Supra Telecom

1311 Executive Center Drive, Suite 220
Tallahassee, FL 32301-5027

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

July 30, 2004

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 040301 –TP**
**SUPRA'S RESPONSE IN OPPOSITION TO BELLSOUTH'S MOTION TO DISMISS**

Dear Mrs. Bayo:

Enclosed are the original and fifteen (15) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Response in Opposition to Bellsouth's Motion to Dismiss to be filed 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,

Brian Chaiken/AHS

Brian Chaiken
Executive V.P Legal Affairs

**CERTIFICATE OF SERVICE**
**Docket No. 040301-TP**

**I HEREBY CERTIFY** that a true and correct copy of the following was served via Facsimile hand-delivery and/or U.S. Mail this 30th day of July 2004 to the following:

***Jason Rojas/Jeremy Susac***
*Office of the General Counsel*
*Florida Public Service Commission*
*2540 Shumard Oak Boulevard*
*Tallahassee, FL 32399-0850*

***Lisa S. Foshee***
*c/o Ms. Nancy H. Sims*
*BellSouth Telecommunications, Inc.*
*150 South Monroe Street, Suite 400*
*Tallahassee, FL 32301-1556*

SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.
2620 S. W. 27th Avenue
Miami, FL 33133
Telephone: 305/ 476-4248
Facsimile: 305/ 443-1078

Brian Chaiken/ AHS
By: Brian Chaiken, ESQ.

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| In Re: Petition of Supra Telecommunications and Information Systems, Inc.'s for arbitration with BellSouth Telecommunications, Inc. | ) ) ) ) | Docket No. 040301-TP<br><br>Filed: July 30, 2004 |

---

**SUPRA'S RESPONSE IN OPPOSITION TO**

**BELLSOUTH'S MOTION TO DISMISS**

Supra Telecommunications and Information Systems, Inc. ("**Supra**") hereby files its response in opposition to BellSouth's Motion to Dismiss, or in the alternative, Partial Motion to Dismiss Supra's First Amended Petition ("**BellSouth's Motion**"). BellSouth's Motion is nothing more than an unsupportable attempt to further delay BellSouth's obligation to perform UNE-P to UNE-L conversions at a reasonable price. Every day that goes by without a reasonable rate being set by this Commission provides further incentive for BellSouth to continue its obstructionist and bad faith delay tactics. For all of the reasons set forth below, BellSouth's Motion should be denied in its entirety.

**BACKGROUND**

Supra initially filed its Petition in this Docket on April 5, 2004, seeking resolution of a contractual dispute, or, in the alternative, requesting that the Commission set a rate for UNE-P to UNE-L conversions. With respect to Supra's request for the establishment of a new rate, Section 364.161(1), Florida Statutes, provides that "**either party may petition the commission to arbitrate the dispute and the commission shall make a determination within 120 days... [t]he prices, rates, terms, and conditions for the unbundled services shall be established by the procedure set forth in Section 364.162.**" (Emphasis added.) Based on this Florida law, the Commission must provide

Supra with the rates, terms and conditions for this conversion process by no later than August 2, 2004.[1]

Notably, BellSouth did not seek to dismiss Supra's original petition. Instead, on April 29, 2004, BellSouth filed its Answer and Response. Apparently, before Supra amended its petition to seek more narrowly focused relief, BellSouth did not feel that it had proper grounds to support a motion to dismiss.

On June 23, 2004, Supra filed a Motion for Leave to Amend and a First Amended Petition. This First Amended Petition narrowly set forth the specific procedures for which Supra sought rates, terms and conditions, and raised new reasons to support the need for expedited relief.

Now, on July 21, 2004, BellSouth files its Motion seeking to dismiss Supra's First Amended Petition in its entirety on the grounds that Supra is seeking reconsideration of the Commission's decision in Docket 990649-TP (the "**Cost Docket**"). Alternatively, BellSouth argues that the portions of Supra's First Amended Petition seeking expedited relief and an interim rate should be dismissed because, allegedly, an order already exists denying such relief as it relates to Supra's original petition. Neither of BellSouth's arguments is supported by the law or the facts and, therefore, BellSouth's Motion should be denied.

## ARGUMENT

**1. BellSouth failed to cite, much less meet, the legal standard for a successful motion to dismiss.**

A motion to dismiss tests the legal sufficiency of the complaint. Barbado v. Green & Murphy, P.A., 758 So.2d 1173, 1174 (Fla. 4th DCA 2000) (citing Bess v. Eagle

[1] Even assuming that the statutory clock begins to run on the date that Supra filed its First Amended Petition, the Commission is to rule by no later than October 23, 2004.

