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March 1, 2002

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket No. 001097-TP - Supra's Response to BellSouth's Motion to Strike Portions of Direct Testimony for Witnesses Ramos and Nilson

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Notice of Service of its Response to BellSouth's Motion to Strike Portions of the Direct Testimony for Witnesses Ramos and Nilson in the above-referenced docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

Brian Chaiken/AHS

Brian Chaiken
General Counsel

DOCUMENT NUMBER-DATE
02424 MAR-1 8
FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery and Federal Express this 1st day of March, 2002 to the following:

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By: Brian Chaiken / AHS
BRIAN CHAIKEN, ESQ.
KIRK DAHLKE, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc., for Resolution of Billing Disputes	))))))	Docket No. 001097-TP Dated: March 1, 2001

SUPRA TELECOMMUNICATION AND INFORMATION SYSTEMS, INC.'S RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO STRIKE PORTIONS OF THE DIRECT TESTIMONY OF OLUKAYODE RAMOS AND DAVID NILSON

Supra Telecommunications & Information Systems, Inc. ("Supra"), by and through its undersigned counsel and pursuant to Rule 28-106.204 of the Florida Administrative Code hereby files this Response to BellSouth's Telecommunications, Inc.'s ("BellSouth") Motion to Strike Portions of the Direct Testimony of Olukayode Ramos and David Nilson and in support hereof states as follows:

INTRODUCTION

On January 31, 2002, this Commission issued an Order Setting Matter For Rehearing and Establishing Procedure (Order No. PSC-02-0143-PCO-TP) ("Order") wherein it specifically identified the following four (4) issues as "controlling" and to be addressed by the parties:

> **ISSUE ONE**: SHOULD THE RATES AND CHARGES CONTAINED (OR NOT CONTAINED) IN THE 1997 AT&T/BELLSOUTH AGREEMENT APPLY TO THE BELLSOUTH BILLS AT ISSUE IN THIS DOCKET?
>
> **ISSUE TWO**: DID BELLSOUTH BILL SUPRA APPROPRIATELY FOR END-USER COMMON LINE CHARGES PURSUANT TO THE BELLSOUTH/ SUPRA INTERCONNECTION AND RESALE AGREEMENT?
>
> **ISSUE THREE**: DID BELLSOUTH BILL SUPRA APPROPRIATELY FOR CHANGES IN SERVICES, UNAUTHORIZED LOCAL SERVICE CHANGES, AND RECONNECTIONS PURSUANT TO THE BELLSOUTH/SUPRA

INTERCONNECTION AND RESALE AGREEMENT?

ISSUE FOUR: DID BELLSOUTH BILL SUPRA APPROPRIATELY FOR SECONDARY SERVICE CHARGES PURSUANT TO THE BELLSOUTH/ SUPRA INTERCONNECTION AND RESALE AGREEMENT?

On February 8th, 2002, Supra, pursuant to said Order, filed Direct Testimonies of David Nilson ("Nilson") and Olukayode Ramos ("Ramos"). On February 22nd, 2002, BellSouth filed a Motion to Strike Portions of the Direct Testimonies of both Ramos and Nilson. Specifically BellSouth, on the basis of relevancy, seeks to preclude testimony pertaining to:

(1) the circumstances leading up to the execution of the October 23, 1997, Supra/BellSouth Interconnection Agreement;

(2) the unbundled network element ("UNE") provisions of the October 23, 1997, Supra/BellSouth Interconnection Agreement;

(3) the circumstances leading up to Supra's adoption of the AT&T/BellSouth Interconnection Agreement in 1999; and

(4) testimony concerning the private arbitration arising under the adopted AT&T/BellSouth Interconnection Agreement.

It is BellSouth's position that the scope of this proceeding should be limited to billing disputes arising under the 1997 BellSouth/Supra Resale Agreement and that the aforementioned testimony surrounding the October 23, 1997 Supra/BellSouth Interconnection Agreement is simply irrelevant. In support of its contention, BellSouth relies upon three (3) Orders entered by the Commission in this case, more particularly: (1) Order Granting Oral Argument and Granting in Part and Denying in Part Motion to Dismiss (Order No. PSC-00-2250-FOF-TP) ("Order on Motion to Dismiss"); (2) Order

Denying Motion for Reconsideration or Clarification of Order on Motion to Dismiss (Order No. PSC-01-0493-FOF-TP) ("Order on Reconsideration"); and (3) Final Order on Complaint (Order No. PSC-01-1585-FOF-TP) ("Final Order"). BellSouth's reliance on these orders is misplaced and disingenuous since the Commission did not address in issuing the same, the applicability of the Supra/BellSouth Interconnection Agreement, which is evident by the foregoing statement set forth in PSC-01-1585-FOF-TP:

> The first matter which we shall address is the issue of whether the billing dispute before us are governed by the <u>1997 [Resale] agreement or the 1999 adopted AT&T agreement.</u> (pg. 3) (Emphasis added)
>
> In Order No. PSC-00-2250-FOF-TP, issued November 28, 2000, we determined that the relevant agreement in this matter is the resale agreement entered into by BellSouth and Supra on June 26, 1997, approved by us on October 8, 1997, and effective June 1, 1997, through December, 1999. (pg. 3-4)

