



# Public Service Commission

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**-M-E-M-O-R-A-N-D-U-M-**

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RECORDS AND REPORTING

**DATE:** APRIL 8, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAXO)

**FROM:** DIVISION OF LEGAL SERVICES (BEDELL) *CB MCB*  
DIVISION OF COMMUNICATIONS (SIMMONS) *SAS*

**RE:** DOCKET NO. 981832-TP - PETITION OF SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC. TO SET ASIDE 2/3/98 ORDER APPROVING RESALE, INTERCONNECTION AND UNBUNDLING AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC., AND TO APPROVE AGREEMENT ACTUALLY ENTERED INTO BY PARTIES.

DOCKET NO. 981833-TP - PETITION OF SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC. TO INITIATE INVESTIGATION INTO UNFAIR PRACTICES OF BELLSOUTH TELECOMMUNICATIONS, INC. IN NEGOTIATING AGREEMENTS WITH ALTERNATIVE LOCAL EXCHANGE CARRIERS (ALECS) AND IN FILING SUCH AGREEMENTS WITH THE FLORIDA PUBLIC SERVICE COMMISSION.

**AGENDA:** 04/20/99 - REGULAR AGENDA - DECISION PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\981832.RCM

### CASE BACKGROUND

These dockets were opened upon the filing of two petitions by Supra Telecommunications & Information Systems, Inc. (Supra) to: (1) set aside Order Number PSC-98-0206-FOF-TP, issued February 3, 1998, approving a resale, interconnection and unbundling agreement with BellSouth Telecommunications, Inc. (BellSouth) and approve the agreement actually entered into by the parties; and (2) initiate an

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agreement actually entered into by the parties; and (2) initiate an investigation into unfair practices of BellSouth in negotiating agreements with alternative local exchange carriers (ALECs) and in filing such agreements with this Commission.

This recommendation concerns these petitions and outstanding motions to dismiss or, alternatively, to strike the pleadings in the above referenced dockets.

### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should BellSouth's Motions to Dismiss or, alternatively, to Strike Petitions as a Sham be granted?

**RECOMMENDATION:** No. The Commission on its own motion should dismiss Supra's petitions based on Supra's failure to file a petition on which the Commission may grant relief. The petitions should be dismissed with leave for the parties to file a corrected copy of the agreement for approval or a request for arbitration on the changed portions of the contract that remain in dispute. If the Commission agrees that the petitions fail to request relief which this Commission has authority to grant, the pending motions are moot. If the Commission does not so agree, BellSouth's Motions to Dismiss should be denied as untimely filed and the Alternative Motion to Strike should be denied because parts of the pleadings are true. (BEDELL)

### **STAFF ANALYSIS:**

#### A. FACTS

The facts, as alleged by Supra and not disputed by BellSouth, are that Supra executed the first agreement received from BellSouth in October of 1997. Thereafter, BellSouth informed Supra that this agreement was a draft and that a modified agreement with certain specified changes, such as the addition of Supra's name to the contract, would be prepared. This "final" agreement was executed by Supra. BellSouth then submitted an agreement to the Commission for approval and an order approving the agreement was

the Commission for approval was not the same as the one executed by Supra.

#### B. SUPRA'S ALLEGATIONS

Supra alleges that the agreement submitted by BellSouth included amended attachments that Supra did not agree to and about which Supra was not informed. According to Supra, this substitution constitutes fraud or gross negligence on the part of BellSouth. It is BellSouth's position that the difference in the attachments was simply an error. However, if this is the case or if BellSouth is willing to make the correct substitutions, it is not clear to staff why the parties are unable to bring an amended agreement to the Commission for approval, nor is it clear why Supra is asking that the entire contract be replaced. However, if the parties are unable to reach agreement on the portions of the agreement that were not originally agreed to, the Commission can address that problem through an arbitration proceeding.

#### C. SUPRA'S PLEADINGS

On December 9, 1998, Supra filed two petitions at the Commission. The first petition, filed in Docket No. 981832-TP seeks the following relief: 1) a hearing before the full Commission; 2) an investigation into BellSouth's contract practices; 3) a site visit to the Interconnection Department of BellSouth to determine which equipment was used to create the contracts in dispute; 4) a finding of fraud and gross negligence as well as violations of Section 251 and 252 of the Act by imposing unreasonable, discriminatory conditions and limitations on the provision of services; 5) to vacate the order approving the interconnection agreement with BellSouth; 6) to replace that agreement with the agreement filed by Supra with the complaint; 7) to inform other states of BellSouth's actions in entering into interconnection agreements; and 8) to reprimand BellSouth and impose monetary sanctions for failure to file the true interconnection, resale agreement.