Capital, Inc., 704 SO.2d 621 (Fla. 4th DCA 1997). "[A] court may not properly go beyond the four corners of the complaint in testing the legal sufficiency of the allegations set forth therein." In Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1983) (citing Martin v. Principal Mutual Life Ins. Co., 557 So.2d 128 (Fla. 3rd DCA 1990); Lewis State Bank v. Travelers Ins. Co., 356 So.2d 1344 (Fla. 1st DCA 1978)), 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." 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).

Not only must the Commission confine itself to the four corners of Supra's First Amended Petition and take all material factual allegations made by Supra as true, the Commission is prohibited from considering any extraneous matters. Martin, Lewis, Connolly, Cook, and Brandon, *supra*. In Reed v. Sampson, 349 So.2d 684, 685 (Fla. 4th DCA 1977), the Court ruled that "[w]here a motion to dismiss a complaint rests on facts outside the scope of the allegations contained in the complaint, the trial court commits reversible error in dismissing the complaint based on those extraneous matters." Id.

BellSouth's Motion is based on extrinsic information that is not contained in Supra's First Amended Petition, including but not limited to, **purported** facts relating to another Commission proceeding. Indeed, BellSouth's Motion contains an independent "Facts" section which provides "BellSouth Facts" which are not contained or referenced

within the four corners of Supra's First Amended Petition and, therefore, are not properly before the Commission in its consideration of a decision on whether or not to dismiss Supra's First Amended Petition. The cases cited herein require that for purposes of determining whether Supra has stated a legally sufficient cause of action, the Commission must ignore all of the alleged facts set forth by BellSouth in BellSouth's Motion that are not also contained within the four corners of Supra's First Amended Petition, and must take Supra's material factual allegations as true.

As BellSouth's Motion is based on extrinsic information that is not contained within the four corners of Supra's First Amended Petition, BellSouth's Motion is not a proper motion to dismiss, but a motion for summary final order masquerading as a motion to dismiss. Unfortunately for BellSouth, Florida law is well settled in that "[a] motion to dismiss is not a substitute for a summary judgment." Combs v. City of Naples, 834 So.2d 194, 198 (Fla. 2nd DCA 2002).

The clearest indication that BellSouth's Motion is nothing more than a last-ditch effort to delay the inevitable establishment of just and reasonable rates for certain UNE-L conversions is that BellSouth (a sophisticated litigation party) fails to set forth its burden, as movant, to succeed. Simply put, BellSouth has not even alleged that it has met (or even identified) the legal standard for a successful motion to dismiss.

As BellSouth has decided to play the part of a litigation rube and has failed to set forth its burden to succeed or, for that matter, any burden, and as BellSouth's Motion relies upon extrinsic information in the guise of "BellSouth Facts," BellSouth's Motion must be denied.[2]

---

[2] In an abundance of caution and subject to Supra's standing objection to the procedural improprieties associated with BellSouth's Motion, Supra has, to the extent possible on the record before the

**2. Despite its claim that the cost of a UNE-P to UNE-L conversion was litigated in Docket 990649-TP,[3] BellSouth has never filed or provided Supra with a cost study which purports to address even a retail to UNE-L conversion, much less a UNE-P to UNE-L conversion.**

Notwithstanding BellSouth's lack of legal support, BellSouth's Motion has no factual support. In an obvious attempt to fit a square peg into a round hole, BellSouth relies on its cost study filed on August 16, 2000,[4] and ordered by the Commission on May 25, 2001 in Order No. PSC-01-1181-FOF-TP, to support its claim that the "FPSC adopted rates for the components of BellSouth's hot cut process."[5]

The October 8 Cost study[6] contains a cost study for installation of a new SL1 or SL2 loop, and a separate study for a retail/resale to UNE-P conversion. Of the $49.57 SL1 NRC, just $0.102 is properly charged when converting from a working retail/resale service to UNE-P. No such study or consideration of the UNE-P to UNE-L conversion was ever made by the Commission in this docket.

In its motion to dismiss, BellSouth speaks extensively about what the Commission did in setting the NRC for SL1 and SL2 loops, without discussing what wasn't done. BellSouth claims that the SL1 and SL2 loop non-recurring rate simultaneously define:

---

Commission, addressed BellSouth's extra-Petition allegations in this response to provide the Commission with a complete understanding of the improper allegations raised and to dispel BellSouth's baseless claims and accusations.

[3] Including all sub-tracks as applicable.

