STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

Petition To Set Aside 2/3/98 Order Approving Resale, Interconnection And Unbundling Agreement Between BellSouth Telecommunications And Supra Telecommunications & Information Systems; And To Approve Agreement Actually Entered Into By The Parties Pursuant to Sections 251, 252 and 271 Of The Telecommunications Act Of 1996	Docket No.: 98-1832-TP

RESPONSE OF SUPRA TO BELLSOUTH'S MOTION FOR PROTECTIVE ORDER

Petitioner Supra Telecommunications & Information Systems, Inc. ("Supra"), pursuant to Rule 25-22.037(2), F.A.C., hereby responds to the Motion for Protective Order filed by BellSouth on February 26, 1999,[1] as follows:

I. Introduction

1. The Commission should deny BellSouth's Motion because it has not demonstrated good

[1] Paragraph one of BellSouth's Motion contends it was not served with Supra's petitions until January 12, 1999. Supra had attempted to resolve this issue without needlessly involving the Commission, but is compelled to respond to the implication in BellSouth's Motion that Supra somehow acted improperly with respect to serving the petitions. Supra served -- and so certified to the Commission – these petitions upon BellSouth's counsel on the same date they were filed with the Commission, December 9, 1998. Counsel for BellSouth wrote the undersigned a letter dated December 21, 1998, in which she discussed the substance of Supra's petitions. Thus, not only was there prima facie evidence that BellSouth was served on December 9, see rule 25-22.028(3)(b), F.A.C., there is clear evidence that BellSouth received these petitions well before January 12. Nevertheless, in an effort to first resolve the matter without involving the Commission, Supra provided BellSouth with additional copies of the Petitions on January 12. Moreover, Supra offered to extend the time for BellSouth to respond to its discovery by "restarting" the time period for BellSouth's responses to begin on January 12, and extending the timeframe from 30 to 45 days per Fla.R.Civ.P. 1.340(a).

cause for prohibiting discovery. BellSouth's Motion rests on two erroneous assertions: (1) that BellSouth's pending Motion to Dismiss or to Strike necessitates an absolute prohibition on all discovery; and (2) even if discovery is permitted in light of the pending motion, that Supra's discovery requests are "burdensome", "irrelevant", "abusive", "calculated to harass" and "grossly improper". BellSouth is wrong on both counts.

2. A court possesses discretion to postpone discovery only upon an affirmative showing of good cause. Fla. R.Civ. P. 1.280(c). The cases cited by BellSouth do not stand for the proposition that a court may prohibit all discovery simply because a party has filed a motion to dismiss. For instance, in *Deltona Corporation v. Bailey*, 336 So. 2d 1163 (Fla. 1976), the plaintiff objected to interrogatories on similar grounds to BellSouth's objections: that the discovery was burdensome, oppressive, and that it would be prejudicial for the defendant to respond prior to disposition of motions to dismiss. The trial court agreed and prohibited all discovery. The supreme court reversed, finding the trial court's bar on <u>all</u> discovery until disposition of the motions was overbroad. *Deltona*, 336 So 2d at 1169-70. The supreme court remanded the case with instructions for the trial court to "consider individually each of the interrogatories . . . and make such order <u>only as necessary</u> to protect the appellees from oppression, undue burden, or expense, where good cause is shown." *Id.* at 1170 (Emphasis added).

3. Thus, the existence of BellSouth's pending Motion to Strike or to Dismiss is not "good cause" for barring all discovery until the motion is resolved. It would be particularly harsh to do so when, as pointed out by Supra's Response to BellSouth's Motion to Dismiss or to Strike, BellSouth's Motion is unwarranted and flat out wrong. *See*

Attachment "A" hereto. Therefore, the Prehearing Officer should determine whether BellSouth has shown good cause that Supra's individual interrogatories and requests for production are oppressive or unduly burdensome. As indicated below, BellSouth has failed its burden.

II. Supra's First Set of Interrogatories and Supplemental Interrogatories

4. BellSouth protests that Supra's Interrogatories 1 through 4 and 6 request information protected by the work product doctrine and attorney client privilege. These interrogatories are well within the scope of permissible discovery under Fla. R. Civ. P. 1.280(b)(1) & (4) and not protected by any privilege. First, BellSouth has provided no basis for its claim of attorney client privilege and the Commission should reject outright such bald assertions. In order to withhold information under a claim of privilege or work product, a party must:

> Make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Fla. R. Civ. P. 1.280(b)(5). BellSouth has made no attempt to comply with this rule.