Supra's other petition requests that this Commission conduct a hearing to fully investigate the change in the attachments to the agreement, what procedures are in place to prevent recurrence, and the extent this conduct and other abuses have been perpetuated against Supra and other ALECs. Supra requests the following

relief: 1) a finding that gross negligence or wilful fraud occurred; 2) the establishing of procedures for investigating BellSouth's contracting practices; 3) informing other states of BellSouth's actions in entering into interconnection agreements; 4) if fraud is proven, referral to Attorney General's Office for antitrust investigation; and 5) reprimand of BellSouth and imposition of monetary sanctions.

D. FAILURE TO STATE A CAUSE OF ACTION ON WHICH RELIEF MAY BE GRANTED

Staff believes that Supra's pleadings do not state causes of action on which this Commission may grant relief. In the pleading filed in Docket No. 981832-TP, Supra requests a full Commission hearing and an investigation, including a site visit with Supra to the "Interconnection Department of BellSouth." The purpose of the requested proceedings are to prevent agreements from being altered in the future and determining which computer was used to alter the agreement. The ultimate determination sought by Supra is a finding that BellSouth committed gross negligence or willful fraud when it substituted the attachments to Supra's agreement. Staff believes that we have the authority to set a matter for hearing and to fully investigate matters if they are within the Commission's jurisdiction. However, matters of contract fraud and gross negligence in contracts are matters for the courts, not this Commission. Our role in approving contracts between local exchange companies (LECs) and alternative local exchange companies (ALECS) is limited to matters related to the provision of competitive services, such as terms and conditions of interconnection and resale. The Commission has declined to rule on more general contract matters, such as the content of a liability clause or the imposition of damages. (See, Docket No. 960757-TP - Petition by Metropolitan Fiber Systems of Florida, Inc. for arbitration with BellSouth Telecommunications, Inc. concerning interconnection rates, terms, and conditions, pursuant to the Federal Telecommunications Act of 1996; Docket No. 960847-TP - Petition by AT&T Communications of the Southern States, Inc. for arbitration of certain terms and conditions of a proposed agreement with GTE Florida Incorporated concerning interconnection and resale under the Telecommunications Act of 1996; and Docket No. 960980-TP - Petition by MCI Telecommunications Corporation and MCI Metro Access Transmission Services, Inc. for arbitration of certain terms and conditions of a proposed agreement with GTE Florida Incorporated concerning resale and interconnection under the Telecommunications Act of 1996.

Supra also requests that Order No. PSC-98-0206-FOF-TP, issued February 3, 1998, be vacated. The above-cited order is the order approving BellSouth and Supra's agreement for resale, interconnection and unbundling. While the Commission may have such authority, absolutely nothing in the pleading explains why this action would be appropriate. Supra also asks us to approve the agreement that it filed with the petition. Clearly, the Commission has the authority to approve or not approve the agreement. However, in BellSouth's Motion it states that the parties may have a disagreement as to the meaning of part of the agreement that was substituted. Staff recommends that the parties conclude their discussions and negotiations concerning the substitution of the attachments to the agreement and if they cannot reach an agreement on the terms to be amended to reflect the correct agreement, they may bring their dispute to the Commission for arbitration.

Included in the relief sought in the first pleading (Docket No. 981832-TP) is Supra's request that this Commission contact all of the states in which BellSouth operates and inform them of BellSouth's conduct. The Commission can do this, but so can Supra. In fact, staff has learned that Supra filed the same complaints with the Georgia Commission which has disposed of the complaints in a fashion similar to staff's recommendation herein. See Georgia Public Service Commission Order issued March 16, 1999, in Dockets Nos. 8338-U and 10331-U, attached. Staff believes that Supra is perfectly capable of bringing these issues to the attention of the other states, if it has not already done so.