[4] A cost study that was extensively modified by both BellSouth (three additional filings) and the Commission staff, before any rates were ever set. Interestingly, BellSouth relies on the older, higher cost study **rejected** by the Commission, and asserts in its interrogatory responses that it neither understands, or agrees with the Commission ordered changes to the BellSouth cost study filed August 16, 2000. This cost study generates the highest UNE rates of any of the filed cost studies.

[5] See Emergency Motion of BellSouth Telecommunications, Inc. for Interim Relief Regarding Obligation to Perform UNE-P to UNE-L Conversions, pg. 5, filed before the United States Bankruptcy Court Southern District of Florida – attached hereto as **Exhibit A.**

[6] As well as all prior and subsequent revisions.

- The cost to install new SL1 and SL2 loop service to a location not currently served;
- The cost to convert working retail (1FR/1FB) service to UNE-L loop service; and
- The cost to convert working UNE-P service to UNE-L service.

Not surprisingly, the work activities are quite different for each, particularly if **"forward-looking reflecting efficient practices and system"**[7] are taken into consideration. The non-recurring cost study does not meet this requirement for all three simultaneously, because, Supra submits, it was never intended to.

BellSouth does not claim that the loop NRC cost study addresses the conversion of BellSouth retail to UNE-P. As it cannot; that conversion has its own cost study, and rate. Nor does BellSouth ever address the fact that: (i) the **same** A.1.1 loop is used in converting from BellSouth retail to Supra UNE-P at the Commission ordered $0.102 (as the subsequent conversion from UNE-P to UNE-L); (ii) there is a reason that the UNE-L should cost the full $49.57; or that (iii) the rate is based upon a cost study which never addresses the realities of moving IDLC served customers to a CLEC owned switch.

Effectively, BellSouth is attempting to take a collection of rates, cherry-pick the most expensive rates it can find, bundle them together, and claim that such make up a Commission-approved cost for converting a working UNE-P service to a UNE-L loop. First and foremost, BellSouth has now flip-flopped its position on this issue from that which it previously argued to a Federal Bankruptcy Court. There, BellSouth admitted that the parties' Florida interconnection agreement does not reference a conversion process from UNE-P to UNE-L.[8,9]

---

[7] PSC-01-1181-FOF-TP at p. 283.

[8] Id at p. 5, para. 12. Of course, because this was drafted by BellSouth in 2001, before a plan for doing such a conversion even existed, one would not have expected the Florida interconnection agreement to have contained such a reference.

Second, this cost study contains costs and probabilities to install a **new** ADSL loop - that are avoided costs in the UNE-P to UNE-L conversion.[10] In setting the rates, this model for installation of a new ADSL loop, as opposed to simply moving an existing working copper line from a BellSouth switch to a Supra switch, was used to set non-recurring rates.[11] Supra is at a loss as to how BellSouth could possibly contend that the charges related to the installation of an ADSL loop – could have anything to do with Supra's request for the conversion of a UNE-P copper loop to UNE-L. The record evidence simply will not support BellSouth's assertions on this issue. Furthermore, no installation related charges – including but not limited to connect and test related charges (other than those for a simple test for dial tone) – should apply to a UNE-P to UNE-L conversion; regardless of how adamantly or how often BellSouth argues that they should.[12]

Moreover, BellSouth bases its arguments on a NRC cost study specifically prepared for the Commission regarding the installation of xDSL service and the loop the service is provided on. BellSouth is trying to connect the dots from ADSL-to-UNE-P-to-UNE-L. As a practical matter, this cannot be done, as BellSouth refuses to provide xDSL services based on its FCC tariffed xDSL transport, on a UNE loop of any kind. If BellSouth won't **perform** that function, then how can it use an xDSL cost study to justify a UNE-P to UNE-L conversion?

---

[9] Notwithstanding BellSouth's admission that such a rate does not exist in the parties' Florida interconnection agreement, the Commission has never ruled on the present substantive issues.

[10] BellSouth response to Supra admission 4K states 100% of all DLC circuits are UDLC and assumed to require a truck roll.

[11] The foundational issue of whether a truck roll is necessary is answered one way for ADSL loop installation, and the opposite for UNE-P to UNE-L conversions.

[12] Supra is not seeking to relitigate the Cost Docket which is not relevant in this proceeding, as the procedures for which Supra is seeking rates have never been adjudicated.