5. Second, these interrogatories do not even come close to requesting BellSouth's protected work product. The work product doctrine protects against disclosure of "mental impressions, conclusions, opinions, or legal theories." *See* F.R.C.P. 1.280(b)(3).

6. Interrogatory 1 requests BellSouth to identify each witness, other than an expert witness,

that BellSouth expects to call; the subject matter of their potential testimony; and the substance of the facts to which they are expected to testify; and to identify any document containing such subject matter or facts. Interrogatory 6 requests the identity of any exhibit BellSouth intends to use at the final hearing.

7. The identity of a witness or exhibit that will be used at trial does not equate to disclosure of BellSouth's legal theories or work product; however, it is "reasonably calculated to lead to the discovery of admissible evidence." F.R.C.P. 1.280(b)(1). How can a party determine who to depose if the identity of a witnesses is withheld? Similarly, disclosure of the general subject matter and objective facts relating to an intended witness' testimony is not equivalent to delving into an attorney's subjective mental impressions, opinions, or the like. Parties are commonly required to exchange this information as part of a prehearing order or stipulation. Finally, if BellSouth has not yet determined who its witnesses or exhibits will be (as it states in paragraph nine of its Motion), all BellSouth need do is state this in its response to Supra's discovery.

8. Interrogatories 3 and 4 request BellSouth to identify any expert witnesses it intends to call and for each witness to state: (a) the field or fields in which the person is considered an expert; (b) the subject matter upon which the witness is expected to testify; (c) the substance of the facts and opinions to which the expert is expected to testify; and (d) a summary of the grounds for each opinion. It is unbelievable that BellSouth claims these interrogatories are protected from discovery or improper. These Interrogatories 3 and 4 come straight from Fla. R. Civ. P. 1.280(b)(4) and the Florida Supreme Court's Standard Interrogatories Forms.

9. Most of BellSouth's remaining objections to Supra's interrogatories and requests for production claim they are overbroad and unduly burdensome. It is unfortunate that BellSouth resorted to filing a Motion to Compel without first attempting to contact Supra to resolve its objections as to overbreadth or burden. As a result BellSouth has created a problem unnecessarily. In some instances BellSouth's objections as to discovery of matters within a nine-state region are understandable, but it was not Supra's intent to go that far. As evidenced below, any legitimate concerns of overbreadth or undue burden could have been easily resolved without involving the Commission.

10. To address BellSouth's claim that Interrogatories 5(c) and 5(e) are over broad and unduly burdensome, Supra is willing to limit the scope of its requests to the identity of individuals receiving and sending electronic mail, and contents thereof, relating to proposed or actual interconnection agreements with Supra. However, Supra reserves the right to later expand these requests to other Florida-based ALECs, if Supra's initial discovery reveals such information reasonably calculated to lead to the discovery of admissible evidence.

11. Contrary to BellSouth's belief, Supplemental Interrogatory 4 is not burdensome or irrelevant. The actions of Mr. Hendrix and Mr. Finlan relating to negotiation and execution of an interconnection agreement are at issue in this case. This Interrogatory requests information that may establish the basis for these actions, and, therefore, is reasonably calculated to lead to the discovery of admissible evidence. This Interrogatory is not burdensome because it is limited to a discrete time period of three years and limited to two of BellSouth's employees.

12. BellSouth's objections to Supra's Supplemental Interrogatory 5 are another example of an issue that could have been resolved informally. It is not Supra's intent to harass BellSouth's employees by delving into their personal matters. Accordingly, Supra will abandon its request for the compensation history of Mr. Hendrix and Mr. Finlan, as this aspect of Interrogatory 5 can be construed to impinge upon a personal matter that is not really relevant to this case. On the other hand, the remainder of this Interrogatory is reasonable and relevant: the date of commencement of employment; the departments of BellSouth they have worked in; the reasons for any transfers between departments; and the reporting line for each department. Again, the actions of Mr. Hendrix and Mr. Finlan are at issue in this case, and this information is relevant as to the reasonableness and basis for these actions.

III. Supra's Request for Production and Supplemental Request for Production

13. BellSouth objects to Request Nos. 4, 6, 7, 11, 12, 16, and 17, largely on the grounds of overbreadth and undue burden. Again, most of the objections could have been resolved informally, had BellSouth contacted Supra prior to resorting to a Motion for Protective Order.

14. In an effort to be cooperative and reasonable as to the breadth of discovery, Supra offers to amend Request Nos. 4 and 6 to apply only to ALECs in Florida rather than BellSouth's entire nine-state region. However, Supra reserves the right to expand the scope of this request to other states within BellSouth's region, if initial discovery shows that it is reasonably calculated to lead to the discovery of admissible evidence.

15. Supra offers to amend Request No. 7 to confine it to any internal correspondence of

BellSouth (that is not privileged) that discusses the implications of the *Iowa Utilities Board* case.

16. Similar to Request Nos. 4 and 6, Supra offers to amend Request Nos. 11 and 12 to "any person or entity in the State of Florida", rather than BellSouth's entire nine state region. Contrary to BellSouth's contention, this information is relevant because BellSouth's dealings with respect to Supra's request for the pricing of UNEs are in dispute, and information relating to requests of BellSouth by others for the pricing of UNEs may lead to information that will establish that BellSouth has engaged in activities that violate the Federal Telecommunications Act of 1996.

17. BellSouth has not explained how Request Nos. 16 and 17 are overly broad, unduly burdensome, or otherwise objectionable, and Supra is unable to frame a response. Nevertheless, in the spirit of open and cooperative discovery, Supra offers to amend Request No. 17 by limiting the request to "all documents relating to communications between Patrick Finlan and others regarding pricing, combination, or access to, UNEs or recombined UNEs in the State of Florida."

18. Supra offers to amend Request No. 20 to information relating to agreements "between BellSouth and Supra or any other ALEC in the State of Florida . . ." However, Supra reserves the right to request such materials as to ALECs in other states if initial discovery shows it would lead to the discovery of admissible evidence.

19. BellSouth claims that Request Nos. 21 and 22 are irrelevant and overly burdensome. The actions and conduct of BellSouth's employees with respect to the negotiation and execution of an interconnection agreement between BellSouth and Supra are at issue in

this case. The material requested in Request Nos. 21 and 22 is relevant because it may provide a basis (or lack of basis) for the actions and conduct at issue. However, in an effort to accommodate BellSouth's overbreadth concerns (although it is hard to believe that BellSouth has more than a few employee handbooks or policy manuals), Supra offers to amend Request Nos. 21 and 22 by consolidating them and limiting the request to documents that specify procedures, policies or conduct relating to contracts and the negotiation of contracts or agreements between BellSouth and other entities. Accordingly, the Request would read:

> Any document provided or made available by BellSouth to its employees that discusses or specifies procedures, policies, or conduct relating to contracts or agreements, or the negotiation of contracts or agreements, between BellSouth and other entities.

20. BellSouth's objections to Supplemental Request No. 1[2] are unfounded. Supra's request for the production of the computer or computer system used by Mr. Finlan to perform the alterations that are at issue in this case is reasonably calculated to lead to the discovery of admissible evidence, because this computer can provide information relating to the chronology and nature of changes between various drafts of the interconnection agreement between Supra and BellSouth. Contrary to BellSouth's assertion, this is not a request to "confiscate" the computer. All BellSouth need do is make the computer available for inspection and downloading of information relevant to

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[2] BellSouth does not specify which Request in the Supplemental Request for Production it has objected to. Because BellSouth references a computer, Supra assumes that the grounds specified in Paragraph 13 of its Motion apply to Supplemental Request No. 1..

the various versions of interconnection agreements at issue in this case.

21. Finally, in the event its Motion is denied BellSouth has requested 30 days after entry of the Order to make appropriate objections to individual requests and to otherwise respond. This request is unjustified and unfair. BellSouth does not need additional time to make objections because its Motion has already set forth its objections. Further, BellSouth has possessed these discovery requests since December 31 and January 7. This case should not be delayed because BellSouth chose to (1) refuse to respond to Supra's discovery because it claimed it had not been served with petitions that it obviously possessed at least as early as December 21; and (2) waited until the very last day for responding to Supra's discovery to file a Motion for Protective Order containing many objections that could have been resolved informally and immediately.

Wherefore, based on the foregoing, Supra requests the Commission to:

(A) schedule a hearing as soon as possible to resolve BellSouth's Motion for Protective Order and BellSouth's Motions to Dismiss and/or Strike Supra's Petitions, if the Commission deems a hearing is necessary to rule on the motions;

(B) deny BellSouth's Motion for Protective Order in its entirety;

(C) order BellSouth to respond immediately to Supra's First Set of Interrogatories, Request for Production, and Supplements thereto; and

(D) enter an order requiring a party to certify in future motions that it has attempted to consult with the other party to resolve any dispute before filing the motion.

Respectfully Submitted this 5th day of March 1999.

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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 HAND DELIVERY 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 5th day of March, 1999.

William L. Hyde

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