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ORIGINAL

June 30, 2003

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. 030482- TP – SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC., RESPONSE TO BELLSOUTH'S MOTION TO DISMISS AND MOTION FOR SANCTIONS AND OPPOSITION TO REQUEST FOR EXPEDITED RELIEF

Dear Mrs. Bayo:

Enclosed are the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Response to BellSouth's Motion to Dismiss and Motion for Sanctions and Opposition to Request for Expedited Relief.

We have enclosed a copy of this letter, and ask that you mark it to indicate that the original was filed, and thereupon return it to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Jorge L. Cruz-Bustillo /gtls

Jorge L. Cruz-Bustillo
Assistant General Counsel

AUS ___
CAF ___
CMP ___
COM 3
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MMS ___
SEC 1
OTH ___

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Supra Telecommunications & Information Systems, Inc., against BellSouth Telecommunications, Inc., for Filing False Usage Data Numbers with the Commission In Docket No. 990649A-TP /	Docket No. 030482-TP Filed: June 30, 2003

RESPONSE TO BELLSOUTH'S MOTION TO DISMISS AND MOTION FOR SANCTIONS AND OPPOSITION TO REQUEST FOR EXPEDITED RELIEF

Supra Telecommunications and Information Systems, Inc., ("Supra") by and through its undersigned counsel hereby files this Response to BellSouth's Motion to Dismiss and Motion for Sanctions and Opposition to Request for Expedited Relief in the styled docket. In support thereof, Supra states the following:

INTRODUCTION

The Florida Public Service Commission ("Commission") has the power to protect the integrity of the regulatory hearing process. Supra's complaint involves "whether a regulated entity, under the jurisdiction of the Commission, is permitted to file false, inaccurate and/or misleading information in a docket." The answer must be no. The Commission cannot be expected to do its job if regulated entities are not held to such a minimum standard. Common sense dictates such a policy.

BellSouth's filed two Motions in one: (1) Motion to Dismiss, and (2) Motion for Sanctions. The third part of the pleading involves an opposition to Supra's request for expedited relief. BellSouth's motion to dismiss is further broken down into six (6) parts labeled "A" through "E." Supra's Response will address each of BellSouth's arguments in

the order in which they appear in BellSouth's motion to dismiss. Supra's Response will also address BellSouth's motion for sanctions and finally its opposition to expedited relief.

RESPONSE TO MOTION TO DISMISS

Argument

BellSouth asserts a single ground as the basis for dismissal: failure to state a cause of action. This Response will set out the standard of review and demonstrate why Supra's complaint does state a cause of action upon which relief can be granted.

A. Standard of Review

This Commission has ordered on numerous occasions that the standard to be applied in disposing of a motion to dismiss is whether, with all of the allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). See also Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000) (all allegations in the petition must be treated as true for purposes of disposing of the motion to dismiss). The Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

The Commission's consideration of the motion is limited to the four corners of the petition. Rohatynsky v. Kalogiannis, 763 So. 2d 1173 (Fla. 4th DCA 2000). A motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the petition itself, without reference to any defensive pleadings or evidence in the case. Barbado v. breen & Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000). See also Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958) (In determining the

sufficiency of the petition, we should confine our consideration to the petition and the grounds asserted in the motion to dismiss).

B. Complaint does state a cause of action

This section will be divided into two parts: (1) the standard of review and its applicability in this instance, and (2) the specific statutory provision that BellSouth violated.

1] Facts assumed to be true.

This Complaint was filed pursuant to Rule 25-22.036(2), Florida Administrative Code. This administrative regulation allows for a person/party to bring a complaint against a party subject to the Commission's jurisdiction. This complaint is filed against BellSouth, an entity subject to the Commission's jurisdiction. Finally, the facts alleged for the purposes of this motion must be "assumed to be true."

Florida law requires that all allegations in the petition must be treated as true for purposes of disposing of the motion to dismiss. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). See also Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000) (all allegations in the petition must be treated as true for purposes of disposing of the motion to dismiss). Under Florida law, the Commission must accept, for purposes of the motion to dismiss, that BellSouth did in fact file false, untruthful and misleading information with the Commission. Thus, the only remaining issue is whether the Commission does or does not have a policy that expects parties to be truthful in their testimony and filings. If so, then BellSouth's motion must be denied.

BellSouth's exhibits outside scope

The exhibits attached to BellSouth's motion do nothing to substantiate whether BellSouth's usage data was in fact truthful and accurate. In addition to being irrelevant, the exhibits are also outside the scope of the Commission's consideration for the purposes of a motion to dismiss. Barbado v. Breen & Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000) (A motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the petition itself, without reference to any defensive pleadings or evidence in the case).

Posigran v. American Reliance Ins. Co. of New Jersey, 549 So. 2d 751, 753 (Fla. 3rd DCA 1988), cited by BellSouth, stands for the proposition that the Commission/court can "take judicial notice of a record filed in another case, where the judgment in such case is pleaded." (Emphasis added). In this case, Supra has not plead the "judgment" that arose out of Docket No. 990649A-TP. Therefore, this Commission cannot consider BellSouth's exhibits in disposing of the motion to dismiss.