Third, the term "hot cut" does not even appear in the Commission's order – probably due to the fact that UNE-P to UNE-L conversions did not exist at the time BellSouth filed its cost study in that docket. It is undisputed that prior to this Commission's May 2001 order on UNE rates, **no CLEC in the state of Florida had been given the ability to provision UNE-P service to its customers.** It is implausible that BellSouth would have submitted a plan for such a conversion when BellSouth itself had absolutely no experience provisioning UNE-P. To believe that in 1999, 2000 and 2001 BellSouth voluntarily sought to establish a rate to convert from a product it never wanted to offer (UNE-P)[13] to UNE-L is revisionist history as UNE-P provisioning remained seriously problematic until after late March 2002 when the Commission ordered BellSouth to implement 'C' (change) orders for retail to UNE-P.

Fourth, despite BellSouth's assertion that in 990649-TP the Commission ordered a rate for UNE-P to UNE-L conversions; BellSouth admitted that it had no such process as of a March 5, 2003 intra-company meeting between the companies.[14] In support of this, one need look no further than to BellSouth's TRO[15] testimony where it, for the first time, defines its recent implementation of processes for such conversions.[16] Furthermore, in direct testimony in Docket 030851-TP, BellSouth's witness Kenneth Ainsworth admits that the Commission did **not** preview the BellSouth Hot Cut process in 990649-TP as it

---

[13] BellSouth was ordered to begin allowing Supra to provision UNE-P service for the first time on June 5, 2001. BellSouth provided a buggy implementation via LENS on June 17, 2001. Prior to that data Supra could only order resale, despite the provisions of two interconnection agreements with BellSouth which provided for UNE-P.

[14] BellSouth told Supra on March 5, 2003 of its intention to charge the full A.1.1 non-recurring rate for UNE-P to UNE-L conversions. Since then, with no intervention by the Commission, BellSouth has increased this rate, **twice**, each time citing Commission decisions in support of the increases.

[15] TRO switching Docket No. 030851-TP ("TRO").

[16] In fact testimony and cross examination focused on what was done, what was broken, and what remained to be done to implement UNE-P to UNE-L hot cuts in the necessary volumes.

was first reviewed during the BellSouth 271 proceeding several years later.[17] Based on the real facts and not "BellSouth's Facts," it is beyond reason to believe that this new procedure was contemplated, much less agreed to and accounted for in the early docket and/or August 2000 cost study.

Assuming that the Commission considered a list of procedures which would create the non-recurring costs for a UNE-P to UNE-L conversion as it purportedly existed in October of 2000, what Supra now seeks is something different – a specified rate for performing specific types of conversions based on the actual work to be performed by BellSouth.

While the cost of conversion of customers served by copper and UDLC served loops is relatively unaffected whether the switch is BellSouth (UNE-P) or Supra (UNE-L), IDLC is significantly different between the two. The IDLC conversion costs depend on how honestly the cost study adheres to the requirement that it address forward looking cost "**based on the most efficient technology deployed**" the BellSouth NRC Cost study **ignores** its deployed technology in favor of brute force.

This "most efficient technology" is precisely defined by BellSouth in the TRO[18] direct testimony of Kenneth Ainsworth.[19] Of the 8 IDLC technologies that will be used to move UNE-P to UNE-L for IDLC served loops, only the option to move the loop to copper or UDLC are addressed by the NRC cost studies. Simply put, the cost study upon

---

17 Direct Testimony of Kenneth Ainsworth pp 9-10 and 15-16.
18 TRO Switching Docket 03-0851-TP
19 030851-TP Direct Testimony of Kenneth Ainsworth p. 25-27.

which the NRC rates are set **does not address 6 of the 8 most efficient methods of converting UNE-P served via IDLC to UNE-L.**[20]

Significantly, it is long-standing policy that the ILECs should only charge for those services that they provide.[21] BellSouth should only be allowed to recover for that work which is actually performed -- no more, no less. BellSouth has not and cannot now argue, in good faith, that Supra is not entitled to seek a rate for something which this Commission has never before considered.

**3. BellSouth apparently argues that prior MCI testimony supports its position; however, if MCI's prior testimony is to be considered, it supports Supra's position.**

In BellSouth's Motion,[22] BellSouth makes a partial cite to MCI testimony in Docket 990649-TP, purporting to show that MCI agrees with BellSouth's position that the sum of the individual network elements should be the non-recurring cost of conversion. If this is the position being forwarded by BellSouth, it is incorrect as MCI has unwaveringly held since 1998[23] that its position is one that sums **the applicable** NRC costs,[24] and not in the manner BellSouth suggests.

