petition, §222(b) precludes a carrier from using a customer's proprietary network information ("CPNI") from another carrier for its marketing purposes. Moreover, Supra was not simply including itself on a list of available carrier when it sent letters to AT&T's customers telling them that they could not have AT&T and suggesting that Supra was the appropriate alternative. Supra goes sell beyond the typical situation in which a customer is calling to initiate service or to simply change service. Supra has used its dispute with AT&T to attempt to coerce customers to switch from AT&T to Supra by offering the customer a list of one—Supra. Such action is clearly a violation of the CPNI requirements under §222(b). AT&T's allegations of this violation clearly present a cause of action. Accordingly, Supra's Motion to Dismiss must be denied.

Conclusion

12. A proper review of Supra's Motion to Dismiss, based on well settled law and taking all the allegations in the AT&T Emergency Petition as true, the Commission should rule that AT&T has substantially complied with all the appropriate procedural rules for initiating action before the Commission requested by the Emergency Petition and that the allegations in the Emergency Petition clearly present a cause of action upon which the relief requested by AT&T can be granted. Accordingly, Supra's Motion to Dismiss AT&T's Petition must be denied.

WHEREFORE, based on the foregoing, AT&T respectfully requests that Supra's Motion to Dismiss be summarily denied.

Respectfully submitted this 24th day of March, 2003.



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CERTIFICATE OF SERVICE

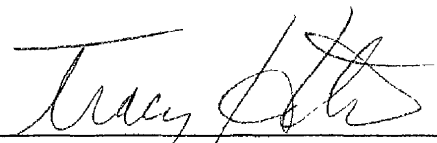
I HEREBY CERTIFY that true and correct copies of the foregoing have been served upon the following parties by Hand Delivery (*) and/or U.S. Mail this 24th day of March, 2003.

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