



1311 Executive Center Drive, Suite 200
Tallahassee, FL 32301-5027

Telephone: (850) 402-0510
Fax: (850) 402-0522
www.supratelecom.com

May 8, 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. 001305-TP – Motion For Leave To File
Reply To BellSouth’s Opposition To Supra’s Motion to Strike,
Or, In The Alternative, To Strike New Issues Raised in
BellSouth’s Opposition**

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecom’s Motion For Leave To File Reply to BellSouth’s Oppositions to Supra’s Motion to Strike, or, In the Alternative, to Strike New Issues Raised In BellSouth’s Opposition in the above captioned docket.

We have enclosed a copy of this letter, and ask that you mark it to indicate that the original was filed, and thereupon return it to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Brian Chaiken
General Counsel

DOCUMENT NUMBER: 04986

04986 MAY-88

FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery and/or Federal Express 8 day of May, 2002 to the following:

Wayne Knight, Esq.
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Nancy B. White, Esq.
James Meza III, Esq.
c/o Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL. 32301
(850) 222-1201 (voice)
(850) 222-8640 (fax)

T. Michael Twomey, Esq.
R. Douglas Lackey, Esq.
E. Earl Edenfield Jr., Esq.
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0710

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4248
Facsimile: (305) 443-9516

By: Brian Chaiken/QHS
BRIAN CHAIKEN, ESQ.

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

Petition for Arbitration of the)
Interconnection Agreement between Bell-)
South Telecommunications, Inc. and)
Supra Telecommunications & Information)
Systems, Inc. pursuant to Section 252(b))
of the Telecommunications Act of 1996)
_____)

Docket No. 001305-TP

Dated: May 8, 2002

**MOTION FOR LEAVE TO FILE REPLY TO
BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION
TO STRIKE, OR, IN THE ALTERNATIVE, TO STRIKE
NEW ISSUES RAISED IN BELLSOUTH'S OPPOSITION**

RESPONDENT SUPRA TELECOMMUNICATIONS & INFORMATION

SYSTEMS INC. ("Supra"), by and through its undersigned counsel, hereby moves to this Commission to allow the enclosed Reply to BellSouth's Opposition To Supra's Motion To Strike And Reply Memorandum ("Opposition to Strike") filed by BELLSOUTH TELECOMMUNICATIONS, INC.'s ("BellSouth") on or about May 1, 2002, or, in the alternative, to strike the new issues and/or requests for relief raised in BellSouth's Opposition to Strike, and in support thereof states as follows:

I. PROCEDURAL BACKGROUND

1. On or about April 24, 2002, Supra filed a Motion To Strike And Reply To BellSouth's Opposition To Supra's Motion For Reconsideration For New Hearing ("Motion to Strike\Reply"). The Motion to Strike\Reply sought to rebut new arguments raised in BellSouth's Opposition To Supra's Motion For Reconsideration For New Hearing ("Opposition on Rehearing") (filed on or about April 17, 2002) and to strike redundant, irrelevant, immaterial and/or scandalous material in BellSouth's Opposition on Rehearing.

2. On May 1, 2002 BellSouth filed its Opposition to Strike in which BellSouth embedded

therein a motion for sanctions. Although not styled as such, BellSouth clearly added an entire section in which BellSouth specifically moved for sanctions against Supra. Obviously, BellSouth's intent in embedding such a motion in a response was to argue that Supra should be precluded from responding to that request.

3. Because the motion for sanctions, embedded within BellSouth's Opposition to Strike should have been brought as a separate motion, Supra should either be given the opportunity to respond to this portion of BellSouth's Opposition to Strike, or such new matters should be stricken and not considered.

II. MEMORANDUM OF LAW

A. BellSouth's Request For Sanctions Is Actually An Improper Motion

Rule 28-106.204(1), Florida Administrative Code, states in pertinent part as follows:

"All requests for relief shall be by motion. All motions shall be in writing unless made on the record during a hearing, and shall fully state the action requested and the grounds relied upon. . . When time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition."