> Until we determine the appropriate NRCs for loop and port combinations for the migration of an existing BellSouth customer, MCIm asserts in its petition that the migration NRCs would be determined by adding the stand-alone rates for the loops and ports, which we established in Order No. PSC-96-1579-FOF-TP. **This would result in NRCs as follows: $178 for the 2-wire analog loop and port; $394 for the 2-wire IDSN loop and port; $179 for the 4-wire analog loop and port; and $652 for the 4-wire DS1 loop and port. <u>These NRCs are inappropriate, MCIm</u>**

---

20 See BellSouth's response to Supra's First Request for Admissions Item 4 k "the October 8 Study assumes all loops served on DLC are to be converted to UDLC functionality." In violation of both the FCC and Commission orders regarding the application of forward looking most efficient methods.

21 See FCC Order 04-110, *In the Matter of Access Charge Reform*, May 18, 2004, at p. 11.

22 BellSouth Motion at p. 3.

23 Or earlier.

24 MCI testified to the "...is simply the sum of the costs of each of the **necessary work activities** ..." (Emphasis added).

**contends, because in each case, the process should entail less than two minutes to perform and cost less than $1.49.**[25]

MCIm witness Hyde filed cost studies based on the assumption that soft dial tone using DIP/DOP was deployed in the BellSouth network and that BellSouth would not disconnect the loop and port before furnishing the UNEs to MCIm. He states that his studies mirror BellSouth's filing in Georgia in Docket No. 7061-U, except that unnecessary functions are removed and BellSouth's proposed fallout rate is reduced from 20 per cent to three per cent.[26] (Emphasis added).

**4. Prior Commission rulings addressed the matter of whether the full individual loop NRC was applicable in conversions involving a combination of UNES in ruling that only the charges appropriate to the conversion should be included.**

In 1998, BellSouth argued that the full loop NRC should be used in a conversion order and the Commission rejected this argument. As a result Docket 990649-TP set a low[27] rate for retail – UNE-P conversion, and a substantially higher[28] rate for locations where no service or soft dial tone is present.

A series of arbitrations initiated by various CLECs in 1996 and 1997 were consolidated into a common Docket, 971140-TP[29] to simultaneously resolve virtually identical issues the various CLECs had with BellSouth regarding UNE combinations entitlement, nonrecurring cost, switched access usage data.

BellSouth initially took the position that nothing less than the combined sum of the non recurring cost of the individual loop elements, **plus** an additional "glue charge"

---

[25] PSC-98-0810-FOF-TP Footnote -- BellSouth currently charges $1.49 to perform a PIC (Presubscribed Interexchange Carrier) change. A PIC change is the process by which telecommunications end users switch long distance providers. MCIm argues that the functions necessary to migrate a loop and port combination are essentially the same as performing a PIC change.

[26] PSC-98-0810-FOF-TP at p. 61 (per the web copy of the order).

[27] $0.102.

[28] Approximately $90.00.

[29] This Docket Styled as: In Re: Motions of AT&T Communications of the Southern States, Inc., and MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., to compel BellSouth Telecommunications, Inc., to Comply with Order No. PSC-96-1579-FOF-TP and to set non-recurring charges for combinations of network elements with BellSouth Telecommunications, Inc., pursuant to their agreement.

would represent the appropriate CLEC NRC. MCI & AT&T disagreed. On June 12, 1998 the Commission, in order PSC-9800810-FO-TP, found that is was not proper to use the sum of the individual UNE NRC to arrive at a combination NRC, as doing so penalized the CLEC for duplicative and avoided charges.

As in the instant Docket, the 1998 dispute centered around: (i) disagreement whether the actual and historical labor activities should be addressed as opposed to the forward looking cost of the efficient network elements deployed in the ILEC central offices; (ii) BellSouth's position that the full individual element NRCs should be applied to a conversion NRC; and (iii) the BellSouth process essentially took apart the functioning retail service and then reconstructed it again. The record shows that BellSouth's 1998 position is virtually identical to the 2004 position.

> BellSouth witness Caldwell identifies the work center activities, LCSC and ACAC for the port and LCSC, Network Services, and RCMAG for the loop, as necessarily involved migration activities, given the working assumption that the migration of an existing BellSouth customer to either MCIm or AT&T can be accomplished without separating the loop and port combinations. **While BellSouth witness Caldwell provides estimated values for these cost components, we note that BellSouth did not actually develop NRCs for migration as we have defined it in this proceeding. Asked to make a cost comparison of the loop and port ordered individually and in combination, witness Caldwell testifies that the only cost savings when a loop and port are ordered in combination rather than individually is a reduction in the ACAC work time.**[30] (Emphasis added).