For Posigran to apply, within the context of a motion to dismiss, Supra must have sought some modification of the prior judgment in Docket No. 990649A-TP. Supra did not seek modification of the prior judgment from that docket. BellSouth admits as much in its motion.[1] Supra's complaint involves the principle that the Commission expects parties to file accurate and truthful information and testimony in docketed proceedings. In the absence of this bedrock, the Commission cannot be expected to do its job.

In Posigran, the plaintiff had sued for an "intentional" tort by the defendant/insured. The insured's policy did not cover "intentional" acts, but only

[1] See pg. 6, BellSouth's Motion.

"negligent" acts. The court dismissed the lawsuit against the insured. Shortly after the dismissal of the insurer, the insured/defendant and plaintiff entered into a consent judgment – that provided that the insured committed "negligent" acts - in which the plaintiff agreed to seek payment for damages only from the insurer. The plaintiff sued the insurer to recover the damages under the consent judgment. The insurer moved to dismiss on the grounds that the consent judgment was "tainted by fraud and collusion and that the policy excluded coverage for intentional acts of the insured." Id. at 752.

The insured attached the plaintiff's original lawsuit, which was dismissed, claiming an "intentional" act by the insured. The appellate court affirmed the lower court's consideration of the attached complaint. In that case, the prior complaint and its dismissal were relevant to considering the new cause of action for enforcement of the consent judgment. In this docketed case, the ultimate judgment made by the Commission in Docket No. 990649A-TP is not relevant to a determination of whether BellSouth submitted inaccurate or misleading information to the Commission.

The exhibits filed by BellSouth do not in any way attempt to demonstrate that BellSouth's "average usage cost" data was truthful or accurate - that information while still outside the scope for purposes of a motion to dismiss, would still be relevant during the subsequent evidentiary phase of this docket. Accordingly, the exhibits attached to BellSouth's motion to dismiss are outside the scope and therefore cannot be considered in determining whether Supra's complaint state's a cause of action for which relief can be granted.

Finally, Abichandani v. Related Homes of Tampa, Inc., 696 So. 2d 802, 803 (Fla. 2nd DCA 1997), cited by BellSouth, involves a situation where the court is permitted to

accept into "evidence" certified copies of portions of another record into the case being litigated. This case is also inapplicable. In considering a motion to dismiss parties cannot introduce "evidence." This is precisely what BellSouth is trying to do in attaching its exhibits: introduce new evidence. As previously stated herein, for purposes of a motion to dismiss, the court cannot consider any "evidence" outside the four corners of the petitioner's complaint. See Barbado v. Breen & Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000).

2] Specific statutory provision enforced.

The complaint also properly alleges that BellSouth is in violation of a statute enforced by the Commission. See Rule 25-22.036(2), F.A.C. Supra cited Section 364.01(4)(g), Florida Statutes, which provides that the Commission shall ensure that all providers of telecommunications services are treated fairly, by preventing anti-competitive behavior.

This Commission has stated: "Chapter 364.01, Florida Statutes, grants broad powers to this Commission . . ." See PSC-03-0578-FOF-TP, pg. 14. (Underline added for emphasis). There is no dispute that the Florida legislature expressly intended "to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies." See Section 364.01(2), Florida Statutes. The Florida Supreme Court has recognized the Commission's "exclusive jurisdiction to regulate telecommunications." Florida Interexchange Carriers Ass'n v. Beard, 624 So.2d 246, 251 (Fla.1993). "By giving the Commission exclusive jurisdiction over telecommunications services, the Legislature has provided the Commission with broad authority to regulate telephone companies." (Emphasis added).

Id. Supra submits, that these broad powers include the discretion to sanction a party for filing false, untruthful and/or materially misleading information, in a docketed proceeding, in order to protect the integrity of the Commission and to prevent future abuses of the regulatory process.

Again, as noted, Supra's complaint involves the principle that the Commission expects parties to file accurate and truthful information and testimony in docketed proceedings. In the absence of this bedrock, the Commission cannot be expected to do its job. Common sense dictates such a policy.

Commission rules and statutes do not include an explicit reference to the principle that parties must be truthful in their filings and testimony. The expectation that a party shall be truthful, however, is implicit and inherent in the "swearing in of witnesses" that occurs during every evidentiary hearing before the Commission.

This Commission also has its own inherent power to protect its integrity and prevent abuses of the judicial process. See Paula Corbin Jones v. William Jefferson Clinton, et al, 36 F. Supp. 1118, 1126 (E.D. Arkansas 1999) ("when rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap."). (Underline added for emphasis). See also Shepard v. American Broadcasting Companies, Inc., 62 F.3d 1469, 1474 (D.C. Cir. 1995).

The expectation to be truthful is also inherent in Section 120.569(e), Florida Statutes, provides in relevant part that: "[a]ll . . . papers filed . . . must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion or other paper and

that, based upon reasonable inquiry, it is not interposed for any improper purposes . . ." (Emphasis added). While this provision provides examples of "improper purposes" the list is not necessarily exhaustive. Filing false, inaccurate and/or misleading information in a docketed proceeding would most certainly fall within the range of possible interpretations of the phrase "improper purposes." See Department of Professional Regulation, Board of Medical Examiners v. Durrani, 445 So. 2d 515, 517 (Fla. 1st DCA 1984) ("The agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable; it need only be within the range of possible interpretation.").

