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February 9, 2005

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. 040301-TP~~ -
SUPRA'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-05-0157-PCO-TP AND ITS REQUEST FOR ORAL ARGUMENT

Dear Mrs. Bayo:

Enclosed are the originals and fifteen (15) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion For Reconsideration Of Order No. Psc-05-0157-Pco-Tp And Its Request For Oral Argument to be filed in the above captioned 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
Executive Vice President, Legal Affairs

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CERTIFICATE OF SERVICE

Docket No. 040301-TP

I HEREBY CERTIFY that a true and correct copy of the following was served via Facsimile, E-Mail, Hand Delivery, and/or U.S. Mail this 9th day of February 2005 to the following:

Jason Rojas/Jeremy Susac
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Nancy White
c/o Ms. Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1556

E. Earl Edenfield, Jr.
BellSouth Telecommunications, Inc.
BellSouth Center – Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375

SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.
2620 S. W. 27th Avenue
Miami, FL 33133
Telephone: 305/ 476-4248
Facsimile: 305/ 443-1078

By: Brian Chaiken

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Supra	)	
Telecommunications and Information	)	Docket No. 040301-TP
Systems, Inc.'s for arbitration	)	
with BellSouth Telecommunications, Inc.	)	Filed: February 9, 2005

SUPRA'S REQUEST FOR ORAL ARGUMENT ON ITS MOTION FOR RECONSIDERATION OF ORDER NO. PSC-05-0157-PCO-TP

Supra Telecommunications and Information Systems, Inc., pursuant to Rule 25-24.058, Florida Administrative Code, hereby requests that the Florida Public Service Commission ("Commission") hear oral argument on its Motion for Reconsideration of Order No. PSC-05-0157-PCO-TP issued on February 8, 2005, filed contemporaneously herewith. In support of the request, Supra states as follows:

1. On December 6, 2004, Supra filed a Motion For Partial Summary Final Order on Issues 3 and 4 of the instant docket.

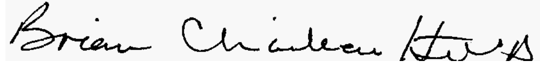
2. On December 17, 2004, BellSouth filed its Response to Supra's Motion for Partial Summary Final Order on Issues 3 and 4.

3. On February 8, 2005, the Commission issued Order No. PSC-05-0157-PCO-TP, whereby the Commission denied Supra's Motion For Partial Final Summary Order.

4. This Request is accompanying Supra's underlying Motion for Reconsideration of that Order, which is being filed contemporaneous herewith. Supra believes that oral arguments in this matter could further clarify the issues for the Commission and allow the Parties to answer any questions that the Commission may have.

WHEREFORE, on the basis of the information contained herein, Supra respectfully request that the Commission grant oral argument on Supra's Motion For Reconsideration of Order No. PSC-05-0157-PCO-TP.

Respectfully submitted,



BRIAN CHAIKEN, ESQ.
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Supra Telecommunications and Information Systems, Inc.'s for arbitration with BellSouth Telecommunications, Inc.	))))	Docket No. 040301-TP Filed: January 28, 2005

SUPRA'S MOTION FOR RECONSIDERATION OF ORDER GRANTING CONSOLIDATION OF DOCKET NUMBERS 040301-TP AND 041338-TP, AND DENYING MOTION FOR PARTIAL FINAL SUMMARY ORDER AND MOTION FOR RECONSIDERATION

Supra Telecommunications and Information Systems, Inc. ("**Supra**"), pursuant to Rule 25-22.0376, hereby files its Motion for Reconsideration of *Order Granting Consolidation of Docket Numbers 040301-TP and 041338-TP, and Denying Motion for Partial Final Summary Order and Motion for Reconsideration* issued February 8, 2005, Order No. PSC-05-0157-PCO-TP ("**Order**"). The Order is based on errors in both fact and law which require that it be reconsidered pursuant to applicable Florida law. For the reasons more fully set forth below, the Florida Public Service Commission ("**Commission**") should reconsider its Order and grant Supra's Motion for Partial Summary Final Order with respect to Issues 3 and 4.