Finally, Supra requests the imposition of a fine for BellSouth's violation of Section 364.07, Florida Statutes, by failing to file the true or correct agreement. The subject contract is a resale, interconnection and unbundling agreement entered into under Section 251 of the Act, not an "intrastate interexchange service contract" subject to the provisions of Section 364.07, Florida Statutes, as Supra argues. Thus, Supra's request that the Commission fine BellSouth for willful violation of Section 364.07, Florida Statutes, by failing to file the correct agreement is not a request on which relief may be granted.

Based on the foregoing, staff recommends that the first petition, Petition of Supra to Set Aside 2/3/98 Order Approving Resale, Interconnection and Unbundling Agreement Between BellSouth Telecommunications and Supra Telecommunications; And to Approve Agreement Actually Entered Into By the Parties, be dismissed on the Commission's own motion. However, the parties should be directed to bring a corrected agreement to the Commission at their earliest convenience and if the parties cannot agree on the corrections, the

dispute as to those terms should be brought to the commission for arbitration.

In the pleading in Docket No. 981833-TP, Supra seeks to have this Commission conduct a hearing and investigate Supra's allegation of gross negligence or fraud in contract actions with Supra and other ALECs. Similar to the first pleading, Supra requests a hearing and investigation, sanctions and notice to other states. In addition, if the Commission were to conclude that there was fraud, Supra requests that the matter be referred to the Attorney General's Office. As discussed above, the determination of fraud or gross negligence is a matter within the purview of the courts, not of this Commission. Further, we have had no indication from other ALECs that there is a problem with BellSouth's substituting attachments to contracts. This is so even though Supra sent a letter to 75 ALECs apprising them of this docket and encouraging them to check their agreements. Therefore, staff recommends that this petition also be dismissed on the Commission's own motion for the same reasons as stated above in the discussion of the first petition.

#### E. BELLSOUTH'S MOTIONS TO DISMISS

Staff believes that the Motions to Dismiss should be denied as untimely. As stated above, Supra's initial petition was filed on December 9, 1998. BellSouth's Motions to Dismiss were not filed until February 1, 1999, some 54 days after the initial pleading was filed. Rule 28-106.204, Florida Administrative Code, requires that a motion to dismiss be filed no later than 20 days after service of the petition on the party. In its responses, Supra did not raise timeliness as a ground to deny the motion to dismiss. In its Motion to Dismiss, BellSouth has not alleged that service was not perfected on the day the petition was filed nor asked for the motion to be accepted as timely filed for any other reason. Therefore, staff recommends that the Motions to Dismiss be denied. However, if the Commission agrees with staff that the Commission is without jurisdiction to grant the ultimate relief sought, then the motions are moot.

#### F. BELLSOUTH'S ALTERNATIVE MOTIONS TO STRIKE SHAM PLEADINGS

BellSouth's motions alternatively seek to have the Commission strike the original pleadings as sham pleadings. These alternative motions do not have the same time limitations for filing as a motion to dismiss. Supra's responses address the alternative

motions and argue that the pleadings are not sham pleadings and should not be stricken. Staff agrees. A motion to strike a sham pleading raises questions of law and fact and Rule 1.150, Florida Rules of Civil Procedure, requires the taking of evidence by the court. If part of the pleading is true, the motion should be denied. Sapienza v. Karland, Inc., 154 So. 2d 204 (3 D.C.A. 1963). The standard is the falsity of the pleading attacked.

By BellSouth's own pleadings, it can be established that Supra's pleadings are partly true. That is, neither party disputes that there are differences between the contract executed by Supra and the one filed by BellSouth for Commission approval. Because we conclude that there is some truth alleged in Supra's pleadings, based on some uncontested facts, staff recommends denial of BellSouth's alternative Motions to Strike Supra's Petitions as sham. However, if the Commission agrees with staff's recommendation that Supra failed to file a petition on which the Commission can grant relief, then the pending motions are moot.

#### G. CONCLUSION

Based on the foregoing analysis, staff recommends that the Commission on its own motion should dismiss Supra's petitions because Supra has failed to file a petition on which the Commission may grant relief. The petitions should be dismissed with leave for the parties to file a corrected copy of the agreement for approval, or a request for arbitration on the changed portions of the contract that remain in dispute. If the Commission agrees that the petitions fail to request relief which this Commission has authority to grant, the pending motions are moot. If the Commission does not so agree, BellSouth's Motions to Dismiss should be denied as untimely filed and the Alternative Motion to Strike should be denied because parts of the pleadings are true.