As noted, despite these expectations to be truthful, the principle is not explicitly detailed. For this reason, Supra chose the vehicle most often invoked by this Commission in regulating the behavior of certificated telecommunications companies: Section 364.01(4)(g), Florida Statutes.

It is generally recognized that the Commission's "interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by this Court if it is not clearly erroneous." BellSouth Telecommunications Inc. v. Jacobs, 834 So.2d 855 (Fla. 2002). BellSouth's argues that "filing information in support of a position" should never be considered improper.[2] The filing of false, inaccurate and/or misleading information in a docket can only have one design: that is to undermine the position of another party's position and/or to obtain an advantage. Supra submits this is self-evident. A regulatory decision that accepts the alleged "facts" proffered by the party submitting the false and inaccurate information leaves the party in a competitive advantage over its rivals.

[2] See pg. 7, BellSouth's Motion.

The Commission is well within its authority to give Section 364.01(4)(g), Florida Statutes, an interpretation consistent with the scope of the Commission's admittedly "broad authority." Florida Interexchange Carriers Ass'n v. Beard, 624 So.2d 246, 251 (Fla.1993). See also Gold CrestNursing Home v. State, Agency for Health Care Administration, 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995) ("It is well settled that the appellate court will give deference to any interpretation by an agency that falls within the permissible range of statutory interpretation."); Department of Professional Regulation, Board of Medical Examiners v. Durrani, 445 So. 2d 515, 517 (Fla. 1st DCA 1984) ("The agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable; it need only be within the range of possible interpretation."). A Commission interpretation of Section 364.01(4)(g), Florida Statutes, that prohibits parties from filing false, inaccurate and/or misleading information with the Commission in a docketed proceeding most certainly falls within the range of possible interpretations. As such, this Commission's interpretation must be accorded deference to its interpretation by any appellate court.

April 2002

Supra's Complaint is specific. In ¶5, Supra identifies what BellSouth represented, in April 2002, was the "average usage cost" per UNE-P access line, serving residential customers. In ¶9, Supra identifies the exact number of total *residential* UNE access lines BellSouth claimed for April 2002. In ¶11, Supra specifically identifies that BellSouth made its representation of the "average usage cost" in the context that: "ALECs can make a profit serving residential customers in Florida at the current UNE-P rates." (Emphasis added). The intended conclusion is that BellSouth's calculation of the "average usage costs" only

involved residential UNE-P access lines. UNE-P does not include UNE-L as BellSouth successfully argued in the FDN arbitration. Accordingly, the "average usage cost" as explicitly referenced should therefore be an average that is based only upon UNE-P lines.

In ¶10, Supra identifies BellSouth's footnote 8, in its April 2002 filing: "BellSouth calculated the average usage cost for FL using the FCC's usage characteristics." See Pg. 20, footnote 8, of Exhibit A, Supra's Complaint. BellSouth never explains what the FCC usage characteristics are in either its April 2002 filing or its motion to dismiss. The text of the April 2002 filing, however, leaves the explicit impression that the average usage cost is based upon "serving residential customers in Florida at the current UNE-P rates." (Underline added for emphasis). If BellSouth now suggests that the "average usage cost" was based upon "all" access lines ("retail, resale and UNE-P including both residential and business") in Florida, then BellSouth would be admitting that the data filed with the Commission in April 2002 was misleading, inaccurate and false.

Supra's Complaint is clear that this case is not about over billing. See ¶13 of Complaint. BellSouth, nevertheless, suggests that the average usage charge to Supra of $28.05 were supported by the rates in the parties' Florida interconnection agreement. This assertion has no relevance. What is relevant is that when you calculate the average usage costs claimed by BellSouth in the residential UNE-P market with the number of total residential UNE access lines, it is simply impossible for the average usage charge to equate to $3.41, as claimed in April 2002 – especially if you accept BellSouth's assertion that Supra was being charged $28.05 as a matter of contract and if you consider that the scope of the calculation was only supposed to be based upon the average usage for residential UNE-P customers. See ¶13 of Complaint.

August 2002

Again, Supra specifically identified BellSouth's claim, in August 2002, of the "average usage cost" per UNE access line. See ¶15. In ¶18, Supra identifies the exact number of total *residential* UNE access lines BellSouth claimed for August 2002. In ¶22, Supra is very specific in identifying that BellSouth made its representation of the "average usage cost," of $2.00, in the context that: ". . . the fact is that AT&T and other ALECs can earn a sizeable profit by providing *residential* service at the lowered UNE rates the Commission set just last year." See Pg. 13 Exhibit B, of Complaint. (Italicized in the original). The intended conclusion is that BellSouth's assertion is based upon an "average usage cost" calculated by using only *residential* UNE access lines.

In ¶19, Supra identifies BellSouth's footnote 14, in its August 2002 filing: "Average usage cost for Florida calculated using state specific usage characteristics." See Pg. 14, footnote 7, of Exhibit B, of Complaint. BellSouth never explains what the "state specific" usage characteristics are in its August 2002 filing. As will be described below, BellSouth testified under oath, in Federal court, that no explanation was given to the Commission,[3] one way or the other, regarding the scope of the calculation of "state specific" characteristics. The Commission is left with the intended impression that the extent of the calculation covered only *residential* UNE access lines.

Like the April filing, the text of the August 2002 filing, however, leaves the explicit and distinct impression that the average usage cost is based upon providing *residential* service at the UNE rates. As noted earlier herein, if BellSouth now suggests that the

[3] Interestingly, for the first time in its motion to dismiss – 10 months after the fact - BellSouth hints at the "true" basis for its calculation for usage: that the data was based upon "all end users in Florida." See pg. 3 and 6 of BellSouth's motion. This admission is contrary to the prior residential UNE cost figures BellSouth proffered in April and August 2002.

"average usage cost" was based upon "all" access lines ("retail, resale and UNE-P including both residential and business") in Florida, then BellSouth would be admitting that the data filed with the Commission in August 2002 was intentionally misleading, inaccurate and false.

Supra's Complaint is, again, clear that this case is not about over billing. See ¶27 of Complaint. BellSouth, nevertheless, suggests that the average useage charge to Supra of $6.95 were supported by the rates in the parties' Florida interconnection agreement.[4] This assertion is, again, irrelevant. What is relevant is that when you calculate the average usage costs claimed by BellSouth with the number of total residential UNE access lines, it is simply impossible for the average usage charge to equate to $2.00, as claimed in August 2002 – especially if you accept BellSouth's claim that the charge $6.95 was per contract and especially if the scope of the calculation was based upon the average usage for residential UNE customers only. See ¶23 and 24 of Complaint.

BellSouth admission

BellSouth has already admitted under oath that the calculations presented to the Commission were inaccurate and misleading. On November 5, 2002, a hearing was conducted in the United States Bankruptcy Court for the Southern District of Florida, in Case No. 02-41250-BKC-RAM. At this hearing, Greg Follensbee (BellSouth's witness) was specifically asked questions involving Docket No. 990649A-TP.

Q. "Are you familiar with Docket 990649A before the FPSC?

[4] BellSouth asserts that this "$6.00" usage number has been "litigated" and Supra "lost." Pg. 15. This is significantly misleading. For the purpose of establishing the amount of Supra's adequate assurance payments, the Federal Court on November 5, 2002, concluded that without a specific challenge "to the rates and usage, there will be no reduction in the projected post-petition exposure." The Court subsequently invited Supra to bring a separate adversarial proceeding precisely to address the issue of usage. The matter is presently pending in Case No. 03-1122-BKC-RAM-A. Supra submits that the Court would find BellSouth's claims of interest and will strive to bring such to the Court's attention.

A. "I didn't participate in that case, but in preparing for this particular hearing, I did read pages out of the brief."

Federal Court Hearing Transcript, pg. 563, line 25 and pg. 564 lines 1-4.

Q. " . . . Wouldn't you agree that the **purpose** was to set BellSouth's costs for providing those services."

A. "Yes. Sir.

Q. "Okay. And you would agree with me that it was BellSouth's **position**, at least in August 2002, that the rates shouldn't be lowered any further than they were already set?

A. "That is correct."

Federal Court Hearing Transcript, pg. 571, lines 10-18. (Emphasis added).

The purpose of Docket No. 990649A-TP was to set BellSouth's costs for providing services. Any information, testimony or data regarding any costs associated with providing service in the UNE or UNE-P environment would be *material* to the proceeding. Whether testimony or information is "material" is the threshold for determining whether a party is guilty of perjury. It should also be the threshold for this Commission in determining whether a party filed false, inaccurate and/or misleading information or testimony.

"In the decisional law of Florida, perjury is defined as the willful giving of false testimony under lawful oath on a material matter in a judicial proceeding. See Adams v. P. Murphy, 394 So. 2d 411, 413 (Fla. 1981) citing Gordo v. State, 104 So. 2d 524 (Fla. 1958); Miller v. State, 15 Fla. 577 (1876). See also State v. Ellis, 723 So. 2d 187, 189 (Fla. 1998) ("Whoever makes a false statement, which he does not believe to be true, under oath in an official proceeding in regard to any material matter shall be guilty of a felony of the third degree.").

In this case, BellSouth's Follensbee claims that the BellSouth's "position, at least in August 2002, [was] that the rates shouldn't be lowered any further than they were already set." (Emphasis added). Mr. Follensbee also testified that the "purpose" of Docket No. 990649A-TP was to set the "cost" for providing service.

BellSouth suggests in its motion that Supra fails to allege "how the Commission relied on this purported false information." See pg. 6, BellSouth's motion. Under a charge of perjury the prosecutor need not demonstrate reliance, only materiality. Also, under Florida law a party's mistaken belief that the statement or information was not material is not a defense. See Section 837.02(3), Florida Statutes. This same principal should apply here. In this instance, BellSouth Witness Follensbee admits to the "purpose" of the proceeding and the "position" that the company took during that proceeding. Supra submits that the issue of materiality is satisfied.

BellSouth's Follensbee was asked:

Q. "And you'll see for usage, it says $2 across the board, Zone 1, Zone 2, Zone 3. Do you see that?"

A. "Yes, sir."

Q. "Do you believe that BellSouth would provide the FPSC with inaccurate numbers in hopes to keep the UNE costs from lowering any further?"

A. "No, it was my understanding that the average cost **was across all lines, not just UNE-P**; that we also consider the residential lines to develop that particular usage."

Q. "Say that again."

A. "Since we didn't know which line could ever be a UNE-P line that was moving from BellSouth retail, in developing the costs using the state-specific usage characteristics, **we used all lines we provide, the retail, resale and UNE-P**."

Federal Court Hearing Transcript, pg. 572, lines 8-23. (Emphasis added).

The April and August filings focus on the costs of doing business in the residential UNE-P and UNE environment. BellSouth makes no reference to "all" lines, including retail, resale and UNE-P (and likely both business and residential) in calculating the average usage costs of $2.00. This information would have been material to the proceeding. The Commission must expect that information filed in any proceeding, that may go unchallenged, is not inaccurate and/or misleading.

Parties should not be invited to play the odds

Parties cannot be allowed to avoid a sanction for misleading the Commission because, for whatever reason, the information is not challenged at the time. This loophole only invites parties to play the odds, and seek to mislead the Commission when believed to be in the parties' best interests – especially in situations such as this where a company's revenue stream and its bottom line are at stake. Inaccurate and misleading information, filed with the Commission, can never be considered acceptable. Violators must know that sanctions will be imposed – if the Commission discovers the violation at the time of the hearing or at some point thereafter.

Mr. Follensbee was asked if BellSouth had provided an explanation for its ambiguous description of the usage calculation: "state specific usage characteristics."

Q. "Did you inform the FPSC what were you doing?

A. "We put a footnote down there. **I don't think there's anything in the document that says that it is or isn't that**. It just says average usage cost for Florida calculated using state-specific usage characteristics."

Federal Court Hearing Transcript, pg. 572, lines 24-23 and pg. 573 lines 1-4.

Finally, after stating it twice, Mr. Follensbee reiterated BellSouth methodology for a third time:

Q. "In other words, Supra's lines were included? The lines that BellSouth leased to Supra were included in this average?"

A. "Yes, sir, but so would all the flat-rate residential that we sell on a retail basis."

Q. "How do you know Supra's lines were included?"

B. "How do I know?"

Q. "Yes."

A. "It's my understanding that **we've looked at all of the retail, resale and UNE-P lines at the time they were looking at the costs characteristics**."

Federal Court Hearing Transcript, pg. 573 lines 5-15. (Emphasis added).

Interestingly, the Honorable Judge Robert A. Mark made the following observation at the conclusion of the parties' testimony:

". . . I am somewhat **troubled** by the fact that BellSouth has put into certain filings with the FCC, I believe, or the Florida Public Service Commission, a $2 per line usage as an average usage." (Emphasis added).

Federal Court Hearing Transcript, pg. 16 lines 3-6. (Emphasis added).

BellSouth claims that Supra's allegations are conclusory and self-serving. A regulatory decision that accepts the position of the party submitting the inaccurate and

misleading information leaves the party in a competitive advantage over its rivals. Supra submits that this is self-evident. For purposes of a motion to dismiss, this Commission must accept Supra's assertion as true. See Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000) (all allegations in the petition must be treated as true for purposes of disposing of the motion to dismiss). BellSouth is free to prove, at a subsequently evidentiary hearing, that it gains no competitive advantage when it files inaccurate and misleading information with the Commission.

Supra's complaint does indeed articulate each of the elements required to be addressed by Rule 25-22.036(3)(b), F.A.C., including the specific provision alleged to have been violated: Section 364.01(4)(g), Florida Statutes. The relief requested, by Supra, is pursuant to Section 364.285(1), Florida Statutes. See Rule 25-22.036(3)(b)4, F.A.C. This provision provides the penalty for a party that violates a Commission order, rule or statute. Accordingly, applying the standard for review, taking all of the allegations as true, demonstrates that the complaint does indeed state a cause of action, pursuant to Rule 25-22.036(3), F.A.C., upon which relief can be granted.

Upon the Commission's own motion

If the Commission finds that Section 364.01(4)(g), Florida Statutes, is not the provision that is violated when a company files false, inaccurate and/or misleading information with the Commission, then Supra requests that the Commission, nevertheless, proceed with this docket under Section 364.058(1), Florida Statutes, which provides in part: "Upon . . . its own motion, the commission may conduct a limited or expedited proceeding to consider and act upon any matter within its jurisdiction." Supra cites to this provision on

the first page of its complaint. See Second line of first paragraph, on pg. 1, of the Complaint and footnote 1.

This provision permits the Commission to proceed with this docket, *under its own motion*, to determine if in fact BellSouth usage data information was false, inaccurate and/or misleading. If so, the Commission can then sanction the violator under whichever provision this Commission deems appropriate.

Finally, at a very minimum, if this Commission finds that Section 364.01(4)(g), F.S., is inapplicable and dismisses this complaint, it should do so without prejudice. Supra would find it hard to believe that this Commission's expectation that parties be truthful in their filings and testimony is not supported by the threat of sanctions of some kind. The law permits a party the right to amend its pleading to cite the appropriate provision for which relief can be granted. See Posigran v. American Reliance Ins. Co. of New Jersey, 549 So. 2d 751, 754 (Fla. 3rd DCA 1988) ("Where a complaint cannot be amended so as to state a cause of action, a dismissal with prejudice is proper."). In this case, the only reason no cause of action could be stated is if the Commission did not have a policy to sanction parties that file false, inaccurate and misleading information and/or testimony with the Commission.