Thus according to Rule 28-106.204, Fla.Adm.Code, a motion is by definition a request for relief. Black's Law Dictionary (5th Ed.) defines the word "motion" as "**[a]n application to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant**". Black's Law Dictionary (5th Ed.) also defines the term "responsive" as "**[a]nswering**" and as something "**which directly answers the allegation**". Given the above, it is reasonable to define a motion as a request for relief which sets forth a basis for that request; while a response should only answer the matters raised in the motion. If a response goes further than to merely

answer the motion (such as by raising new issues or seeking affirmative relief), then the response is no longer a true response and arguably is in violation of Rule 28-106.204(1), Fla.Adm.Code.

In this proceeding, BellSouth has on numerous occasions either raised new issues in its responses and/or has sought relief in its responses. BellSouth's instant Opposition to Strike is a perfect example of an improper response in that BellSouth devotes an entire section in its brief to an affirmative request for sanctions. In this regard, Section IV of BellSouth's Opposition to Strike, which is entitled "The Commission Should Sanction Supra For Attempting To Mislead The Commission", is actually a motion which seeks affirmative relief, but which is cleverly embedded within a document styled as a "response." This practice of raising new issues and/or requesting relief within a response is a deliberate attempt to circumvent the purpose and intent of Rule 28-106.204(1), Fla.Adm.Code. That purpose being to establish an orderly procedure by which requests are raised in motions, and opposing parties are then given a reasonable opportunity to defend and/or oppose those requests for relief. Given the fact that BellSouth has requested relief and devoted a substantial portion of its Opposition to Strike to the proposition that no "Reply Briefs" are allowed under Rule 28-106.204(1), Fla.Adm.Code; any reasonable person would conclude that BellSouth is attempting to ambush its opposition by framing motions as responses in order to avoid a meaningful briefing of the issues.

In Order No. PSC-00-1777-PCO-TP (In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications for violation of the Telecommunications Act of 1996; petition for resolution of disputes as to implementation and interpretation of interconnection, resale and collocation agreements; and petition for emergency

relief; Docket No. 98-0119-TP), Supra sought to strike a motion for reconsideration which had been filed by BellSouth several months after the filing deadline for such motions. In denying Supra's motion to strike, this Commission stated in pertinent part as follows:

"Although styled as a Motion for Reconsideration, BellSouth's Motion does not seek reconsideration of any specific Commission Order. Instead, BellSouth asks that we determine that the issue of whether BellSouth has modified the ALEC ordering system . . . should be resolved in Dockets Nos. 960786-TL and 981834-TP. . . Florida courts have held that '[a] pleading will be considered what it is in substance, even though mislabelled.' Mendoza v. Board of County Commissioners/Dade County, 221 So.2d 797, 798 (3rd DCA 1969). See also Sodikoff v. Allen Parker Company, 202 So.2d 4 (Fla.App. 1967); Hough v. Menses, 95 So.2d 581, 582 (Fla. 1957). 'Courts should look to the substance of a motion and not the title alone.' Mendoza v. Board of County Commissioners/Dade County, 221 So.2d 797, 798 (3rd DCA 1969)."

See Order No. PSC-00-1777-PCO-TP at pages 6-7. Accordingly, it is incumbent upon this Commissioner to look into the substance of a motion or response, rather than merely its label. Where a response crosses the line and actually raises new issues or seeks relief, then the opposing party should be given an opportunity to respond as contemplated by Rule 28-106.204(1), Fla.Adm.Code.

B. Reply To BellSouth's Request For Sanctions

The basis of BellSouth's request (i.e. motion) for sanctions in its Opposition to Strike is that "Reply Memorandums" are per se impermissible and thus Supra should be sanctioned for filing any "Reply Memorandums." BellSouth's position is not supported by either case law or the relevant rules and any thus request for sanctions should be denied.

