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ORIGINAL

July 18, 2001

Mrs. Blanca S. Bayo
Director, Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Re: Docket No. 001305-TP (BellSouth v. Supra)
(Supra v. BellSouth)

Dear Mrs. Bayo:

Enclosed please find an original and 15 copies of Supra's Response to BellSouth's Notice of Intent to Request Confidential Classification and Supra's Request for Confidential Classification, and Supra's Response to BellSouth's Response and Motion to Dismiss.

Please file the original of this document in the captioned docket, mark it and return a copy to me.

Regards,

Adenet Medacier

Adenet Medacier

enclosures

cc: All parties of record
Brian Chaiken
Olukayode Ramos

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications and Information Systems, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996	Docket No. 001305-TP
Complaint of Supra Telecommunications and Information Systems Regarding BellSouth's Bad Faith Negotiation Tactics	Filed: July 13, 2001

SUPRA'S RESPONSE TO BELLSOUTH'S RESPONSE AND MOTION TO DISMISS

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel, hereby files its Response to BellSouth's Response and Motion to Dismiss and in support therefor states:

1. On or about June 9, 2001[1], BellSouth filed its Response to and Motion to Dismiss Supra's Complaint Regarding BellSouth's Bad Faith Negotiation Tactics ("Motion"). In connection with its Motion, BellSouth incorrectly argued that Supra has failed to set forth facts sufficient to support its claim of Bad Faith and/or that it is unable to prove the facts asserted in the Complaint. Specifically, at page six (6) of the Motion, BellSouth states that "[s]ince Supra has filed a Complaint alleging that BellSouth acted in bad faith, it bears the burden of setting forth facts that, if proven, would establish its claim. Supra has failed to do so." At set forth in detail below, BellSouth's argument is misplaced for two reasons. First, Florida law is legion in holding that Supra is not required to prove that BellSouth engaged in bad faith negotiation tactics in order to avoid

[1] Supra did not receive its copy until June 12, 2001.

a motion to dismiss. Second, Supra has alleged facts sufficient to support its claim of Bad Faith.

STANDARD FOR A MOTION TO DISMISS

2. A motion to dismiss only tests the legal sufficiency of a complaint. *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1DCA 1983). In *Varnes v. Dawkins*, the Court ruled that "in determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." *Id*, citing, *Martin v. Principal Mutual Life Ins. Co.*, 557 So.2d 128 (Fla. 3DCA 1990); *Lewis State Bank v. Travelers Ins. Co.*, 356 So.2d 1344 (Fla. 1 DCA 1978). The Court went on to state that "all material factual allegations of the complaint must be taken as true." *Id*, citing, *Connoly v. Sebeco, Inc.*, 89 So.2d 482 (Fla. 1956); *Cook v. Sheriff of Collier County*, 573 So.2d 406 (Fla. 2 DCA 1991); *Brandon v. County of Pinellas*, 141 So.2d 278 (Fla. 2DCA 1962).

3. BellSouth mischaracterized the Commission's order in PSC-01-1180-FOF-TI as requiring factual proof in a Motion to Dismiss. In fact, BellSouth is attempting to have this Commission believe that its own ruling requires Supra to prove the facts alleged in the complaint to withstand a challenge to a Motion to Dismiss. That interpretation is incorrect. A Motion to Dismiss does not consider any proof offered by the Complainant or the respondent. *Martin*, supra; *Lewis*, supra. To the contrary, the Commission must consider all of Supra's allegations as true. *Connolly*, supra; *Cook*, supra, *Brandon*, supra.

4. The only consideration that the Commission should make is whether the facts alleged by Supra legally sustain the elements of a cause of action for bad faith. *Varnes*. The Commission in order 01-1180-FOF-TI rightfully stated that "[w]hen making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner."

5. In this case, Supra's allegations support its claim that BellSouth acted in bad faith in negotiating a "Follow-On" Interconnection Agreement with Supra. Specifically, Supra alleged that (1) BellSouth refused to furnish documents required by 47 C.F.R. 51.301, a statutory violation, (2) that BellSouth refused to negotiate from the parties' current Agreement, and (3) that Supra is greatly damaged or prejudiced by BellSouth's behavior. Taken as true, such is sufficient to deny BellSouth's challenge, although BellSouth has failed to even raise this issue in its Motion to Dismiss.[2] Instead, BellSouth's arguments misleadingly and improperly focus on the truthfulness of Supra's allegations (BellSouth, page 7) and its own affirmative defenses (BellSouth, page 1). These arguments are irrelevant and inappropriate in considering a motion to dismiss and should be disregarded.

ISSUES RAISED BY BELLSOUTH

6. For the sake of completeness Supra will address BellSouth's other argument, although irrelevant to a Motion to Dismiss. BellSouth argued that "the FCC Rule contemplates a situation in which an ALEC "is seeking to identify network elements that will be used "to serve a particular customer," and requires information from the

[2] Similar considerations are made in insurance bad faith cases. Both there and in this case, an action for bad faith is a statutory creation. Once alleged, then the legal threshold is met and defeats a motion to dismiss. See generally, *Brookins v. Goodson*, 640 So.2d 110 (Fla. 4DCA 1994)

incumbent LEC to do so." This argument is both inaccurate and disingenuous. The FCC addressed that issue at section 155 of its First Report and Order. The FCC generally recognizes that it is reasonable for a CLEC to request information about an Incumbent LEC's network. The FCC specifically footnoted that the information in the Interconnectivity template, the same template that Supra sent to BellSouth, would constitute good faith issues for negotiation. Conversely, refusal to provide the information would constitute bad faith. The FCC stated that:

> "... It would be reasonable, for example, for a requesting carrier to seek and obtain cost data relevant to the negotiation, or information about the **incumbent's network** that is necessary to make a determination about which network elements to request to serve a particular customer.[3]..." Extract of ¶ 155 of FCC First Report and Order. (Emphasis added.)

The FCC contemplated that an ALEC would need to have information about an ILEC's network in order to determine the capabilities of said network and how these capabilities would allow the ALEC to request the appropriate network elements to properly serve the needs of a particular customer. Refusal by an ILEC to furnish network information, where a CLEC needs that information to serve "a particular customer", constitutes bad faith. BellSouth would read this statement so narrowly as to mean, then, that refusal to provide network information to serve "many customers" does not amount to bad faith. It is interesting to note that BellSouth accuses Supra of being illogical and nonsensical.

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[3] *See* discussion of technical feasibility, *infra*, Section IV. In addition, the Commission's federal advisory committee, the Network Reliability Council, has developed templates that summarize and list activities that need to occur when service providers connect their networks pursuant to defined interconnection specifications or when they are attempting to define a new network interface specification. As consensus recommendations from the Council, we presume the elements defined in the templates are "good faith" issues for negotiation. Comments of the Secretariat of the Second Network Reliability Council at 4-5 (*citing Network Reliability: The Path Forward*, (1996), Section 2, pp. 51-56). (actual footnote 283 of the First Report and Order)

7. Additionally, BellSouth's statement that "BellSouth has never refused a reasonable request from Supra, or from any other carrier, for information that is necessary to negotiate an interconnection agreement" (BellSouth, paragraph 6, page 6) is so disingenuous as to be sanctionable. On or about November 2, 2000, the Federal Communications Commission ("FCC") entered a consent decree against BellSouth for BellSouth's violations of section 251(c)(1) of the Communications Act of 1934, as amended, and section 51.301 of the Commission's rules, in connection with BellSouth's alleged failure to negotiate in good faith the terms and conditions of an amendment to an interconnection agreement with Covad Communications Company (Covad) relating to BellSouth's provision of unbundled copper loops in nine states. BellSouth was fined $750,000 by the FCC for the very act it has committed against Supra.

8. BellSouth's statement that Supra's request is "non-sensical" (BellSouth, page 4), "so vague and ill-formed that it is indecipherable" (BellSouth, page 5) is irreconcilable with the FCC's determination that the items in the template would constitute "good faith issues for negotiation." In addition, such is not a challenge to the legal sufficiency of Supra's complaint.

9. Finally, BellSouth's attempts to explain why it insists that Supra negotiate from its standard agreement is unconvincing. BellSouth argued that its "practices have changed, the controlling law has changed, and the interconnection offerings, terms and conditions that are available have changed" without offering any proof or examples. If this were true, amending the parties' current agreement to reflect such changes would be even easier than creating a new agreement from scratch. It is obvious that BellSouth, in creating an entirely new agreement, has attempted to make numerous changes in favor of

itself, which have nothing to do with changes in the law, but which, nevertheless, would limit BellSouth's contractual obligations. The parties' current agreement (the AT&T-BellSouth 1997 Agreement), which had been subject to a rigorous and comprehensive arbitration before the FPSC, serves as a much fairer starting point than BellSouth's template, which was created solely by BellSouth and not subject to the safeguards of the FPSC's arbitration proceedings.

9. Nevertheless, BellSouth's argument does not serve as a valid excuse for refusing to even consider the current agreement as a basis for negotiation. The parties have been operating under the "current agreement" since October 1999. It simply makes sense that the negotiation for a "Follow-On" agreement begin with the current agreement.

WHEREFORE, Supra prays this Commission DENY BellSouth's Motion to Dismiss and grant such other and proper relief.

Respectfully submitted,

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By: Adenet Medacier
ADENET MEDACIER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

Federal Express this 18th day of July, 2001 to the following:

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July 18, 2001.

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