BRIEF INTRODUCTION

In its Order, the Commission made errors of fact and law. It found an issue of material fact where there could not possibly be one; namely, "whether an appropriate rate for a UNE-P to UNE-L conversion is contained in the parties' ICA." See Order at pg. 7. As this Commission has already found that the parties' ICA "does not explicitly list a rate for a UNE-P to UNE-L hot cut,"[1] the Commission cannot now reverse itself and find otherwise. Further, as the parties' ICA unambiguously provides that BellSouth must bear

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[1] See Order No. PSC-04-0997-PCO-TP at pg. 9 and Order at pg. 7

the costs for fulfilling its obligations under the ICA "except as otherwise specifically stated,"[2] the fact that there may exist "rates that are associated with the necessary steps to effectuate a hot cut" is irrelevant. The parties have entered into an ICA. The ICA either does or does not contain a specific rate for a UNE-P to UNE-L conversion. There can be no issue of material fact as to the existence, or lack thereof, of such a rate in the ICA. The Commission has ignored the plain language of the parties' ICA, in violation of Florida law, which requires that the Commission read and apply this contractual language according to its plain and ordinary sense. In furtherance of such, the Florida Supreme Court has held:

> Where there is no room for doubt . . . contracts are to be construed according to the sense and meaning of the terms which the parties have used, and, if clear and unambiguous, these terms are to be taken and understood in their plain and ordinary sense.

Goldsby v. Gulf Life Ins. Co., 117 Fla. 889 (Fla. 1935).

STANDARD OF REVIEW

The proper standard of review on a motion for reconsideration is whether or not the Commission overlooked or failed to consider a point of fact or law in rendering its order. *See* Diamond Cab Co., v. King, 146 So.2d 889, 891 (Fla. 1962); and In re: Complaint of Supra Telecom, 98 FPSC 10, 497, at 510 (October 28, 1998) (Docket No. 980119-TP, Order No. PSC-98-1467-FOF-TP). This standard necessarily includes any mistakes of either fact or law made by the Commission in its order. In re: Investigation of possible overearnings by Sanlando Utilities Corporation in Seminole County, 98 FPSC 9, 214, at 216 (September 1998) (Docket No. 980670-WS, Order No. PSC-98-1238-FOF-WS) ("It is well established in the law that the purpose of reconsideration is to bring to our attention some point that we

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[2] See General Terms & Conditions ("GT&C") §22.1 of the ICA.

overlooked or failed to consider or a mistake of fact or law"); see e.g. In re: Fuel and purchase power cost recovery clause and generating performance incentive factor, 98 FPSC 8, 146 at 147 (August 1998) (Docket No. 980001-EI, Order No. PSC-98-1080-FOF-EI) ("FPSC has met the standard for reconsideration by demonstrating that we may have made a mistake of fact or law when we rejected its request for jurisdiction separation of transmission revenues").

A trial court has jurisdiction to reconsider a prior ruling, and may examine several factors in determining the propriety of such reconsideration, including whether a matter is presented in a different light or under different circumstances; there has been change in governing law; a party offers new evidence; manifest injustice will result if the court does not reconsider its prior ruling; the court needs to correct its own errors; or an issue was inadequately briefed when first contemplated by the court. 56 Am. Jur. 2d Motions, Rules, and Orders § 41. In the present case, this Commission should reconsider its Order a.) because manifest injustice will result if the Commission does not reconsider its prior ruling; and b.) to correct an error in the failure to abide by Florida statutory law.

ARGUMENT

There Exists No Issue of Material Fact.