First, it should be noted that Rule 28-106.204(1), Fla.Adm.Code, authorizes the filing of a motion and a response. However, the rule does not specifically prohibit the filing of a "Reply

Memorandum". If all parties to proceedings before the FPSC filed true motions and true responses, there should be no need for any party to file a "Reply Memorandum." The reality, of course, is that litigants, such as BellSouth, sometimes try to gain an unfair advantage by either raising new issues in a response, or styling motions as part of a response, thus seeking to preclude a party from properly briefing a matter before the Commission. However, despite BellSouth's arguments, this Commission has already recognized in Order No. PSC-00-1777-PCO-TP, that it is the substance of the filing that is important, rather than its label. Thus a motion embedded in a response should not be viewed merely as a response, but rather as either an improper motion which should be stricken, or as a motion for which a response should be allowed. Similarly, a document labeled as a "Reply Memorandum" should not be considered an unauthorized filing, if in fact it is merely responding to new issues raised in the response, or is defending against affirmative relief sought in a response brief. This position is compatible with both Rule 28-106.204, Fla.Adm.Code, and this Commission's prior ruling in Order No. PSC-00-1777-PCO-TP.

The caselaw cited by BellSouth does not alter the analysis set forth above. In Order No. PSC-00-1777-PCO-TP, BellSouth filed a true reply brief which did not seek to address any new issues raised by Supra, or otherwise defend against a request for relief raised in any response brief. Moreover, in that docket, BellSouth did not file a response to Supra's motion to strike. In granting, Supra's motion to strike, this Commission stated as follows:

"Supra argues that the rules governing motions for reconsideration contemplate a motion and a response. Neither provides for a reply brief, such as that filed by BellSouth. Therefore, Supra asks that BellSouth's reply be stricken. BellSouth did not file a response to the Motion to Strike. We agree with Supra that neither the Uniform Rules nor our rules contemplate a reply to

a response to a Motion. Therefore, the Motion to Strike is granted."

As is clear from the above, BellSouth did not respond to the Motion to Strike, nor did BellSouth raise any basis for the reply, such as responding to new issues or requests for relief raised in a response brief. It is interesting to note that this Commission would have considered BellSouth's reply brief had Supra not sought to strike the same; thus treating the reply much like inadmissible evidence introduced during a hearing to which no party took an objection.

In this instance, the filing of a reply was needed to respond to new issues raised by BellSouth in its Opposition on Rehearing. As such, the Reply was keeping within the spirit of Rule 28-106.204, Fla.Adm.Code and this Commission's prior ruling in Order No. PSC-00-1777-PCO-TP. Accordingly, the Reply was not filed for any improper purpose and indeed was contemplated by the applicable rules and prior precedence.

In any event, nothing in the rules or prior precedence states that a party may not file a reply or that the Commission should automatically not consider a reply. Clearly, if the reply is more akin to a response in opposition to new issues or relief raised in a response brief, then such a filing would be contemplated by Rule 28-106.204, Fla.Adm.Code and Order No. PSC-00-1777-PCO-TP. If a party believes that the filing is inappropriate, the proper and more preferable procedure would be to file a motion to strike and thus allow the opposing party an opportunity to explain the basis for filing the reply brief. In this instance, if BellSouth truly had a problem with Supra's reply, it should have filed a motion to strike as contemplated by Order No. PSC-00-1777-PCO-TP.

In Order No. PSC-98-1467-FOF-TP (In re: Complaint of Supra Telecommunications & Information Systems against BellSouth Telecommunications, Inc. for violation of the

Telecommunications Act of 1996; petition for resolution of disputes as to implementation and interpretation of interconnection, resale and collocation agreements; and petition for emergency relief; Docket No. 98-0119-TP), this Commission held that "sanctions should only be imposed when truly warranted, in order to avoid ' . . . chill[ing] an attorney's enthusiasm or creativity in pursuing factual or legal theories.'" See Order No. PSC-98-1467-FOF-TP at pages 12-13. This Commission also held that an improper purpose in a pleading which justifies the imposition of sanctions is "manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." See Order No. PSC-98-1467-FOF-TP at page 12. Supra's filing of its Motion to Strike\Reply nowhere approaches this threshold conduct. Neither does the innocent misstatement of Supra's counsel (Brian Chaiken) about when public records requests were made, give rise to such conduct. The fact that Supra employees subordinate to counsel were a few days late in making document requests upon FPSC Staff, and thus caused counsel to make an innocent misstatement (which is largely irrelevant) does not rise to the standard needed to impose sanctions. Accordingly, there is no basis for imposing sanctions against Supra or its counsel.