By relying on said orders in support of its position, BellSouth fails to account for the fact that billing issues 2-4 explicitly address BellSouth's ability to charge Supra for various fees pursuant to the "BellSouth/Supra Resale <u>and</u> Interconnection Agreement." (Emphasis added) Should the Commission accept BellSouth's erroneous position, Supra is unaware as to why a Rehearing, or any hearing for that matter, would be necessary given the fact that this Commission has, pursuant to the orders listed above, identified the 1997 Supra/BellSouth Resale Agreement to be controlling as opposed to the October 5, 1999, Supra/AT&T Agreement. As set forth more fully below, since the aforementioned testimony is highly relevant and has a direct bearing on the issues espoused by the Commission in its Order, said testimony should not be stricken.

ARGUMENT

1. Testimony regarding the circumstances leading up to the execution of the October 23, 1997 Supra/BellSouth Interconnection Agreement

and

2. Testimony regarding the unbundled network element ("UNE") provisions of the October 23, 1997 Supra/BellSouth Interconnection Agreement

BellSouth incorrectly complains that both Ramos and Nilson present inconsequential testimony regarding events leading up to the execution of the October 23, 1997, Supra/BellSouth Interconnection Agreement and the UNE provisions contained therein. Contrary to BellSouth's position, this testimony has direct bearing on the issues in this case. Specifically, the testimony lays the foundation for Supra's claim that the October 23, 1997, Supra/BellSouth Interconnection Agreement controls BellSouth's ability to have billed the charges which are at issue. This testimony elicits Supra's intentions to adopt the June 10, 1997, BellSouth/AT&T Interconnection Agreement as well as efforts expended by Supra to acquire UNEs and UNE combinations as far back as September 1997 and attempts by BellSouth to preclude and/or fail to recognize Supra's ability to acquire the same. It is undisputed that the Interconnection Agreement that was filed with this Commission back in 1997 failed to contain, through the actions of BellSouth, certain provisions in Attachment 2 which when read in conjunction with other provisions contained therein imposed the obligation upon BellSouth to provide Supra with UNE combinations. Whether Supra had the ability to place orders for, and whether BellSouth had the ability to bill Supra for, UNEs and/or UNE Combinations is an issue which will determine whether Supra was billed correctly. Had BellSouth allowed Supra to order UNEs under the 1997 Supra/BellSouth Interconnection Agreement, BellSouth

could not have billed Supra for the charges it has assessed under the 1997 Supra/BellSouth Resale Agreement. Any argument espoused by BellSouth that Supra should not be allowed to use this forum to pursue "general grievances under long-expired agreements"[1] or that Supra must "request that the Commission expand the current list of issues"[2] in order to entertain such relevant testimony belies the issues laid out by this Commission. Given that the Interconnection Agreement and the Resale Agreement expired at the same time, one must wonder why BellSouth does not apply this same logic to its own case.

It must be noted that BellSouth, through Direct Testimony of Patrick Finlen filed in this proceeding on February 8th, 2002, addressed this very subject matter in a lengthy eight (8) pages.[3] Although BellSouth in its Motion to Strike[4] states that said testimony was inserted on the mere basis of "[anticipating] Supra's testimony[5], BellSouth could have addressed the testimony in rebuttal. Based upon Mr. Finlen's testimony and the fact that testimony regarding these very same circumstances was presented through Mr. Finlen and introduced into evidence at the Final Hearing, the relevancy of this material becomes even more evident. Hence, neither the testimony of Ramos or Nilson nor the documents referenced therein should be stricken.

3. Testimony regarding the circumstances leading up to Supra's adoption of the AT&T/BellSouth Interconnection Agreement in 1999

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[1] See Motion to Strike pg. 5.
[2] See Motion to Strike pg. 4.
[3] See pg 5, line 14 through pg. 13, line 7 of Mr. Finlen's Direct Testimony.
[4] See Footnote 2 on pg. 3 of said Motion.
[5] See pg. 3 of said Motion.

BellSouth complains that testimony provided by Ramos concerning circumstances leading up to Supra's adoption of the AT&T/BellSouth Interconnection Agreement in 1999 is irrelevant and designed "solely to paint BellSouth in a bad light."[6] Contrary to BellSouth's position, this testimony has direct bearing on the issues in this case. As stated above, Supra announced its intentions to adopt the June 10, 1997, BellSouth/AT&T Interconnection Agreement[7] since late 1997 which is the very same agreement that Ramos believed, upon BellSouth's representations, that he was obtaining when he signed the October 23, 1997, Supra/BellSouth Interconnection Agreement. In connection with Issues 2-4, this testimony supports Supra's position that BellSouth has engaged in a consistent manner, with tortious intent to harm Supra by denying Supra the ability to order and thereby provide service using UNE Combinations. This conduct has not only harmed Supra, but also the entire CLEC industry, as well as the consumers whom Congress had intended to benefit from competition yet-to-be fully fostered by the Telecommunications Act of 1996. The testimony also lends support to Supra's claim that BellSouth did not, up until the year 2000, have written procedures in place by which Supra could order the UNEs under their 1997 Interconnection Agreement. Accordingly, Ramos' testimony and the exhibits referenced therein should not be stricken.

4. Testimony concerning the private arbitration arising under the adopted AT&T/BellSouth Interconnection Agreement.

BellSouth seeks to strike certain portions of Nilson's Direct Testimony concerning the private arbitration arising under the adopted AT&T/BellSouth

[6] See Motion to Strike at pg. 6.

Interconnection Agreement on the grounds of (1) relevancy and (2) confidentiality. In connection with BellSouth's first stance and as referenced above, the testimony sought to be stricken, which includes an admission by one of BellSouth's own witnesses, is highly relevant as it goes to establish the following: (1) Supra and BellSouth had in place an Interconnection Agreement that provided for the acquisition of UNE combinations as far back as October of 1997; (2) the deleted UNE Combination provisions set forth in Attachment 2 of the parties' October 23, 1997, Interconnection Agreement are material; (3) Supra requested to obtain UNEs and UNE combinations as far back as September 1997 and BellSouth, despite Supra's requests, intentionally failed to provide UNEs and UNE combinations; and further that (4) BellSouth did not, have written procedures in place by which Supra could order said UNEs and UNE combinations.

As to BellSouth's second position that the material should be stricken as confidential, Supra did, despite BellSouth's statements, redact the material quoted from the June 5th, 2001 Commercial Arbitration Award and identified in BellSouth's Motion to Strike as **Page 58, Line 17 through Page 64 Line 14**[8]. As to the confidential status of **Page 30, Line 15 through Page 32, Line 2 and Page 43, Line 12 through Page, 49, Line 9** of Nilson's Direct Testimony, Supra regretfully acknowledges that page 31, line 5 through line 12 should have been redacted as being confidential as should have page 43, line 12 through page 48, line 10[9]. Supra sincerely apologizes for any inclusion of confidential material within the testimony of Nilson and would state that such was done

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[7] The AT&T/BellSouth Interconnection Agreement, as does the Supra/BellSouth Interconnection Agreement, contains provisions regarding a CLEC's ability to purchase and acquire UNEs and UNE combinations.

[8] BellSouth, in its Motion to Strike, alleges that lines 15-17 of Page 64 are confidential however this is not true as the statements contained therein are mere argument.

without intent and was an oversight discovered only after receipt of BellSouth's Motion to Strike. Supra must also point out that although the information may be deemed confidential under the parties' agreement that the testimony does not divulge proprietary business information of BellSouth, but instead contains admissions which directly support Supra's claims.

On page 9 of the Motion to Strike and in footnote 5 of same, BellSouth alleges that Exhibit DN-40 is confidential and assumes that the testimony of Nilson set out in Section III of its Motion, along with the exhibits contained therein, are related to the private arbitration and presumably should be stricken. First, Exhibit DN-40 is the same as Exhibit DN-31, which is a copy of an Order (No. PSC-98-0810-FOF-TP) issued by this Commission on June 12, 1998 in Docket No. 971140-TP, and is a public document. Secondly, and in connection with the exhibits referenced in Section III of BellSouth's Motion, even if the exhibits were somehow made a part of and/or related to the private arbitration, since the documents were originally obtained and/or developed by Supra in the ordinary course of its business dealings with BellSouth[10] and/or are matters of public record,[11] such cannot be construed as confidential. Similarly, even if the testimony referenced therein were somehow made a part of and/or related to the private arbitration, it cannot be said that Supra's recitation of facts known to it and acquired through the ordinary course of business dealings with BellSouth can be deemed or otherwise

[9] Supra does not agree with any other allegations by BellSouth that material, other than that acknowledged herein, should be deemed confidential as said material is argument and/or recites documents Supra obtained in the ordinary course of its business dealings with BellSouth.
[10] See Exhibits DN5-10, 12-20, 26-28 and 32-39; Exhibit DN-29, although referenced in Nilson's Direct Testimony, was not filed and/or provided to BellSouth and will not be made a part of the record in this case.
[11] See Exhibits DN 11, 20, 30 and 31.

construed to be confidential. Accordingly, Supra respectfully requests that BellSouth's request to strike testimony and exhibits be denied.

WHEREFORE, for the reasons discussed above, Supra Telecom respectfully requests that the Commission denies BellSouth's Motion to Strike the referenced portions of the testimonies of witnesses Ramos and Nilson.

Respectfully submitted this 1st day of March 2002.

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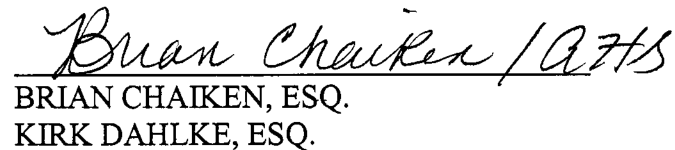

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