The BellSouth cost studies, then and now, assume that a working functional service will be **disassembled and reconstructed at CLEC cost** during a conversion. A review of the BellSouth conversion cost study filed with the Commission noted the results of the Staff's:

---

30 PSC-98-0810-FOF-TP at p. 64 (per the web copy of the order).

> [Witness Caldwell's] schedules ... do not represent the migration of an existing BellSouth customer ... BellSouth's definition of migration is resale. **It appears that the ... schedules assume that the loop and port have to be separated to be provided to the [ALEC].**[31]

In AT&T v. Iowa Utilities, the Supreme Court ruled that the ILEC could not mandate provisioning which effected disconnection of elements unnecessarily raising the cost to new entrants. In respect of this, the Commission refuted BellSouth's position finding:

> Based on the evidence in the record, we conclude that BellSouth's collocation proposal is unnecessary for the migration of an existing BellSouth customer. **We conclude further that BellSouth's proposal to break apart loop and port combinations that are currently connected, requiring AT&T or MCIm to establish a collocation facility where the unbundled loop and the unbundled port would be recombined, is in conflict with the terms of the parties' agreements and the Act as interpreted by the Eighth Circuit. Iowa Utilities Bd. I, 120 F.3d at 814. Moreover, we find that BellSouth's proposal does not address the migration of an existing BellSouth end user. Hence, we reject it.**[32] (Emphasis added).

The Commission ultimately set a $1.49 rate for all 2 wire UNE-P service instead of the $178 sum of the individual UNEs,[33] by addressing the work actually performed in a conversion as different from the NRC for an individual UNE to be installed where none exits.

> We find further that a qualification to pricing UNE combinations that do not recreate an existing BellSouth retail service as the straightforward summation of the individual element prices is set forth in Section 8 of Attachment I of the agreement. There, the agreement provides that **BellSouth shall provide recurring and non-recurring charges that do not duplicate charges for functions or activities that MCIm does not need when two or more network elements are combined in a single order. This language reflects our decision in Order No. PSC-97-0298-FOF-TP at pages 30 through 32 that the parties work together to establish recurring and non-recurring charges free of duplicate**

---

31 PSC-98-0810-FOF-TP at pg 65.

32 PSC-98-0810-FOF-TP at pg 66.

33 This is the equivalent to what BellSouth seeks to do in this case.

**charges or charges for unneeded functions or activities when UNEs are combined in a single order.**[34] (Emphasis Added)

This is well settled precedent and was carried forth in the most recent cost docket with a separate analysis of retail to UNE-P conversions and new loop installations. The record will show that no analysis of duplicative and/or avoided costs, whether forward looking or not, has ever been done before the Commission for a UNE-P to UNE-L conversion.

**5. If the issue of retail to UNE-P conversion NRC was ever addressed by the Commission, there would be a record of it – for which there is not. What is in the record, however, (in the establishment of a 2 wire voice grade analog loop) are the work activities for xDSL service – a very <u>different and distinct</u> technical undertaking.**

There is simply no record of the Commissioning this issue – as the Commission has not. While the Commission did perform an analysis on the BellSouth non-recurring cost studies, this analysis was limited to just three representative UNEs, **believed to be equally applicable to all UNEs.**

> We have closely analyzed BellSouth's nonrecurring cost studies for representative types of unbundled network elements (UNEs); based on our examination, we chose **three** representative UNEs to present at length in this analysis: ADSL loop, CCS7 Signaling, and Interoffice Transport - DSO. **Based on the record, this analysis would be equally applicable to all UNES.** These three representative UNES were chosen **due to a greater amount of testimony addressing the ADSL loop** and to provide an example of a signaling element and a transport element, and in order to prevent redundancy in this analysis. **Based on these extensive reviews, we applied the results of what was learned to other UNE nonrecurring cost studies that included similar activities, probabilities, etc.** The **nonrecurring cost study for the ADSL loop generated the most scrutiny by the ALECs**, consequently producing the most ALEC rebuttal of any of the nonrecurring cost studies, so that is the first cost study we analyze.[35]

---

34 PSC-98-0810-FOF-TP at p. 27.

35 PSC-01-1181-FOF-TP at p. 286.

It is undisputed that the loop type for ADSL service is the 2 wire analog loop. There is just **one** 2 wire non-recurring cost study in the entire BellSouth filing, the FL-2w.XLS cost study submitted by BellSouth. PSC-01-1181-FOF-TP ("**May 2001 UNE Cost Order**") **clearly** states that the non-recurring cost study "reviewed in detail" by the Commission is an ADSL loop cost study, and the only 2 wire non-recurring cost study BellSouth can point to is the FL-2w.xls **study,**[36] establishing the work requirements and costing for 2 wire ADSL loop installation. There are **not** separate ADSL and Voice 2 wire non-recurring cost studies filed by BellSouth, and as this sole cost study **cannot** represent two things simultaneously,[37] BellSouth's argument must fail.