Accordingly, this Commission should grant this Motion to file a reply, accept the above arguments in response to BellSouth's Motion for Sanctions, and thereafter deny said Motion. Alternatively, this Commission should strike BellSouth's request for sanctions for the reasons set forth below.

C. Alternative Motion To Strike

Contrary to BellSouth's contentions, motions to strike are authorized by law under a wide

variety of circumstances. For example, Florida Statute § 120.569(2)(e) states in pertinent part as follows:

"All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction . . ."

Furthermore, Fla.Stat. § 120.569(2)(g) states that irrelevant, immaterial, or duly repetitious matters shall be excluded. Thus it is clear that Fla.Stat. § 120.569 contemplates the striking of a motion, filing or material which is either: (a) interposed for any improper purpose, such as to harass or to cause delay, or for frivolous purposes or to needlessly increase the cost of litigation; or (b) is irrelevant, immaterial or duly repetitious.

Additionally, Florida Rules of Judicial Administration, Rule 2.060(c) states in pertinent part as follows:

"The signature of an attorney (on any pleading or other paper filed) shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other paper had not been served."

Thus under Rule 2.060, Fla.R.Jud.Adm., it is proper to strike any paper filed by an attorney for which there is no good ground to support the filing or which is interposed for delay.

Given the above, it is clear that a proper sanction for an inappropriate filing is the striking of

that filing from the record. In Picchi v. Barnett Bank of South Florida, N.A., 521 So.2d 1090, 1091 (Fla. 1988), the Florida Supreme Court held that a paper filed by an attorney which was not authorized by the rules of procedure or caselaw, was subject to being stricken. Likewise, the Court in Hicks v. Hicks, 715 So.2d 304, 305 (Fla. 5th DCA 1998), held that a motion filed by an attorney which violated Rule 2.060, Fla.R.Jud.Adm., was voidable and subject to being stricken.

With respect to this Commission, in Order No. PSC-98-1467-FOF-TP (cited previously), this Commission ruled that a "Motion to Dismiss BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP for Misconduct" ("Motion to Dismiss Reconsideration") was a pleading subject to being stricken. In its Motion to Strike, BellSouth argued that Supra's Motion to Dismiss Reconsideration was a pleading subject to being stricken under Fla.R.Civ.P. 1.140 as containing scandalous matters, and under Fla.R.Civ.P. 1.150 as being false and a sham. In granting BellSouth's motion and striking Supra's Motion to Dismiss Reconsideration, this Commission held that Supra's motion was in-fact a pleading subject to being stricken. See Order No. PSC-98-1467-FOF-TP at pages 6-10; see also Order No. PSC-96-0790-FOF-WU (In re: Application for amendment of Certificate No. 488-W in Marion County by Venture Associates Utilities Corp.; Docket No. 93-0892-WU) at pages 4-6 (where motion to strike late-filed evidence was granted under Fla.R.Civ.P. 1.140(f) since it was not authorized and therefore immaterial and impertinent). Florida Rule of Civil Procedure 1.140(f) authorizes the striking from the record of any redundant, immaterial, impertinent or scandalous matter from any pleading, at any time. Likewise, Fla.R.Civ.P. 1.150(a) authorizes the striking of any pleading (or part thereof), which is a sham. Thus under this Commission's ruling in Order No. PSC-98-1467-FOF-TP, a

motion or other filing may be stricken under either Fla.R.Civ.P. 1.140 or Fla.R.Civ.P. 1.150; and more particularly, if the filing contains redundant, immaterial, impertinent or scandalous matters, or is a sham filing.

