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June 24, 2003

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

JUN 24 PM 3:15
COMMISSION
CLERK

**RE: Docket No. 030349-TP - SUPRA's REPOSE TO BELLSOUTH's
PARTIAL MOTION TO DISMISS**

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Response to BellSouth's Partial Motion To Dismiss in the above captioned docket

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

Sincerely,

Jorge Cruz-Bustillo
Jorge Cruz-Bustillo
Assistant General Counsel

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CERTIFICATE OF SERVICE
Docket No. 030349-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery, U.S. Mail and/or Federal Express this 24TH day of June 2003 to the following:

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By: Jorge Cruz-Bustillo/JWA
JORGE CRUZ-BUSTILLO

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint by Supra Telecommunications)
and Information Systems, Inc., regarding)
BellSouth's Use of Carrier to Carrier Information)
_____)

Docket No. 030349-TP

Filed: June 24, 2003

RESPONSE TO BELL SOUTH'S PARTIAL MOTION TO DISMISS

Supra Telecommunications and Information Systems, Inc., ("Supra") by and through its undersigned counsel hereby files this Response to BellSouth's Partial Motion To Dismiss ("Partial Motion") in the styled docket. In support thereof, Supra states the following:

BellSouth alleges a single ground for dismissing Supra's complaint. Its Partial Motion is divided into part A and B. The former sets out the standard of review and the latter the basis for dismissal. The ground for dismissal is that the Florida Public Service Commission ("Commission") lacks subject matter jurisdiction to adjudicate this matter. This Response will describe the procedural background involving this docket. The Response will then set out the standard of review as well as an explanation of why this Commission does have subject matter jurisdiction.

PROCEDURAL BACKGROUND

On April 18, 2003, Supra filed a Complaint against BellSouth involving two subject areas. The first involved BellSouth's \$75 Cash back Promotion Tariff. The second subject area involved BellSouth's illegal use of carrier-to-carrier information (a.k.a. CPNI), such as switch orders, for marketing purposes. Issue identification in this case was scheduled for June 6, 2003. On May 20, 2003, this Commission voted in a case involving BellSouth's Key Customer Tariff: Docket No. 020199-TP. The resolution of the impact of BellSouth's Key Customer Tariff, in Docket No.

020119-TP, addressed similar questions to those Supra raised regarding BellSouth's Cash Back Promotion.

Supra filed its proposed issue list on Friday, May 30, 2003 – ten (10) days after the Commission had voted in Docket No. 020199-TP. In this issue list, Supra did not include any issues addressing BellSouth's Cash Back Promotion. Rather, all of Supra's issues addressed BellSouth's illegal use of carrier-to-carrier information for marketing purposes.

At the issue identification meeting, the Commission Staff suggested that Supra file an Amended Complaint focusing only on those issues involving violations of Commission policy based upon the proscriptions found under Section 364.01(4)(g), Florida Statutes, and 47 USC §222. BellSouth indicated in the presence of Staff that if Supra amended its complaint that BellSouth would not object to the issues proposed by Supra.

On Monday, June 2, 2003 (3 days after the issue identification meeting) Supra filed its Amended Complaint focusing only on BellSouth's illegal use of carrier-to-carrier information, such as switch orders, to generate information for marketing purposes. Both the Federal Communications Commission ("FCC") and this Florida Public Service Commission ("Commission") have found that BellSouth may use information about a customer switch, for marketing purposes, if that information is obtained through independent retail means in a form available throughout the retail industry. Supra's Amended Complaint includes a documented BellSouth admission that it generates lists for marketing purposes from internal sources and not from independent retail means in a form available throughout the retail industry. BellSouth's actions are in violation of Commission Order Nos. PSC-03-0578-FOF-TP and PSC-03-0726-FOF-TP, Section 364.01(4)(g), Florida Statutes, and 47 USC §222(b).