C. Complaint is NOT procedurally improper

This complaint is procedurally proper. BellSouth argues that this Commission cannot sanction BellSouth because the proceeding in which the information was proffered has since closed. This would be analogous to arguing that under Florida law a party could escape a charge for perjury by claiming that a judgment in the civil proceeding has already

been entered. The closing of the case in effect acting as a grant of immunity for any lies made during that proceeding. This is contrary to the law.

There are many examples of parties being prosecuted for perjury and/or sanctions being imposed after a case has been settled, adjudicated or dismissed. The most famous is that of former President William Jefferson Clinton – entering into a plea agreement with the Office of Independent Counsel to a count of perjury, just prior to leaving office, for lying under oath in a prior settled civil case. For this reason, Supra's complaint is procedurally proper.

Rule 1.540(b) is inapplicable

Supra is not seeking to have the Commission modify the prior order issued in Docket No. 990649A-TP. BellSouth argues that Supra should have invoked Rule 1.540(b), Florida Rules of Civil Procedure as the basis for its motion. This rule is only applicable in circumstances where a party is seeking specific relief from a judgment. Supra does not ask anywhere in its complaint for relief from the order entered in Docket No. 990649A-TP. Supra is not asking the Commission to readjust the usage rates – up or down. Supra's complaint is very specific. Did BellSouth file false, inaccurate and/or misleading data? If so, then they should be sanctioned to protect the integrity of the Commission and to prevent future abuses of the Commission hearing process. Supra submits, that because Supra is not seeking relief from a prior judgment/order that it would have been procedurally improper for Supra to attempt to invoke the rule suggested by BellSouth. For these reasons, Supra's complaint is procedurally proper.

D. Fraud is inapplicable to this proceeding.

Supra's complaint never intended to state a cause of action for fraud with respect to the filing of the "average usage cost" data. Supra does utilize the term fraud in ¶28 of the Complaint, but only in the context of BellSouth's massive over billing. As noted in ¶27, of the Complaint, BellSouth over billed Supra by approximately Sixty Seven million (**$67,000,000.00**) dollars for the time period of June 2001 through June 2002. Reason dictates that this billing practice could not have been the product of mistake or inadvertence.

Aside from the single mention and use of the term fraud, Supra does not allege nor intends to prove the civil cause of action for fraud. Another reason for not filing an action for fraud with this Commission is that this regulatory body does not have the authority to award damages. Damages are, of course, a necessary element of a cause of action for fraud. For this reason, BellSouth arguments with respect to Supra's failure to allege fraud with specificity are simply irrelevant.

Finally, BellSouth argues that Section 364.01(4)(g) does not authorize the Commission to "vacate" or "modify" a prior decision. This is true. But, again, Supra has not asked the Commission to vacate or modify its prior decision. For this reason, Rule 1.540(b) is also inapplicable. Nor is Supra asking the Commission to utilize Section 364.01, F.S. as a "stop-gap" as suggested by BellSouth. For this reason, the arguments made by BellSouth in this instance are irrelevant.

E. Complaint is not time-barred.

BellSouth argues that Supra did not bring its complaint within a reasonable time period. See pg 12, BellSouth's motion. To substantiate its proposition, BellSouth cites to Rule 1.540(b) as an example of what is considered a "reasonable time:" one year. Supra's complaint was filed within one (1) year of the entry of the final order in Docket No. 990649A-TP. Accordingly, pursuant to BellSouth's own logic Supra's complaint would be timely.

Furthermore, the statute of limitation for perjury is three years. BellSouth's time-barred argument is the equivalent of suggesting that under Florida law a party can escape a charge for perjury by claiming that a judgment in the civil proceeding has already been entered – irrespective of any statute of limitations. The closing of the case in effect acting as a grant of immunity for any lies made during that proceeding. Supra submits that this is simply unacceptable and a bad precedent for this Commission to set with respect to its expectations that parties will not file inaccurate or misleading information in a docketed proceeding.

Finally, BellSouth suggests that Supra either knew or should have known of their false information. See pg. 12 of BellSouth's motion. As part of the parties' commercial arbitration ordered accounting for the billing period of June 2001 to June 2002, BellSouth was required to turn over AMA data. Despite numerous attempts to get the AMA data from BellSouth during the year 2002, BellSouth refused claiming that it could not be done timely or efficiently. Supra finally received the AMA data in October 2002, and processed the data in February 2003. Only after processing the data was Supra able to

conclusively establish that BellSouth has systematically over billed Supra in every bill submitted over the thirteen (13) month period of the accounting. After further due diligence and reasoned assessment it was concluded that filing this Complaint with the Commission was the appropriate and responsible course of action. Again, utilizing BellSouth's own logic, Supra submits that it acted under the circumstances in a prompt and reasonable fashion. Accordingly, the complaint was timely.

Whether the complaint was timely, however, is not a relevant issue. The issue is did BellSouth file false, inaccurate and/or misleading information. Supra submits that regulated entities should not be permitted to game the regulatory process by attempting to argue that misleading and inaccurate information is acceptable so long as a party can avoid having the accuracy of the information questioned until after the proceeding ends. Such a policy would send the wrong message and would undermine the integrity of the regulatory hearing process here in Florida.