DOCKET NOS. 981832-TP, 981833-TP  
DATE: APRIL 8, 1999

**ISSUE 2:** Should these dockets be closed?

**RECOMMENDATION:** Yes, if the Commission agrees that the petitions fail to request relief which this Commission has authority to grant. (BEDELL)

**STAFF ANALYSIS:** If the Commission agrees that the petitions fail to request relief which this Commission has authority to grant, the petitions should be dismissed and the dockets should be closed.



COMMISSIONERS:

STAN WISE, CHAIRMAN  
ROBERT B. BAKER, JR.  
BOB DURDEN  
LAUREN "BUBBA" McDONALD, JR.



DEBORAH K. FLANNAGAN  
EXECUTIVE DIRECTOR

HELEN O'LEARY  
EXECUTIVE SECRETARY

Georgia Public Service Commission

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March 16, 1999

EXECUTIVE SECRETARY

IN RE:

Petition to Set Aside 1/6/98 Order Approving the  
Interconnection Agreement Negotiated by BellSouth  
Telecommunications, Inc. and Supra Telecommunications  
& Information Systems, Inc.; 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. 8338-U

3010

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 Georgia Public Service Commission.)

)  
)  
) Docket No. 10331-U

3011

BY THE COMMISSION:

On January 15, 1999, Supra Telecommunications & Information Systems, Inc. ("Supra") filed with the Georgia Public Service Commission ("Commission") two petitions. Both of Supra's Petitions allege that BellSouth Telecommunications ("BST" or "BellSouth") altered the Interconnection Agreement between the parties after execution. On January 6, 1998, the Commission issued an Order approving the altered agreement.

In its Petition to Set Aside 1/6/98 Order Approving the Interconnection Agreement Negotiated by BellSouth and Supra, Supra requests a hearing before the full Commission, an investigation as to how the Interconnection Agreement was changed, a Commission finding that BellSouth acted either in gross negligence or willful fraud, that BellSouth has imposed unreasonable, discriminatory conditions and limitations on the provision of telecommunications services by Supra, that the January 6, 1998 Order of the Commission approving the Interconnection Agreement be vacated, that the Commission approve the Interconnection Agreement filed as "Exhibit A" of Supra's Petition as the true agreement entered into between the parties, that the Commission contact the other nine states wherein BellSouth provides service and notify them of BellSouth's actions, and that the Commission impose monetary sanctions against BellSouth for its actions.

The only additional relief sought in Supra's Petition to Initiate Investigation into the Unfair Practices of BellSouth is that if it is determined that BellSouth has defrauded Supra and/or other Alternative Local Exchange Carriers ("ALECs") in the filing of agreements, that the Commission contact the Georgia Attorney General so that a determination can be made as to whether BellSouth's conduct warrants an antitrust investigation or deceptive trade practices investigation for violations of O.C.G.A. § 10-1-372(a)(12).

On February 12, 1999, BST filed a joint response to both dockets as a "Verified Motion to Dismiss". In its Motion, BellSouth admits that the Agreement that it filed with the Commission on November 10, 1997, differed from the agreement that was executed by the parties. BST acknowledges that this was its own mistake, but claims that there was no intent involved.

The Commission finds that it is reasonable to require that BellSouth file with the Commission the correct version of its Interconnection Agreement with Supra. The Commission also finds that there is not sufficient reason to believe that BellSouth acted intentionally in filing the incorrect version of the agreement.

**WHEREFORE IT IS**

**ORDERED**, that BellSouth shall file with the Commission the correct version of the Interconnection Agreement between BellSouth and Supra.

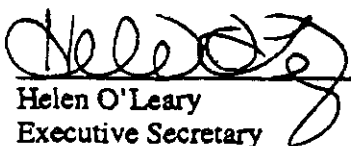
**ORDERED FURTHER**, that the January 6, 1998 Commission Order, approving the Interconnection Agreement between BellSouth and Supra is hereby vacated.

