

NANCY B. WHITE
Assistant General Counsel-Florida

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

April 21, 1998

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

Re: Docket No. 980119-TP (Supra Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to Supra Telecommunications and Information Systems, Inc.'s Motion for Continuance.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White (kr)

Nancy B. White

- ACK _____ Enclosures
- AFA _____
- APP _____ cc: All parties of record
- CAF _____ A. M. Lombardo
- CMU Suriani R. G. Beatty
- CTR _____ William J. Ellenberg II
- EAG _____
- LEG 2 _____
- LIN 3 _____
- OPC _____
- RCH _____
- SEC 1 _____
- WAS _____
- OTH _____

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

CERTIFICATE OF SERVICE
Docket No. 980119-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served
by Facsimile and Federal Express this 21st day of April, 1998 to the following:

Beth Keating
Legal Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
Tel No. (850) 413-6199
Fax No. (850) 413-6250

Suzanne Fannon Summerlin, Esq.
1311-B Paul Russell Rd., #201
Tallahassee, Florida 32301
Tel. No. (850) 656-2288
Fax. No. (850) 656-5589

Nancy B. White (kr)
Nancy B. White

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Supra Telecommunications) Docket No.: 980119-TP
and Information Systems, Inc., Against)
BellSouth Telecommunications, Inc.)
_____) Filed: April 21, 1998

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
OPPOSITION TO SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.'S
MOTION FOR CONTINUANCE**

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Rule 25-22.037(2)(a), Florida Administrative Code, hereby files its Opposition to Supra Telecommunications and Information Systems, Inc.'s ("Supra") Motion for Continuance filed on April 20, 1998. As grounds therefore, BellSouth respectfully states the following:

1. On April 20, 1998, Supra filed a Motion to Continue the hearing in the above captioned matter from the presently scheduled date of April 30, 1998. Supra bases its Motion on the allegation that BellSouth has not cooperated with Supra's discovery efforts. BellSouth rejects this allegation.

2. Supra first claims that BellSouth has not cooperated in producing witnesses for deposition. This is not true. BellSouth is producing the five witnesses who prefiled direct and rebuttal testimony on behalf of BellSouth for depositions on April 22, 1998., at Supra's request.

3. Supra has also indicated to BellSouth that Supra wants to depose thirteen other employees of BellSouth, employees that have not been designated as BellSouth's representatives in this matter. Four of these individuals are not listed in BellSouth's data banks as employees. Six of the employees are located

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COMMUNICATIONS SECTION

in Birmingham, Alabama, one is located in Jacksonville, Florida, one is located in Orlando, Florida, and one is located in Miami, Florida. BellSouth, in the spirit of compromise, offered to voluntarily produce these nine employees for deposition via telephone if Supra would withdraw this Motion. Supra refused to do so. BellSouth's letter confirming this offer and Supra's refusal is attached hereto as Exhibit "A".

4. BellSouth's position on this matter is quite clear. As the above employees constitute non-party witnesses under the Florida Rules of Civil Procedure, valid personal service on these employees will be required in order to depose them. Based on the applicable rules of procedure, Supra may not notice BellSouth employees for deposition without serving a subpoena on the individual employee.

5. Rule 25-22.034, Florida Administrative Code, states that a party may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. Additionally, pursuant to Rule 25-22.045, Florida Administrative Code, parties may obtain a subpoena from the presiding officer or the Division of Records and Reporting.

6. Based on the foregoing authorities, Rule 1.310(a)(6), Florida Rule of Civil Procedure, is applicable to the instant issue. It states in pertinent part:

In the notice a party may name as the deponent a public or private corporation, a partnership or association, or a governmental agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors,

or managing agents¹, or other persons who consent to do so, to testify on its behalf and may state the matters on which each person designated will testify.

7. Pursuant to Rule 1.310(a)(6), Florida Rule of Civil Procedure, a person who is not a party to a pending lawsuit must be served with a subpoena before being required to appear for their deposition. Anderson Investments Co. Ltd. v. Lynch, 540 So. 2d 832, 833 (Fla. 4th DCA 1988); West Stuart Acreage, Inc. v. Hannett, 427 So. 2d 323 (Fla. 4th DCA 1983); Ward v. Gibson, 340 So. 2d 481, 482 (Fla. 3d DCA 1976). See also, Script Tokai Corp. v. Cayo, 623 So. 2d 828 (Fla. 3d DCA 1993) ("Since Nitta [a former corporate officer of the defendant] ceased to be a director before his deposition was to be taken, he can only be deposed upon being served with a subpoena.")

8. In Anderson Investments Co., Ltd., respondents noticed a non-party witness for deposition without serving the witness with a subpoena. In quashing the order of contempt obtained by the respondents, the court stated:

[Petitioners] ... point out that the witness, Bill Anderson, who was noticed for deposition, was never served with a subpoena; and they correctly note that a person who is not a party to a pending lawsuit must be served with a subpoenas before being required to appear for deposition.