STANDARD FOR REVIEW

This Commission has ordered on numerous occasions that the standard to be applied in disposing of a motion to dismiss is whether, with all of the allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). See also Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000) (all allegations in the petition must be treated as true for purposes of disposing of the motion to dismiss). The Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

The Commission's consideration of the motion is limited to the four corners of the petition. Rohatynsky v. Kalogiannis, 763 So. 2d 1173 (Fla. 4th DCA 2000). A motion to dismiss for failure to state a cause of action may be granted only by looking exclusively at the petition itself, without reference to any defensive pleadings or evidence in the case. Barbado v. Breen & Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000). See also Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958) (In determining the sufficiency of the petition, we should confine our consideration to the petition and the grounds asserted in the motion to dismiss).

ARGUMENT

Complaint does state a cause of action

First, Supra would note that BellSouth does not allege that Supra has failed to state a cause of action. The standard of review would, still, nevertheless, require this Commission to deny BellSouth's motion. As noted at the outset, this Commission has ordered on numerous occasions that the standard to be applied in disposing of a motion to dismiss is whether, with all of the allegations in the petition assumed to be true, the petition states a cause of action upon which

relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). See also Brown v. Moore, 765 So. 2d 749 (Fla. 1st DCA 2000) (all allegations in the petition must be treated as true for purposes of disposing of the motion to dismiss). This Complaint was filed pursuant to Rule 25-22.036(2), Florida Administrative Code. This administrative regulation allows for a person to bring a complaint against a party subject to the Commission’s jurisdiction. The complaint also properly alleges that BellSouth is in violation of a statute enforced by the Commission as well as a Commission order. See Rule 25-22.036(2), F.A.C. Supra’s complaint does indeed articulate each of the elements required to be addressed by Rule 25-22.036(3)(b), F.A.C. The relief requested, by Supra, is pursuant to Section 364.285(1), Florida Statutes. See Rule 25-22.036(3)(b)4, F.A.C. Applying the standard for review, taking all of the allegations as true, demonstrates that the complaint does indeed state a cause of action, pursuant to Commission regulations, upon which relief can be granted.

Subject Matter Jurisdiction

BellSouth’s position

BellSouth argues that “applying these principles [standard of review for motion to dismiss] to the case at hand mandates that the Commission dismiss Supra’s request that the Commission interpret, and find that BellSouth is in violation of federal law.” See pgs. 3 & 4 of BellSouth’s Partial Motion. BellSouth argues that for jurisdiction to reside, the Commission must first “determine whether the Legislature has granted it any authority to find that BellSouth is in violation of federal law.” See pg. 5 of BellSouth Partial Motion. BellSouth completes its argument by suggesting that “Supra cannot demonstrate that the Commission has the authority to grant the relief Supra requests.” Id.

Supra's Response

The provisions that Supra alleges BellSouth has violated are Commission Order Nos. PSC-03-0578-FOF-TP and PSC-03-0726-FOF-TP, Section 364.01(4)(g), Florida Statutes, and 47 USC §222(b). This Commission is authorized to enforce its own Orders, Florida Statutes and federal provisions.

Contrary to BellSouth's assertion, Supra will articulate and demonstrate precisely why this Commission has authority to grant the relief requested by Supra.

This Commission stated clearly in Commission Order No. PSC-03-0578-FOF-TP that: "under Section 364.01, Florida Statutes, we [the Commission] have jurisdiction to review conduct that is alleged to violate an FCC rule [§222(b)] if such violation could be deemed anti-competitive behavior under Florida law." See Commission Order No. PSC-03-0578-FOF-TP, pg. 15. This Commission uses the term "jurisdiction" in the above referenced statement. This Commission has already determined that it has subject matter jurisdiction to adjudicate a matter involving a violation of 47 USC §222. BellSouth's arguments are best suited for an appeal of the Commission's previous determination that subject matter jurisdiction does reside with this Commission.