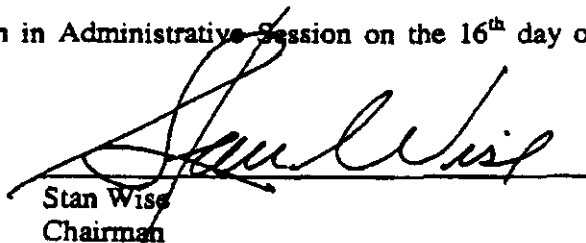
**ORDERED FURTHER**, that the remainder of the relief sought by Supra in each of its complaints is denied.

**ORDERED FURTHER**, that jurisdiction over this matter is expressly retained for the purpose of entering such further order or orders, as this Commission may deem just and proper.

**ORDERED FURTHER**, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

The above by action of the Commission in Administrative Session on the 16<sup>th</sup> day of March, 1999.

  
Helen O'Leary  
Executive Secretary

  
Stan Wise  
Chairman

DATE: 3/25/99

DATE: 3-25-99



One Company, One Bill, One Low Price

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September 28, 1999

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

Re: Docket Nos. 990649-TP, 971527-TX, 980119-TP, 980253-TP, 980800-TP,  
981832-TP, 981833-TP, 981834-TP, 990036-TP

Dear Mrs. Bayó:

Supra Telecommunications and Information Systems, Inc. (Supra Telecom), pursuant to Rule 28-106.106, Florida Administrative Code, hereby seeks leave of the presiding officer for Mark E. Buechele, Esq. To appear as a qualified representative in the above-referenced dockets. David Dimlich will no longer represent Supra Telecom in these dockets, and Supra Telecom respectfully requests that his name be withdrawn as qualified representative.

Mr. Buechele is located at 2620 SW 27<sup>th</sup> Avenue, Miami, Florida 33133. His telephone number is 305-531-5286. Mr. Buechele is currently Supra Telecom's General Counsel and possesses the necessary qualifications to responsibly represent the company's interests in these matters. An affidavit of Mr. Buechele is enclosed.

Thank you for your assistance.

- AFA \_\_\_\_\_
  - APP \_\_\_\_\_
  - CAF \_\_\_\_\_
  - CMU \_\_\_\_\_
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  - EAG \_\_\_\_\_
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  - MAS \_\_\_\_\_
  - OPC \_\_\_\_\_
  - PAI \_\_\_\_\_
  - SEC 1
  - WAW \_\_\_\_\_
  - OTH Lead dkt
- Olukayede A. Ramos  
Chairman and CEO

*Done 10/12/99*

DOCUMENT NUMBER-DATE

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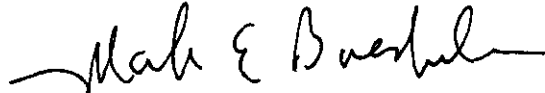
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**AFFIDAVIT**

Being first duly sworn, the undersigned counsel, **MARK E. BUECHELE**, states as follows:

The undersigned counsel is an attorney admitted to practice and a member in good standing of the State of Florida Bar No. 906700 and possesses the necessary qualifications to responsibly represent Supra Telecom's interests in Dockets Nos. 990649-TP, 971527-TX, 980119-TP, 980253-TP, 980800-TP, 981832-TP, 981833-TP, 981834-TP, and 990036-TP

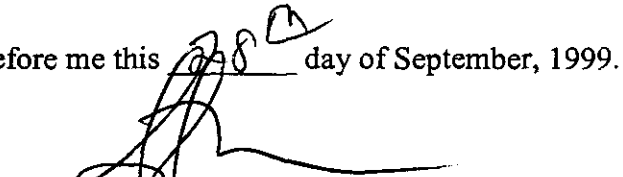
The undersigned counsel has knowledge of Florida Statutes relative to the Commission's jurisdiction; has knowledge of the Florida Rules of Civil Procedure relating to discovery in an administrative proceeding; has knowledge of the Florida Administrative Code and Florida Statutes relative to the rules of evidence, including the concept of hearsay in an administrative proceeding; has acquired knowledge of the factual and legal issues in these proceedings; and has knowledge of and compliance with the Standards of Conduct for Qualified Representatives contained in Rule 28-106.107 of the Florida Administrative Code.



Mark E. Buechele, Esq.  
General Attorney  
2620 SW 27 Avenue  
Miami, Florida 33133

STATE OF FLORIDA )  
COUNTY OF MIAMI-DADE)

Sworn to and subscribed before me this 28<sup>th</sup> day of September, 1999.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:

