



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

ORIGINAL

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

January 14, 2003

Mrs. Blanca Bayo, Director  
Division of Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 323099-0850

RECEIVED-FPSC  
03 JAN 14 PM 4:00  
COMMISSION  
CLERK

**RE: DOCKET NO. 021249-TP - SUPRA TELECOM'S RESPONSE  
TO BELL SOUTH'S MOTION TO DISMISS COMPLAINT AND  
OPPOSITION TO REQUEST FOR EXPEDITED RELIEF**

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Response to BellSouth's Motion to Dismiss Complaint and Opposition to Request for Expedited Relief.

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

Sincerely,

*Jorge L. Cruz-Bustillo* JAB

Jorge L. Cruz-Bustillo  
Assistant General Counsel

AUS \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_  
GCL \_\_\_\_\_  
OPC \_\_\_\_\_  
MMS \_\_\_\_\_  
SEC 1 \_\_\_\_\_  
OTH \_\_\_\_\_

RECEIVED & FILED

*R. V. N.*

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

00431 JAN 14 8

FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE**

**Docket No. 021249-TP**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served via Hand Delivery, Facsimile, Federal Express or U.S. Mail this 14th day of January, 2003 to the following:

Patty Christensen, 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)

SUPRA TELECOMMUNICATIONS  
& INFORMATION SYSTEMS, INC.  
2620 S.W. 27<sup>th</sup> Avenue  
Miami, Florida 33133  
Telephone: (305) 476-4252  
Facsimile: (305) 443-9516

By: George L. Cruz - Bustillo / AHS  
JORGE L. CRUZ-BUSTILLO, ESQ.  
Assistant General Counsel

**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of Supra	)	
Telecommunications & Information Systems,	)	
Inc., against BellSouth	)	Docket No.: 021249-TP
Telecommunication, Inc.'s for Non-Compliance	)	
with Commission Order No.	)	
PSC-02-0878-FOF-TP	)	Filed: January 14, 2003
<hr/>		

**SUPRA TELECOM'S RESPONSE TO BELL SOUTH'S MOTION TO DISMISS  
COMPLAINT AND OPPOSITION TO REQUEST FOR EXPEDITED RELIEF**

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, pursuant to Florida Administrative Code Rules, hereby files its Response to BellSouth Telecommunication, Inc.'s ("BellSouth") Motion to Dismiss Complaint and Opposition to Request for Expedited Relief ("Motion to Dismiss") and in support thereof states:

**STANDARD FOR A MOTION TO DISMISS**

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*, 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 "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)

A motion to dismiss does not at all consider any proof offered by the Complainant or the respondent. *Martin, supra; Lewis, supra.* To the contrary, the Florida Public Service Commission ("Commission") must consider all of Supra's allegations as true. *Connolly, supra; Cook, supra, Brandon, supra.*

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 finding BellSouth in non-compliance of this Commission's Orders. *Varnes.* In Commission Order PSC-01-1180-FOF-TI, this Commission rightfully stated that: "When 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."

### **ISSUES RAISED BY BELLSOUTH**

In its attempt to have Supra's Complaint dismissed, BellSouth raises three arguments: (1) the Complaint fails to state a claim for which the Commission may grant relief; (2) Supra's Complaint is premature; and (3) the Commission lacks subject matter jurisdiction over the matters alleged in the Complaint. Supra will address each such argument individually and show that none constitute a valid reason to dismiss Supra's Complaint.

#### **I. SUPRA'S COMPLAINT DOES STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED**

This Commission has issued two orders directing BellSouth to continue to provide FastAccess Service to those BellSouth voice customers who choose to switch their voice provider to Supra: Commission Order Nos. PSC-02-0878-FOF-TP as clarified by Order No. PSC-02-1453-FOF-TP – BellSouth does not deny this. After the entry of Order PSC-02-0878-FOF-TP BellSouth filed a motion for reconsideration asking this Commission to "clarify that BellSouth is not required to provide FastAccess service over a UNE loop, but instead BellSouth may provide that service over

a new loop that it installs to serve the end user's premises." Id. at pg. 5. This Commission explicitly rejected this BellSouth interpretation.

BellSouth, utilizing its tried and true tactic of quoting out context, attempts to mislead and obscure this Commission actual findings by asserting that this Commission did not address how FastAccess was to be provisioned. Motion to Dismiss pg. 3. The actual complete quote can be found in ¶ 16 of Supra's Complaint: "Although the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service to FDN [or Supra] was not addressed in the Commission's [initial FDN] Order, **we believe that FDN's position is in line with the tenor of our decision.**" Order at pg. 5. (Emphasis added). What FDN had argued was that: "BellSouth's provisioning proposal [of requiring a second loop] would be harmful and undermine the Commission's intent." Order at pg. 5. "Further, FDN asserts that second loops are not ubiquitously available and an additional loop would reduce the efficient use of the existing loop plant." Id.

While BellSouth was partially correct in stating that the original order was silent on how the provisioning would be implemented, this Commission was clear that such provisioning would **not** include the requirement that a consumer obtain a second line as a condition precedent to switching voice providers. The Commission was also clear that "BellSouth's migration of its FastAccess Internet Service to an FDN [or Supra] customer **shall be a seamless transition** for a customer changing voice service from BellSouth to FDN [or Supra] in a manner that **does not create an additional barrier** to entry into the local voice market." (Emphasis added). Order No. PSC-02-1453-FOF-TP at pg. 6. Commission Order No. PSC-02-1453-FOF-TP was issued on October 21, 2002.

Supra properly alleged that BellSouth sent a letter dated November 22, 2002 [*See* Exhibit C of Supra's Complaint] in which BellSouth proposed to Supra the very BellSouth policy that this

Commission had rejected thirty-two (32) days earlier. Supra also has properly alleged that BellSouth is **not** complying with these orders. If taken as true - which this Commission must do for the purposes of BellSouth's motion - there is no doubt Supra has stated a claim for which relief can be granted.

Supra's Complaint also alleges specific facts – in addition to BellSouth's insistence of a second loop - that BellSouth's method of provisioning would alter the quality of the internet service, and add several new preconditions before a consumer will be permitted to switch voice providers. BellSouth's plan requires the consumer to accept the following pre-conditions: (1) to pay a higher rate to maintain his or her FastAccess service, (2) to possess a credit card - as opposed to receiving a paper bill which is a privilege enjoyed by BellSouth voice customers (3) that BellSouth will downgrade the quality of the service, and (4) a 60-day minimum requirement before a consumer can switch voice providers. See ¶'s 24 & 30 of Supra's Complaint. On this last pre-condition BellSouth wrote the following on November 22, 2002: "BellSouth shall have no obligation to provide FastAccess to a Supra end user if such end user did not have FastAccess for at least 60 days prior to the time Supra submits the LSR to convert voice to Supra." See ¶ 30 and Exhibit C, pg. 2, of Supra's Complaint.

BellSouth's inability to "leave well enough alone" inspired their next and final pre-condition, namely, that BellSouth shall be permitted a "win-back" contact prior to allowing the consumer to switch voice providers. See ¶ 22 of Supra's Complaint. Any contact during time of conversion is a win-back contact. Irrespective of how BellSouth characterizes its contact or the purpose of its contact, the intervention by BellSouth is designed to create doubts in the consumer's mind. Add to this intervention all of these new pre-conditions BellSouth insist upon, it is fair to say that BellSouth is sure to "win-back" a large portion of these customers. This Commission must

remember that consumers who purchase DSL are more likely to be purchasers of BellSouth's many vertical services. This also translates into higher access revenues for BellSouth. For BellSouth, the bottom line is paramount.<sup>1</sup> Any penalties and fines for failing to comply with state and federal law and this Commission's orders, is negligible and minor compared to revenues BellSouth realizes from these captive consumers.

Supra properly alleged that BellSouth's additional requirements of higher rates, credit cards and inferior service quality, along with its improper and illegal win-back contact - seeking approval of these onerous pre-conditions - with the end user prior to BellSouth permitting the consumer to switch, is not consistent with this Commission's decision (1) that "a customer's Internet access service would not be altered when the customer switched voice providers" and (2) that there "shall be a seamless transition for a customer changing voice service from BellSouth." Order No. PSC-02-1453-FOF-TP at pgs. 5-6.

Looking at the four corners of the Complaint and taking Supra's allegations as true – which this Commission must do - Supra has brought forth a claim for which relief can be granted and thus Supra's Complaint must not be dismissed for failure to state a claim for which relief can be granted.

## **II. SUPRA'S COMPLAINT IS NOT PREMATURE**

BellSouth next attempts to have Supra's Complaint dismissed by asserting that Supra's Complaint is not ripe. Motion to Dismiss p. 4. BellSouth and Supra's Interconnection Agreement was approved on August 22, 2002. The FDN Recon Order was issued on October 21, 2002 and applies simultaneously to the Commission-approved Interconnection Agreement between Supra and BellSouth. Thus, any non-compliance is a violation of the Commission's

---

<sup>1</sup> Evidence for this proposition can be found in BellSouth's actions in refusing to comply with the Orders which are the subject of Supra's Complaint.

orders. Notwithstanding, BellSouth makes the unpersuasive argument that “BellSouth should not be expected to provide FastAccess for Supra end-users other than in the same manner it provides FastAccess for FDN end-users.” Id. Not surprisingly, BellSouth cites to no authority in support of its proposition.

The reason the argument is unpersuasive is that FDN and BellSouth are not drafting language to be consistent with this Commission’s orders. On the Contrary, in FDN’s Motion To Approve Interconnection Agreement filed on November 19, 2002, FDN writes<sup>2</sup> that: “At BellSouth’s request, FDN also consented to renegotiate considerable portions of the agreement originally filed with the arbitration petition.”

FDN correctly details that this Commission rejected BellSouth’s interpretation that BellSouth should be permitted to demand that a customer obtain a second line prior to switching.<sup>3</sup> FDN, however, has voluntarily accepted the “two loop” approach in order to obtain other favorable concessions from BellSouth in other parts of the interconnection agreement.