### 6. BellSouth has compounded its error by improperly charging an $8.22 crossconnect NRC.[38]

When POTS[39] service is provided to a customer,[40] a 2 wire analog voice grade loop (UNE element A.1.x) must be connected to an Exchange Port – 2-Wire Analog Line Port via a crossconnect. The BellSouth[41] switch is connected to a wiring block on the Main Distribution Frame ("MDF"). Copper,[42] or UDLC[43] served loops are terminated on

---

36 **And possibly the non-recurring retail/resale to UNE-P conversion** "Switch as is" cost study which established **the 0.0902 / 0.102 rate for retail/resale to UNE-P conversions.**

37 i.e. It cannot be **both** an ADSL new loop NRC and a UNE-P to UNE-L loop, or even a retail to UNE-L loop **NRC.**

38 See Declaration of Daonne Caldwell, at ¶6, attached to BellSouth's *Response and Objection to Supra's Motion for Partial final Order on Issue of Connect and Test Related Charges.* BellSouth offers no proof or citations to defend its assertion that the $8.22 cost of a 2 wire crossconnect is not wholly duplicative of the NRC rate BellSouth is seeking to recover from the A.1.1 and A.1.2 elements, or a justification as to why this element, not addressed in 990649-TP, should be added to the elements which were ordered by the Commission in the Cost Docket.

39 Plain Old Telephone Service

40 Whether ultimately billed as retail, resale UNE-P or UNE-L.

41 **Or Supra.**

42 Call enters the central office on a 2 wire copper pair.

43 Call enters the CO on various transport facilities and is converted back to 2 wire copper pair in the CO and terminated at the MDF.

blocks on the MDF. The blocks are joined by a 2-wire copper crossconnect (jumper). IDLC[44] served loops are crossconnected,[45] usually electrically or optically, to the switch.

When a CLEC purchases the P.1.1 UNE-P, 2 wire analog voice (POTS) service from BellSouth, **the CLEC is not billed a separate crossconnect charge,**[46] whether the line is converted from retail, or built from the ground up. Yet a crossconnect most assuredly exists. When Supra purchases the same network element as UNE-L, Supra is billed an additional rate for a "Covad" crossconnect, without explanation or citation to any authority for same. The cost of that UNE-P crossconnect is contained within the (FL-2w.xls) October 8 Cost Study.[47] It is undisputed that this section contains the work activity of cross connecting the loop to the switch, along with other administrative activities[48],[49]. Yet, amazingly, BellSouth seeks this charge **over and above** its charges for installing a loop, making this charge wholly duplicative of the connect-and-test charge embedded in the loop NRCs, despite carefully worded responses to the contrary.[50]

## 7. BellSouth's own arguments show that this matter is ripe for an expedited hearing.

---

44 The call enters the CO on various transport facilities, and is never converted back to a 2 wire copper loop. The digitized call is optically or electrically routed to the switch in an automated manner not unlike Internet routing.

45 The 2 wire loop from the customer premises is terminated to an IDLC box in a remote terminal connected to the central office via a transport (a.k.a. feeder) facility.

46 Recurring **or** non-recurring.

47 See INPUTS_CONNECT&TEST – CENTRAL OFFICE FORCES (CO).

48 See Bellsouth response to Supra's 1st request for admissions, Item number 4c "the 15 minute work time associated with pay band 431X (Central Office) involves several functions necessary in provisioning an SL1 loop. These functions include printing the order, testing the existing circuit, installing the wire, plug-in (if necessary), testing the new circuit, cutting the circuit, post cut circuit test, and updating the dispatch system."

49 For IDLC served loops the crossconnect at the remote terminal are defined by INPUTS_CONNECT&TEST – SPECIAL SERVICES INSTALLATION & MAINTENANCE (SSI&M) AND INSTALLATION AND MAINTENANCE (I&M) WORK ACTIVITIES. This too is undisputed.

50 See Declaration of Daonne Caldwell, at ¶7, attached to BellSouth's *Response and Objection to Supra's Motion for Partial final Order on Issue of Connect and Test Related Charges.*

BellSouth argues that: (i) it has already filed and received an approved cost study for the very conversions which Supra seeks; and (ii) this is a complex case which shall require much discovery and days of hearing and therefore cannot be heard on an expedited basis. Which one is it? Based on the present BellSouth Motion, Supra would expect BellSouth's evidence to be the exact same cost study and testimony it filed with the FPSC back in 2000. Should BellSouth seek to introduce anything else, Supra will reserve its right to seek all appropriate remedies.

