

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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REGULATORY AND REPORTING

Petition Of Supra Telecommunications & Information Systems, Inc. To Initiate Investigation Into The Unfair Practices Of BellSouth Telecommunications, Inc. In Negotiating Agreements With ALECs And Filing Such Agreements With The Florida Public Service Commission

Docket No.: 98-1833-TP

RESPONSE OF SUPRA TO BELLSOUTH'S MOTION TO DISMISS PETITION OR, ALTERNATIVELY, TO STRIKE PETITION AS A SHAM

Petitioner Supra Telecommunications & Information Systems, Inc. ("Supra"), pursuant to Rule 25-22.037(2), F.A.C., hereby responds to the Motion of BellSouth to Dismiss Petition Or, Alternatively, To Strike Petition As A Sham, filed February 1, 1999, as follows:

1. As a matter of law BellSouth has failed to establish a plausible basis to dismiss the petition or strike it as a "sham" pleading.

2. BellSouth's Motion is replete with additional "facts" that go far beyond the four corners of Supra's Petition. It is difficult to determine whether these supplemental disputed facts are intended to support BellSouth's Motion to Dismiss or its Motion to Strike. BellSouth's Motion to Dismiss should be denied to the extent it relies on its supplemental disputed facts because it is long established that:

A review of facts and evidence or a determination on the evidence is not appropriate for ruling on motions to dismiss. Instead, the review is "necessarily confined to the well-pled facts alleged in the four corners of the complaint . . . and [the Commission] is not authorized

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to consider any other facts."

*E.g., In Re: Jacksonville Suburban Utils. Corp.*, Docket No. 941130WU, Order No. PSC-950479FOFWU (Fla. PSC April 13, 1995) (citing *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993)).

3. Further, BellSouth's supplemental "facts" (disputed by Supra) that BellSouth offers to counter Supra's allegations fail to establish that Supra's Petition is a "sham" pleading that should be stricken. A sham pleading:

'is palpably or inherently false, and from the plain or conceded facts in the case, must have been known to the party interposing it to be untrue.' In reviewing a motion to strike pleadings, the 'striking of pleadings is not favored and all doubts are to be resolved in favor of the pleadings.' A '[m]otion to strike a pleading admits the truth of all facts well pleaded' . . . . [W]hen a party submits any evidence to support his allegations which directly contradicts the other party's position, the court cannot strike one party's pleadings simply because the opposing party says they are false.

*McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So. 2d 214, 216 (Fla. 2d DCA 1998) (citations omitted). Thus, it is not enough that BellSouth has offered allegations and an affidavit that contradict Supra's allegations. BellSouth's additional evidence does not show that Supra's allegations are "palpably or inherently false," and its Motion to Strike is without merit.

4. Even BellSouth's characterization of the so-called "essential nugget of fact" or "nugget of truth" in Supra's Petition reveals that other essential facts are in dispute. BellSouth claims that Mr. Ramos was unable to "unzip" the second document sent by BellSouth via e-mail, that it sent a paper version (a third document) via overnight delivery to Mr. Ramos, that this third document contained the substitutions at issue, that this third document was signed by Mr. Ramos and was filed with the Commission. Supra disputes BellSouth's version of events. Contrary to

BellSouth's allegations, Mr. Ramos was eventually able to "unzip" the second document, which he printed, signed, and returned to BellSouth. Mr. Ramos did not receive BellSouth's alleged overnight delivery.

5. BellSouth claims its actions in substituting attachments to an Agreement that Supra had signed, without Supra's knowledge or consent, and filing the altered Agreement with the Commission, were simple error. Assuming that Supra's version of events is correct, BellSouth's actions are not simply a "mistake," they are willful and calculated to gradually wear down Supra's resources and thereby eliminate its competitor.

6. BellSouth further contends that even accepting Supra's allegations as true, Supra's Petition should be dismissed or stricken because BellSouth offered to amend the existing Agreement to include the "Attachment 2" that was taken from the version signed by Supra, or to adopt the MCI interconnection agreement, and that Supra has so far refused to accept these offers. BellSouth's contention is incorrect for two reasons.