This Commission has created an issue of material fact, where, pursuant to the plain language of the parties' agreement, coupled with the Commission's previous factual findings, there is none. It is true that ambiguities in a contract can create genuine issues of material fact as to the correct interpretation of the contract, and may therefore preclude summary judgment. *See* Griffin Builders Supply, Inc. v. Jones, 384 So.2d 265, 266 (Fla. 2d DCA 1980). "When the wording of an agreement is ambiguous and parties suggest

different interpretations, the issue of proper interpretation becomes one of fact precluding grant of summary judgment." 384 So. 2d at 266. However, in the present case, when the wording of the agreement is unambiguous, and there is no dispute as to what the language means (i.e. the definition of GT&C Section 22.1), no genuine issue of material fact exists, and summary judgment is appropriate.

In this case, there is no dispute that the parties' Interconnection Agreement does not specifically set forth a rate for a UNE-P to UNE-L conversion The Commission has found and stated such. See Order No. PSC-04-0997-PCO-TP at pg. 9 and Order at p. 7. In fact, BellSouth even agrees that the parties' ICA does not specifically set forth a rate for UNE-P to UNE-L conversions.[3]

BellSouth failed to provide an affidavit, or any evidence, which sets forth or creates any genuine issues of material fact. Although the burden is upon the party moving for summary judgment to establish the absence of any issue of material fact and the party against whom summary judgment is sought is not required to file any opposing affidavits, he has the right so to do and if the contents of the file, specifically the items referred to in Rule 1.510 RCP, establish no issue of material fact then it does become incumbent upon the party against whom the judgment is sought to demonstrate, by affidavit or otherwise, the existence of an issue of material fact in order to avoid having a summary judgment rendered against him. Connell v. Sledge, 306 So.2d 194 (1975). BellSouth has not contended, either in its response or in a competing affidavit, either that a.) the contractual language in this case is ambiguous or b.) pointed to any language in the ICA specifically setting forth a rate for UNE-P to UNE-L conversions. As such,

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[3] See BellSouth's *Emergency Motion of BellSouth Telecommunications, Inc. for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions,* at pg. 5, paragraph 12, filed before the United States Bankruptcy Court, Southern District.

Supra has met its burden of showing that no genuine issue of material fact exists as to whether the parties' ICA specifically sets forth a rate for UNE-P to UNE-L conversions, and BellSouth has not met its burden of establishing the existence of an issue of material fact as to whether the parties' ICA specifically sets forth a rate for UNE-P to UNE-L conversions.

The plain language of the parties' ICA dictates what happens next. Neither BellSouth, nor the Commission in its Order, has set forth any logical reason as to why the plain language of sections 3.1 and 22.1 of the GT&C of the parties' ICA does not apply. Rather, BellSouth accuses Supra of "blatant misquotations" and "outrageous contract construction" while (1) failing to even argue that the contractual language, that BellSouth drafted, is ambiguous and (2) making a blatant and outright error in its reading of Section 3.1 of the GT&C. BellSouth argues, at pg. 5 of its Response to Supra's Motion for Partial Summary Final Order on Issues 3 and 4, that:

> Even a cursory glance at §3.1 of the General Terms and Conditions reveals that this provision applies only when a CLEC is either terminating the entire ICA, or a specific ICA attachment. Because Supra is not terminating an ICA Attachment, or the entire ICA, this provision is inapplicable to UNE-L conversions. Even if Supra was correct (which it is not), this provision says nothing about the costs of such a transition and it makes no sense at all to assume BellSouth would agree to bear such costs.

Instead of a "cursory glance," Supra suggests a thorough reading of Section 3.1 of the GT&C, which provides, in its entirety:

> **Supra may terminate any Services and Elements provided under this Agreement** upon thirty (30) days written notice to Bellsouth unless a different notice period or different conditions are specified for termination of such Services and Elements in this Agreement or pursuant to any applicable tariff, in which event such specific period or conditions shall apply, provided such period or condition is reasonable, nondiscriminatory and narrowly tailored. Where there is no such different notice period or

> different condition specified, Supra Telecom's liability shall be limited to payment of the amounts due for any terminated Services and Elements provided up to and including the date of termination. **Upon termination, BellSouth agrees to cooperate in an orderly and efficient transition to Supra Telecom** or another vendor such that the level and quality of the Services and Elements is not degraded and to exercise its best efforts to effect an orderly and efficient transition. **Supra Telecom agrees that it may not terminate the entire Agreement pursuant to this section**. (Emphasis added.)