F. <u>There is no waiver.</u>

The waiver arguments advanced by BellSouth are misplaced in this instance. Timeliness and waiver are not a defense to a prosecution for perjury. And neither should these arguments act as a defense in support of the filing of inaccurate and/or misleading information with this Commission. The principle being protected here is the integrity of the Commission hearing process. Accordingly, the arguments advanced by BellSouth only undermine this standard.

BellSouth cites Order No. PSC-02-0117-PCO-TP which provides "that if a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding." BellSouth argues this language operates to confer upon

BellSouth an immunity from any future charge that it filed false, inaccurate and/or misleading information in that docket. BellSouth misinterprets the Commission's order.

The Order does not confer an immunity allowing BellSouth to undermine the integrity of the Commission or the integrity of future regulatory proceedings. On the contrary, the language simply provides that the Commission will not consider a party's evidence - introduced during the evidentiary hearing – in the Commission's decision-making process for that particular proceeding. Again, Supra is not asking this Commission to reconsider prior evidence submitted in that docket with the intent that the Commission vacate or modify its prior decision in Docket No. 990649A-TP. If Supra were seeking such relief, then the highlighted language may have some relevance. But Supra is not. Accordingly, the language of the order is inapplicable to the facts and circumstances of the complaint. As such, Supra's complaint is not barred by any doctrine of waiver. Additionally, Supra's complaint involves the rights of the Commission to hold a party responsible for its actions before the Commission. Supra is not a party that can waive the Commission's rights.

RESPONSE TO MOTION FOR SANCTIONS

BellSouth claims that the first reason for imposing sanctions against Supra is because Supra's complaint is "based upon pure speculation and conjecture as well as facts that Supra knows to be false."[5] See pg. 15 of BellSouth's motion. This Complaint is based upon BellSouth's filed Schedule 8's with the Commission as well as its explanation for the usage data provided in both the April and August 2002 filings.

[5] It is interesting to note that BellSouth seeks to have the Commission sanction Supra for providing information allegedly known to be false, yet at the same time seeks to prevent the Commission from imposing these same sanctions upon BellSouth which is the basis for the underlying Complaint.

Further support for this complaint comes from the AMA data Supra was able to obtain from BellSouth and process in February 2003.

BellSouth's own data filed with the Commission is expressly contradicted by BellSouth's Mr. Greg Follensbee's testimony - under oath and under penalty of perjury - before the United States Bankruptcy Court for the Southern District of Florida. Mr. Follensbee explicitly stated that the average usage cost was based upon "all" lines "retail, resale and UNE-P." Supra submits that BellSouth's allegation of "pure speculation and conjecture" is itself an unsubstantiated claim.

Next, BellSouth alleges, as another basis for sanctions, that there are "facts that Supra knows to be false." Whether BellSouth charged Supra rates pursuant to the contract or not has no bearing on BellSouth's claim that the average usage cost is only $3.41 or $2.00. If it turns out that BellSouth was charging rates pursuant to the parties' contract, that only proves the point further that residential UNE usage rates could not average $3.41 or $2.00 as claimed by BellSouth. Whether Supra actually paid the rates is also irrelevant. Notwithstanding, Supra had a legal right, pursuant to the parties' contract, to withhold payment during the pendency of a billing dispute. As it turns out, if Supra had been paying BellSouth's overly inflated bills, BellSouth would have wrongfully collected approximately **$67 million** dollars from Supra. Fortunately for Supra, the parties' contract protected Supra from these incumbent abuses. In short, there are no facts Supra knows to be false that were included in Supra's Complaint.

The next allegation that Supra is aware of facts known to be false is BellSouth's assertion that the "$6.95" usage number has been "litigated" and Supra "lost." This is a significantly misleading statement by BellSouth. For the purpose of establishing the amount

of Supra's adequate assurance payments, the Federal Court on November 5, 2002, concluded that without a specific challenge "to the rates and usage, there will be no reduction in the projected post-petition exposure." The Court subsequently invited Supra to bring a separate adversarial proceeding precisely to address the issue of usage. The matter is presently pending in Case No. 03-1122-BKC-RAM-A.

Again, even if BellSouth's claim were true – which it is not – this point would only further substantiate that the average usage cost data filed by BellSouth was inaccurate and misleading. In short, there are no facts Supra knows to be false that were included in Supra's Complaint.

The next basis for sanctions is that Supra is on a "witch-hunt." The basis for this claim is that Supra did not ask the Commission to vacate or modify the prior decision. Such a request, Supra submits, would have been procedurally improper because the docket is on appeal. Supra's issue is more fundamental: is it acceptable for a regulated entity to file false, inaccurate and/or misleading information and/or testimony in a docket proceeding. Supra submits that violators of such a fundamental principle cannot find solace in arguments of waiver or timeliness. Both such defenses are simply inapplicable. They would be inapplicable under a charge of perjury and they should be inapplicable under these circumstances.