**8. Expedited treatment is warranted in light of existing law and new circumstances.**

As set forth above, Section 364.161(1), Florida Statutes, provides that "**either party may petition the commission to arbitrate the dispute and the commission shall make a determination within 120 days.** As the 120th day from the petition date is fast approaching, the Commission should seek to hold a hearing as soon as is practical.

More significantly is the unrest and speculation caused by the recent D.C. Circuit Court decision regarding the UNE-P related provisions in the FCC TRO Order. This uncertainty is harmful to both customer and investor confidence in the CLEC industry. The establishment of a reasonable conversion cost so as to allow for facilities-based competition via UNE-L would go a long way to creating certainty, increasing confidence in this industry, and ensuring competition remains. Furthermore, as UNE-P prices may soon be raised or as UNE-P may soon sunset, Supra needs to be able to quickly transfer its customers to its own facilities, so as to provide the least cost impact on its customer base. Delays in the establishment of the UNE-P to UNE-L conversion costs will only serve to delay Supra's ability to make these transfers as soon as possible.

If the Commission is considering a finding of non-impairment as it relates to elements included in UNE-P, Supra's costs of providing service could be significantly impacted as early as January 1, 2005 – less than five months away. Supra needs to begin converting its lines to UNE-L today, to ensure that it is not materially adversely affected by any future changes to UNE pricing.

**9. Collateral Estoppel does not apply.**

In its only attempt at providing a legal citation in support of anything in BellSouth's Motion, BellSouth claims that Supra is collaterally estopped from seeking expedited relief and an interim rate.[51] Although BellSouth cited a case which stood for the general proposition of this judicial doctrine, BellSouth makes no attempt to show how it has met the elements of such a claim. "Collateral estoppel requires that: (i) the issue be identical in both the prior and current action; (ii) the issue was actually litigated; (iii) the determination of the issue was critical and necessary to the judgment in the prior action; and (iv) the burden of persuasion in the subsequent action not be significantly heavier." SEC v. Bilzerian (In re Bilzerian), 153 F.3d 1278, 1281 (11th Cir. 1998).

First, BellSouth cannot possibly argue that there are two separate actions comprising both a "prior and current action." The parties are litigating the same case.

Second, the issue of whether Supra was entitled to expedited or interim relief has never actually been litigated. Supra is unaware of any written, final, non-appealable order having been issued by the Commission in this case. BellSouth does not even argue that there is one; instead, BellSouth argues that an oral statement made by a Commission

[51] Significantly, although BellSouth seems to make an argument for dismissal of Supra's First Amended Petition, in its entirety, based on the theory of collateral estoppel, BellSouth only argues that this doctrine applies in its alternative argument. Amazingly, BellSouth never espouses a legal theory in support of its Motion to dismiss Supra's First Amended Petition in its entirety, leaving both Supra and the Commission to guess.

staff member at an issue identification hearing, in which no transcript was taken, constitutes "a full litigation and a final decision."[52] Again, BellSouth has cited to no legal authority in support of this outlandish position.

Third, it is inconceivable that the issue of expedited hearings and interim rates could be deemed "critical and necessary to the judgment in the prior action, assuming that there were both a prior matter and a judgment in it. BellSouth ignores this prong of the judicial doctrine in its entirety, as it does the fourth prong regarding the burden of persuasion. The doctrine of collateral estoppel does not and can not apply to this case.

## CONCLUSION

BellSouth has failed to: (i) allege the burden of proof it must meet to succeed on its Motion; (ii) allege any legal cause of action upon which it bases its Motion; and (iii) identify any facts within the four corners of Supra's First Amended Petition which would allow BellSouth to meet its burden. BellSouth could only have filed its present Motion for the purpose of unreasonable delay. Specifically, BellSouth is seeking to delay Supra's deposition of BellSouth's cost study witness, as evidenced by BellSouth's counsel's statements at the issue identification hearing held on July 23, 2004, seeking to postpone such during the pendancy of BellSouth's Motion.

---

[52] See BellSouth's Motion at p. 6, fn 3.

**WHEREFORE,** for all of these reasons set forth hereinabove, Supra requests that the Commission deny, in its entirety, BellSouth's Motion to Dismiss.

Respectfully submitted this 30th day of July 2004.

By: Brian Chaiken/AHS
BRIAN CHAIKEN, ESQ.
FBN: 0118060

SUPRA TELECOMMUNICATIONS AND
INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4248
Facsimile: (305) 443-1078