7. First, the discrepancies between the document sent to Supra and signed by Mr. Ramos and the document filed with the Commission go beyond "Attachment 2." That is why Supra has requested the Commission to order that the version that was signed by Mr. Ramos be filed in toto, rather than simply amending the altered Agreement to incorporate Attachment 2. This would not, as BellSouth believes, require the Commission to accept a generic document that does not even mention Supra by name. Supra requests the Commission to accept the version of the document sent via e-mail by Mr. Finlan (which Mr. Ramos was in fact able to "unzip" and print). That is the document agreed upon by the parties, that is the document that mentions Supra by name, and that is the document Supra wishes to be filed.

8. Second, BellSouth's Motion ignores the very heart of Supra's claim for relief. This case is not about a difference as to contract interpretation. BellSouth's "bait and switch" behavior is just the latest transgression in a series of dilatory and anti-competitive actions undertaken by BellSouth in its dealings with Supra. Alone, each transgression may on its face seem inconsequential, but taken together reveal a pattern of behavior that must be stopped immediately. Indeed, the justification for Supra's Petition calls to mind cases that accept jurisdiction to adjudicate conduct that is "capable of repetition, yet evading review." *Honig v. Doe*, 484 U.S. 305 (1988); *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1076 (Fla. 1984), *appeal dismissed*, *DePerte v. Tribune Co.*, 471 U.S. 1096 (1985). Enough is enough. Supra has alleged a legitimate factual basis for the Commission to set aside the Agreement and take appropriate action to sanction BellSouth for its misconduct.

9. Further, BellSouth's claim that Supra has no basis to invoke the Commission's jurisdiction to commence an investigation into the matters alleged in its Petition is without merit. Indeed, BellSouth's claim is premised on a misreading of Supra's Petition. Contrary to BellSouth's belief, Supra is not requesting the Commission to authorize Supra to initiate an investigation. Similarly, Supra has not stated in its Petition that the Commission has no discretion in this matter. Rather, Supra's Petition establishes a legitimate basis for the Commission to exercise its discretion to initiate an investigation. Furthermore, such a petition is clearly authorized by the Commission's rules.<sup>1</sup>

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<sup>1</sup> Rule 25-22.036(4) provides that a petition is appropriate when a person subject to Commission jurisdiction, or substantially affected person seeks . . . some other Commission action not otherwise offered by these rules. Supra's Petition is also authorized as a complaint, which is "appropriate when a person complains of an act or omission by a person subject to

10. Finally, contrary to BellSouth's assertions, Supra's Petition sets forth facts that, if proven, demonstrate the existence of improper conduct that justify the imposition of sanctions by the Commission. As set forth specifically in Supra's Petition, section 364.285, Florida Statutes, authorizes the Commission to impose monetary sanctions for willful violations of Chapter 364. The well-pled allegations of Supra's Petition establish a basis for this Commission to impose sanctions for BellSouth's willful misconduct, and, therefore, Supra's request for sanctions against Supra is well-founded.

Wherefore, based on the foregoing paragraphs and the well-pled allegations of Supra's Petition, Supra requests the Commission to:

- (A) schedule a hearing as soon as possible to resolve BellSouth's Motion, if the Commission deems a hearing is necessary to rule on the Motion; and
- (B) deny BellSouth's Motion in its entirety.

Respectfully Submitted this 2<sup>th</sup> day of February 1999.

**GUNSTER, YOAKLEY, VALDES-FAULI  
& STEWART, P.A.**

Attorneys for Petitioner  
215 South Monroe Street  
Suite 830  
Tallahassee, Florida 32301  
(850) 222-6660

By:   
William L. Hyde

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Commission jurisdiction which affects the complainants substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order." Rule 25-22.036(5), F.A.C.

Florida Bar No.: 265500  
Rebecca A. O'Hara  
Florida Bar No.: 0015792

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been filed with the Florida Public Service Commission, Records and Reporting, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0851 and a copy has been furnished by U.S. mail to Nancy B. White and J. Phillip Carver, General Counsel-Florida, BellSouth Telecommunications, Inc., 150 S. Monroe Street, Room 400, Tallahassee, FL 32301 and Kathy Bedell, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0851 on this 12<sup>th</sup> day of February, 1999.

  
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Rebecca A. O'Hara