It is interesting to note that in BellSouth's present Opposition to Strike, BellSouth argues for an exactly opposite rule of law than that which BellSouth successfully argued for and obtained in Order No. PSC-98-1467-FOF-TP. In its Opposition to Strike, BellSouth argues that Florida Rules of Civil Procedure 1.140 and 1.150 do not apply to motions, but rather only to complaints, answers and affirmative defenses. However, in Order No. PSC-98-1467-FOF-TP, BellSouth successfully argued that those rules do apply to motions. Under BellSouth's own perverse logic, its attorneys should now be sanctioned for such conflicting positions.

In addition to rules of procedure and administration, motions to strike have also been granted by this Commission and the Courts for other various reasons. For example, in Order No. 21710 (89-8 FPSC 270) (In re: Objection to notice by Hudson Utilities, Inc. of intent to transfer Certificate 104-S in Pasco County to Robert Bammann and Judith Bammann; Docket No. 890662-SU), this Commission granted a motion to strike various objections on the grounds that said objections were "**irrelevant and immaterial**". Likewise, in Order No. PSC-98-1254-FOF-GU (In re: Complaint of Mother's Kitchen Ltd. against Florida Public Utilities Company regarding refusal or discontinuance of service; Docket No. 970365-GU), this Commission struck various responses to motions as being untimely and thus not allowed under the applicable rules. Since the late-filed motions were not authorized under the applicable rules, it was proper to grant the motions to strike. Again in Order No. PSC-99-0186-FOF-GU (In re: Complaint of Mother's Kitchen Ltd. against

Florida Public Utilities Company regarding refusal or discontinuance of service; Docket No. 97-0365-GU), this Commission struck various exhibits attached to a motion for reconsideration, which had not previously been made part of the record. Since the filing of such exhibits was not authorized, the Commission granted the motion to strike. Likewise, the Courts in overseeing administrative agencies have upheld similar motions to strike. For example, in Plante v. Department of Business and Professional Regulation, 716 So.2d 790, 792 (Fla. 4th DCA 1998), the appellate court affirmed an agency ruling which struck evidence that had not previously been submitted during the evidentiary hearing. Finally, in Ropes v. Stewart, 45 So. 31 (Fla. 1907), the Florida Supreme Court upheld the striking of a declaration which the lower court found to be scandalous. Thus it appears that even in the absence of any specific rules or statutes, Courts have the inherent power to strike scandalous materials from filings and other public records.

Based upon the above, it is clear that this Commission has the power to strike any material or filing from the record which is either: (a) not authorized by the rules; (b) is redundant, impertinent, irrelevant, immaterial and/or scandalous; (c) is a sham; (d) is interposed for any improper purpose, such as to harass or to cause delay, or for frivolous purposes, or which needlessly increases the cost of litigation; and (e) for which there is no good ground to support the filing.

In this instance, BellSouth has improperly included a motion for sanctions within its Opposition to Strike response brief. The inclusion of a motion within a response brief is not contemplated by the rules and thus not authorized. Accordingly, it would be appropriate to strike any reference in the record to said request for sanctions and ignore the same.

WHEREFORE SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS,

INC., respectfully requests that this Commission grant leave to file the above Reply, or, in the alternative, strike and ignore any request for sanctions found in BELLSOUTH TELECOMMUNICATIONS, INC.'s Opposition To Supra's Motion To Strike And Reply Memorandum.

Respectfully submitted, this 8th day of May, 2002.

SUPRA TELECOMMUNICATIONS &
INFORMATION SYSTEMS, INC.
2620 S. W. 27th Avenue
Miami, Florida 33133
Telephone: 305/476-4248
Facsimile: 305/443-9516

BY: Brian Chaiken *BCS*

BRIAN CHAIKEN
General Counsel
Florida Bar No. 0118060