As will be detailed below, this Commission has already recognized that the sharing of carrier-to-carrier information with others outside of BellSouth's wholesale division is illegal and "harms competition." It stands to reason that actions which "harms competition" would also be "anti-competitive." This was the rationale utilized in Order No. PSC-03-0578-FOF-TP.

47 USC §222(b) expressly prohibits the use of proprietary customer information for a carrier's own marketing efforts. In Order No. PSC-03-0726-FOF-TP (Docket No. 020119-TP), this Commission quoted the FCC with respect to the §222 prohibition: "We conclude that

competition is harmed if any carrier uses carrier-to-carrier information, such as switch [orders] or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions accordingly.” (Bold and underline added for emphasis). See Order No. PSC-03-0726-FOF-TP, pg. 45.

This Commission also stated in Order No. PSC-03-0578-FOF-TP, that: “The main thrust of the [Federal] Telecommunications Act is the promotion of fairness and competition in the telecommunications industry.” See PSC-03-0578-FOF-TP, pg. 14. Additionally, “Chapter 364.01, Florida Statutes, grants broad powers to this Commission in the enforcement of the intent of the [Federal Telecommunications] Act.” Id. (Underline added for emphasis). *Supra* would submit, that this Commission quote is recognition that the Florida legislature has indeed granted this Commission authority to act consistent with the Federal Act and all regulations applicable thereto.

As expressly noted by this Commission, in Order No. PSC-03-0726-FOF-TP (Docket No. 020119-TP), the FCC has already found “that **competition is harmed** if any carrier uses carrier-to-carrier information, such as switch [orders] or PIC orders, to trigger retention marketing campaigns.” (Bold added for emphasis). See Order at pg. 45. As such, because the use of carrier-to-carrier information has already been found to harm competition, it only follows that this Commission has jurisdiction to review conduct that is alleged to violate §222(b), because such a violation would be anti-competitive under Section 364.01(4)(g), Florida Statutes. This is, of course, the exact logic the Commission followed in Order Nos. PSC-03-0578-FOF-TP and PSC-03-0726-FOF-TP. Accordingly, this Commission does have the authority and subject matter jurisdiction to adjudicate this matter.

AT&T Order on Jurisdiction

BellSouth attempts to distinguish the Commission's decision in Order No. PSC-03-0578-FOF-TP. Interestingly, BellSouth argues in its Partial Motion that AT&T never requested that the Commission find that Supra actually violated Section 222(b) of the Act. This is not true.

The author of BellSouth's Partial Motion did not read paragraph 4(D) of the AT&T complaint in Docket No. 030200-TP, which reads as follows: "cease utilizing the CPNI of AT&T customers to conduct a marketing campaign for its own long distance services." See pg. 4 of Order No. PSC-03-0578-FOF-TP (Commission sets out the specific relief requested by AT&T). The only way for the Commission to make such a finding in that docket would be for the Commission to first determine that Supra had in fact violated §222.

Support for this proposition can be found in the Commission's restatement of AT&T's allegation, namely, "AT&T asserts the use of . . . is illegal under Federal law and the orders and rules of the FCC." See pg. 2 of Order No. PSC-03-0578-FOF-TP. See also ¶20 of AT&T's complaint¹ - which describes the only basis, for the relief, requested by AT&T: 47 USC §222(b). Paragraph 20, of AT&T's complaint, is void of any reference to any state statute, rule or Commission order as the basis for the alleged illegal use of carrier-to-carrier information. Based on AT&T's allegation that Supra was in violation of 47 USC §222, this Commission found that: "under Section 364.01, Florida Statutes, we [the Commission] have jurisdiction to review conduct that is alleged to violate an FCC rule [§222(b)] if such violation could be deemed anti-competitive behavior under Florida law." See PSC-03-0578-FOF-TP, pg. 15. (Emphasis added). Again, this Commission has already determined that it has subject matter jurisdiction.

¹ BellSouth admits, on pg 7 of its Partial Motion, that 47 USC §222 is the only basis for AT&T's request for relief under paragraph 4(D).

Commission policy detailed under Order Nos. PSC-03-0578-FOF-TP and PSC-03-0726-FOF-TP (which reaffirmed prior Commission Order No. PSC-02-0875-PAA-TP at the May 20, 2003 Agenda Conference), is based upon the proscription of carrier-to-carrier information found under 47 USC §222. Further support, for this proposition, can be found in the fact that Commission Order No. PSC-03-0726-FOF-TP quotes so extensively from FCC orders interpreting §222.² This Commission also adopted the following language at its May 20, 2003 Agenda Conference, which in relevant part provides that State commissions may enforce proscriptions on carrier-to-carrier information:

“We reiterate our finding in the Second Reconsideration Order that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier.” . . . “In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.” (Underline added for emphasis).

See Order No. PSC-03-0726-FOF-TP pg. 47. The plain import of the above underlined language is that FCC decisions regarding §222, cannot be cited by incumbent carriers, as a pretext, to argue that State Utility Commissions are preempted and therefore prohibited from taking action in this area. This is precisely BellSouth’s argument. Individual state action to enforce the proscription against the improper use and sharing of carrier-to-carrier information is precisely what this Commission did when it issued Order Nos. PSC-03-0578-FOF-TP and PSC-03-0726-FOF-TP. The basis of these orders was the enforcement of 47 USC §222. Accordingly, *Supra* submits that a reasonable interpretation of Florida Statutes and prior Commission Order would

² Docket No. 020119-TP asked the Commission whether further restrictions were warranted on in-bound calls to BellSouth call centers. See Order No. No. PSC-03-0726-FOF-TP - pgs. 44-47. The present docket involves BellSouth sharing of wholesale carrier-to-carrier information with other parts of the BellSouth company including for marketing purposes.

suggest that this Commission does indeed have subject matter jurisdiction to adjudicate this matter.

Additional support for Commission authority to enforce matters involving the Federal Telecommunications Act can be found under Section 120.80(13)(d), Florida Statutes, which reads as follows: “Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with that act.” Commission Order Nos. PSC-03-0578-FOF-TP and PSC-03-0726-FOF-TP are policies consistent with that Act.

Conclusion

First, in applying the standard for review, taking all of the allegations as true, demonstrates that Supra’s complaint does indeed state a cause of action, pursuant to Commission regulations, upon which relief can be granted.

Next, this Commission has expressly recognized that it does in deed have subject matter jurisdiction to adjudicate a matter involving 47 USC §222. See Order No. PSC-03-0578-FOF-TP, pg. 15. By using the term jurisdiction in its order, the Commission has already determined that it has subject matter jurisdiction. BellSouth’s arguments are better suited for an appeal.

This Commission stated that: “Chapter 364.01, Florida Statutes, grants broad powers to this Commission in the enforcement of the intent of the [Federal Telecommunications] Act.” See Order No. PSC-03-0578-FOF-TP, pg. 14. (Underline added for emphasis). This quote is the Commission’s recognition that the Florida legislature has indeed granted this Commission authority to act consistent with the Federal Act and all regulations applicable thereto. Supra’s complaint, however, is clear that BellSouth’s actions are in contravention of prior Commission

Order Nos. PSC-03-0578-FOF-TP and PSC-03-0726-FOF-TP, which are premised upon the Commission's authority under Chapter 364, Florida Statutes, and the proscriptions under 47 USC §222(b). For this reason, Supra's relief asks for a finding for violations of both Commission Orders/Policy and 47 USC §222 - the former being based upon the latter.

Accordingly, for all of the foregoing reasons Supra submits that this Commission does have subject matter jurisdiction to adjudicate this matter.

WHEREFORE, Supra respectfully requests for the foregoing reasons that this Commission deny BellSouth's Partial Motion To Dismiss.

Respectfully submitted this 24th day of June 2003.

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