The final basis for sanctions is that this complaint is a "new shotgun litigation strategy" and that Supra should be prevented from raising legitimate issues with the Commission. The first "litigation" BellSouth refers to is Docket No. 021249-TP. This case involves BellSouth refusal to comply with prior Commission Orders involving BellSouth's Fast Access and how that interferes with local competition. The Complaint

is legitimate and of great significance to all Florida CLEC providing service over UNE-P. The next case is Docket No. 030349-TP. This case involves BellSouth's improper use of wholesale carrier-to-carrier information for marketing purposes. Again, the allegations are supported by documentation and testimony, under oath, of BellSouth witnesses in other legal proceedings. The Complaint is legitimate and Supra would submit important to all Florida CLECs. The Final case is this docket.

BellSouth cites as evidence for the harassing nature of these complaints that Supra seeks to have the Commission impose penalties on BellSouth. BellSouth is well aware that this Commission cannot award damages. Section 364.285(1), F.S., is clear that if a party violates a statute, rule or order the Commission can impose a penalty. Presumably, BellSouth wouldn't mind these legitimate issues being raised so long as they knew that no penalty would be imposed at the conclusion of the hearing. Supra submits that this assertion is ridiculous.

BellSouth asks this Commission to ignore the merits of each case filed by Supra and to sanction Supra because it has simply raised too many legitimate issues. Each docket is filed on the merits of the issues raised. Further support for the proposition that Supra only puts forth issues of legitimacy can be found in Supra's actions to amend Docket No. 030349-TP. After the filing of that docket and before the issue identification meeting, the Commission voted on similar issues in another case. Supra judged that the issues were redundant and moved to amend the complaint to reduce it to a single matter. Again, what remained was a matter that rests on its merits.

Supra has no "shot-gun" litigation strategy. Supra's only goal is to bring matters to the Commission when deemed warranted. Accordingly, BellSouth's claim that this complaint was filed "solely" to harass BellSouth is just wrong.

This Complaint was drafted with great care and forethought by the undersigned. My signature on the complaint does certify that I not only read the pleading, but drafted it as well, and that based upon reasonable inquiry as to the facts the complaint is not interposed for any improper purpose. Determining whether the data provided the Commission is false, inaccurate and/or misleading is always a legitimate endeavor – no matter whom the complainant may be. For this reason, as well as those outlined above, this Commission should deny BellSouth's request for sanctions and should proceed to hearing on the merits of this complaint.

RESPONSE TO OPPOSITION TO EXPEDITED RELIEF

Supra's Complaint raises several bases for expedited relief. The first is Section 364.058, Florida Statutes, which BellSouth completely ignores. This provision allows the Commission, upon a petition, to conduct an "expedited proceeding to consider and act upon *any matter* within its jurisdiction." (Emphasis added). Supra raises this provision on the first page of the complaint. The second is the internal Commission memorandum. This directive discusses both disputes arising out of interconnection agreements and when the dispute involves a single issue. In this case, a fair argument can be made that BellSouth prior data filings effects all competitor interconnection agreements. Therefore, this complaint involves the parties' interconnection agreement. Next, the Commission memorandum was directed at disputes that lent itself to a quick resolution: the single-

issue dispute. This complaint involves a single issue. Accordingly, the standards set out in that memorandum have been met and expedited review should be conferred.

Supra based its request for emergency, expedited relief on Order No. PSC-03-0578-FOF-TP. In that case, AT&T filed a complaint and requested an expedited hearing. The only alleged emergency was that the respondent had allegedly violated a Commission statute and/or rule. AT&T did not cite to Section 364.058, Florida Statutes, nor did they cite to the internal Commission memorandum regarding expedited hearings. AT&T's initial complaint was void of any reason for the need for expedited relief. On April 15, 2003, the Commission granted AT&T's request for an emergency expedited hearing. The hearing in that matter was set for July 16, 2003 – approximately 90 days from the date the Commission disposed of the respondent's motion to dismiss. Based on this precedent Supra moved for an expedited proceeding in both Docket No. 030349-TP and 030482-TP.

As BellSouth freely acknowledges, the denial for expedited relief in Docket No. 030349-TP was not issued until the day before Supra filed its Amended Complaint in Docket No. 030482-TP. The undersigned was not aware nor had received the order in the former docket before the Amended Complaint was filed in the latter docket. Had the undersigned been aware of Order No. PSC-03-0671-PCO-TP Supra would have included an explanation for the need for expedited relief under Section 364.058, Florida Statutes. The reason would have mirrored the implicit basis outlined in AT&T complaint: whenever a company is alleged to be violating a statute, rule or order of the Commission that matter must be resolved expeditiously in order to maintain the integrity of the

regulatory process and to ensure compliance within the industry. This same rationale holds true here in this docketed matter.

For this reason, Supra respectfully requests that this Commission grant Supra's request for expedited relief and set this single-issue matter for hearing as soon as practical.

CONCLUSION

For the reasons set forth herein, Supra respectfully requests that this Commission deny BellSouth's motion to dismiss and motion for sanctions. Furthermore, Supra respectfully requests that this Commission set this matter to be heard on an expedited basis given the limited nature of the complaint.

Respectfully submitted this 30th day of June 2003.

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JORGE L. CRUZ-BUSTILLO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was delivered by Hand Delivery, Facsimile, Federal Express or U.S. Mail to the persons listed below this 30TH day of June 2003.

Ms. Nancy White
c/o Nancy Sims
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By: _____
JORGE L. CRUZ-BUSTILLO