A reading of the final sentence of Section 3.1 shows one of three things must be true: (a) BellSouth makes a completely disingenuous argument in an attempt to intentionally mislead this Commission in its Response to Supra's Motion for Partial Summary Final Order on Issues 3 and 4, (b) BellSouth is unable to read and understand the language which BellSouth itself wrote into this ICA, or (c) BellSouth has no other argument and therefore must resort to making inflammatory comments against Supra as its only defense. Perhaps option (c) is most accurate, as BellSouth's entire Response focuses on an attempt to discredit Supra, as opposed to addressing the merits of Supra's Motion and the actual ICA language which BellSouth drafted. In any event, the plain language is what controls, not what BellSouth may or may not have intended or now wishes it to be.

To clear up another "failure" of BellSouth to understand a portion of Supra's Motion[4], Supra has highlighted the language in Section 3.1 speaking to BellSouth's obligation "to cooperate in an orderly and efficient transition to Supra Telecom" of terminated services and elements (i.e. a UNE-P to UNE-L conversion). The relevance of this provision goes directly to the admission made by BellSouth's Ken Ainsworth:

> Well, I've got what's in the testimony, and I'll just refer to that just to keep on track, but as -- first of all the -- you get a request – an LSR request is supported by the CLEC, and the LSR request would come in in a mechanized fashion to make that request to migrate that service from a

[4] See BellSouth's Response at pg. 4, regarding the testimony of BellSouth's Ken Ainsworth.

> UNE-P to a UNE-L service, **and it would pass through our systems and generate some -- an N and a D order to transition that particular product** and also that order would comply with an LNP portion that will would also build an LNP -- it would also build it as an LNP for porting purposes into impact for a concurrence message so that we could do the porting on that number.[5]

(Emphasis added.) BellSouth's witness, by no coincidence, describes the conversion process as a transitioning of services and elements, exactly as described in Section 3.1 of the GT&C.

BellSouth's arguments are no less incorrect as to Section 22.1 of the GT&C. Here, BellSouth suggests a "quick glance at the specific provision reveals that the provision applies to situations where a license, or permit, etc is required as a prerequisite to performance." Again, Supra suggests a more thorough reading of Section 22.1, which provides, in its entirety:

> Except as otherwise specifically stated in this Agreement, or any FCC or Commission order or rules, each Party shall be responsible for its costs and expenses in complying with the obligations under this Agreement.

On either a "quick glance" or a thorough one, there is no mention of any "license or permit, etc" that is required as a prerequisite to performance. Furthermore, despite having over 18 months to find something in the 500 plus pages of text which makeup the ICA, BellSouth has yet to find some logical overlay which applies in this situation, as suggested by the U.S. Bankruptcy Court and cited to by BellSouth in its Response. The language in Section 22.1 contains no prerequisites, and neither the Commission nor BellSouth has pointed to any applicable exceptions, which satisfy the criteria of Section 3.1. As the ICA does not "**specifically state**" a hot cut rate, as is required by Section 22.1, the plain language provides that BellSouth must bear its own costs to transition

[5] See deposition transcript of Kenneth Ainsworth, taken on September 22, 2004 at p. 25 lines 3 -16.

services (UNE-P) to Supra Telecom (UNE-L). Any other reading of the ICA goes against its plain meaning and is therefore contrary to Florida law.

CONCLUSION

WHEREFORE, Supra Telecommunications and Information Systems, Inc. respectfully requests that this Commission reconsider its Order and grant Supra partial summary final order as to Issues 3 and 4, and provide that BellSouth must bear its own costs for providing UNE-P to UNE-L conversions, and that BellSouth may not charge Supra any costs for such.