BellSouth wants to use this FDN negotiated concession as binding authority to impose the same anti-competitive pre-condition on Supra. BellSouth’s ploy is transparent and unpersuasive. The Commission’s orders are clear. This Commission has explicitly rejected the “two loop” approach. BellSouth’s continued demand to impose such a pre-condition is a willful violation of lawful Commission orders.

The Commission’s Orders obligate BellSouth to provide Supra FastAccess service consistent with and pursuant to the Commission's Orders. The way in which FDN and BellSouth finally agree to provision new customers has no binding legal effect on BellSouth’s legal

---

<sup>2</sup> See FDN Motion, pg. 2, footnote 3.

<sup>3</sup> See FDN Motion To Approve pg. 3, second paragraph.



obligations towards Supra and this Commission's orders. Any argument that BellSouth may make to the contrary is frivolous, without merit and simply unpersuasive.

BellSouth could have sought a stay of the Commission's orders as it applies to Supra. BellSouth did not. Furthermore, the time for seeking such a stay, as it applies to Supra, has elapsed. Accordingly, BellSouth's non-compliance with Commission Order Nos. PSC-02-0878-FOF-TP as clarified by Order No. PSC-02-1453-FOF-TP is clearly ripe for adjudication. Supra's Complaint must, therefore, not be dismissed as premature.

### **III. THE COMMISSION DOES NOT LACK SUBJECT MATTER JURISDICTION**

Once again, BellSouth has cut and pasted, from a myriad of other motions regarding this same issue before this and other state commissions, its universally rejected "lack of jurisdiction" argument. This argument should not be considered and should be stricken pursuant to the doctrine of *res judicata*. As this issue has been addressed, litigated and resolved on numerous occasions<sup>4</sup>, Supra will not reiterate its response to BellSouth's rejected jurisdictional arguments.

Rather Supra merely asserts that the doctrine of *res judicata* applies. *Res judicata*, or claim preclusion, is a judicial doctrine which provides "that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights and responsibilities of the parties and their privities" and that "res judicata constitutes an absolute bar to a subsequent judicial proceeding involving the same cause of action." Baptiste v. Commissioner of Internal Revenue, 29 F.3d 1533, 1539 (11<sup>th</sup> Cir. 1994). It prevents a party from relitigating a cause of action, thus giving finality to legal proceedings, Kelley v. South Bay Bank (In re Kelley), 199 B.R. 698, 702

---

<sup>4</sup> See p. 4 of Order No. PSC-02-0765-FOF-TP, issued June 5, 2002 in Docket No. 010098-TP. See p. 2 of the FDN Recon Order. See also Staff's Final Recommendation in Docket No. R-26173 before the Louisiana Public Service Commission; June 6, 2002 Order issued in Case No. U-13193 by the Michigan Public Service Commission. Further BellSouth has brought this very issue to Federal Court by appealing the FDN decisions in Case No. 4-02cv325 in the United States District Court for the Northern District of Florida.

(B.A.P. 9<sup>th</sup> Cir. 1996), and applies to an order if: (i) the order was rendered by a court of competent jurisdiction and in accordance with the requirements of due process; (ii) the order was final and on the merits; (iii) there is an identity of both parties or their privities; and (iv) the later proceeding involved the same cause of action as involved in the earlier proceeding. Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.), 898 F.2d 1544, 1550 (11<sup>th</sup> Cir. 1990).

All four criteria are met here, as BellSouth concedes:

"BellSouth understands and appreciates the Commission's previous decisions in other proceedings, wherein it rejected this argument. BellSouth reraises this argument not to belabor the Commission but to inform the Commission of the jurisdictional deficiencies in its FDN [and Supra] Orders and to preserve BellSouth's rights on appeal."

Motion to Dismiss p.5 fn. 1.

The Commission must not consider this argument – previously rejected by this Commission - and must not dismiss Supra's Complaint on the basis of BellSouth's continued claim that the Commission was without jurisdiction to issue the orders in question.

The only matter before this Commission is (1) whether there exists a Commission Order(s) and (2) did BellSouth refuse to comply with the Commission Order(s). If the answer to these questions is yes, then BellSouth is subject to fines and penalties. Supra's Complaint properly alleges the appropriate facts substantiating the above referenced matters. Accordingly, BellSouth's Motion to Dismiss must be denied.

WHEREFORE, Supra respectfully requests that this Commission Deny BellSouth's Motion to Dismiss and for such other relief this Commission deems appropriate.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of January 2003.

SUPRA TELECOMMUNICATIONS &  
INFORMATION SYSTEMS, INC.

2620 S.W. 27<sup>th</sup> Ave.

Miami, Florida 33133

Telephone: 305.476.4239

Facsimile: 305.443.1078

By: Jorge L Cruz-Bustillo / atts  
Jorge L. Cruz-Bustillo  
Assistant General Counsel  
Supra Telecom