Id. at 833 (emphasis supplied).

9. Additionally, it should be noted that a party also fails to comply with Rule 1.310(6) if it does not designate with reasonable particularity the matters on

¹ A managing agent is one who has exclusive and immediate charge of his department or the place where he is with authority to manage and conduct it as his discretion and judgment directs. Seaboard Air Line Railroad Co. v. Ford, 92 So. 2d 160, 168 (Fla. 1955).

which the examination is being requested. Chiquita Int'l. Ltd. v. Fresh Del Monte Prod., N.V., 705 So. 2d 112, 113 (Fla. 3d DCA 1998). Moreover, if a party seeks to depose a corporation, it is the corporation, not the court or the opposing party, who decides what agent shall appear and speak for the corporation in litigation. Id. at 113; Anderson Investments Co. Ltd., 540 So. 2d at 833; West Stuart Acreage, Inc., 427 So. 2d at 323; Ohio Realty Investment Co. v. Lawyers Title Insur. Corp. of Richmond, Va., 244 So. 2d 176, 179 (Fla. 4th DCA 1971).

10. In West Stuart Acreage, Inc. v. Hannett, 427 So. 2d 323, the Court clearly stated:

Neither the officers, directors, shareholders or employees of a corporation are parties to an action against the corporation. It is the corporation, not the court or the opposing party, who decides what agents shall appear and speak for the corporation in litigation. To be sure discovery may be had of a particular officer, director, shareholder or employee of a corporation by service of process upon the individual like any other witness. Ohio Realty Investment Co. v. Lawyers Title Insurance Corp., 244 So. 2d 176 (Fla. 4th DCA 1971). Here the individual has never been served with process, either as a separate party or as a witness.

See also, Tucker Brothers, Inc. v. Menard, 90 So. 2d 908 (Fla. 1956) in which the Court defined managing agent is the "managing representative of the corporation." Id. at p. 913. None of the employees *Supra* wants to depose have been designated as BellSouth's representative in charge of the matters in dispute. BellSouth has designated the five witnesses who filed prefiled testimony in this matter as its representatives.

11. Supra next argues that, while Supra fully responded to BellSouth's interrogatories and request for production of documents, BellSouth filed numerous objections to Supra's discovery. BellSouth disputes that Supra merely responded to BellSouth's questions with the statement that it was "impossible to list each . . . action by BellSouth against Supra in Florida because such actions have been so numerous" This was not an acceptable response. BellSouth, however, moved on and attempted to obtain more concrete information from Supra's witnesses at deposition.


12. BellSouth filed objections to Supra's discovery within ten days as required by the procedural order in this case. BellSouth, however, on April 20, 1998, the date the discovery responses were due, responded to each interrogatory with the exception of those concerning the issues that had been stricken by the Prehearing Officer. In response to the document requests, BellSouth responded to each one with the exception of those concerning the issues that had been stricken by the Prehearing Officer and three requests that were overly broad and unduly burdensome.


13. BellSouth has made every effort to cooperate with Supra in discovery. Supra has no foundation upon which to request a continuance. Moreover, Supra's claim that BellSouth will not be prejudiced by continuing the hearing to May 21 and 22, 1998 is untrue. As stated by BellSouth at the Prehearing Conference on April 17, 1998, one of BellSouth's witnesses is not available on those dates.

14. Rule 25-22.041 of the Florida Administrative Code states that a hearing may be continued for good cause shown. It is BellSouth's position that Supra has not demonstrated good cause. Supra filed its Complaint on January 23, 1998 and has had four months in which to conduct discovery. Supra waited until two weeks prior to the hearing to raise the issue of additional discovery. Therefore, BellSouth believes Supra's motion should be denied.

Respectfully submitted this 21st day of April, 1998.

BELLSOUTH TELECOMMUNICATIONS, INC.

 (KR)
ROBERT G. BEATTY
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NANCY B. WHITE
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April 21, 1998

Via Facsimile

Suzanne Fannon Summerlin, Esq.
1311-B Paul Russell Rd., #201
Tallahassee, Florida 32301

RE: Depositions for Docket No. 980119-TP (Supra Complaint)

Dear Suzanne:

Confirming our conversation of this date, BellSouth offered to voluntarily produce the nine individuals that we have located for depositions at the earliest possible time via telephone in return for Supra's withdrawal of the Motion for Continuance. Supra declined this offer.

Sincerely,

Nancy B. White (lcr)
Nancy B. White

NBW/vf

cc: Beth Keating, Esq.
John Bowman, Esq.
Nancy Sims

EXHIBIT "A"