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November 5, 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 No. 040301-TP -
SUPRA'S MOTION IN LIMINE TO PREVENT BELLSOUTH FROM INTRODUCING HEARSAY EVIDENCE AND UNSUPPORTED TESTIMONY

Dear Mrs. Bayo:

Enclosed is the original and fifteen (15) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion In Limine To Prevent Bellsouth From Introducing Hearsay Evidence And Unsupported Testimony 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 /JW

Brian Chaiken
Executive Vice President, 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, E-Mail, Hand Delivery, and/or U.S. Mail this 5th day of November 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

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

SUPRA TELECOMMUNICATIONS
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Brian Chaiken /sw

By: Brian Chaiken

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 Filed: November 5, 2004

SUPRA'S MOTION IN LIMINE TO PREVENT BELLSOUTH FROM INTRODUCING HEARSAY EVIDENCE AND UNSUPPORTED TESTIMONY

Supra Telecommunications and Information Systems, Inc. ("**Supra**"), by and through undersigned counsel, pursuant to Sections 90.801, 90.802, and 90.604, Florida Statutes, submits this Motion in Limine to Prevent BellSouth Telecommunications, Inc. ("**BellSouth**") from Introducing Hearsay Evidence and Unsupported Testimony, and in support thereof, states as follows:

ARGUMENT

A. Ms. Caldwell is Incompetent to Testify to Matters of Work Times, Elements, and/or Probabilities.

On August 18, 2004 and September 22, 2004, Supra conducted the deposition of Ms. D. Daonne Caldwell. On September 8, 2004, BellSouth filed the Direct Testimony of Ms. Caldwell and on October 8, 2004, BellSouth filed the Rebuttal Testimony of Ms. Caldwell.

Section 90.604, Florida Statutes, provides:

> Except as otherwise provided in s. 90.702 (Testimony by Experts), a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness's own testimony.

As evidenced by Ms. Caldwell's testimony, she is nothing more than a supervisor with no personal knowledge of the work elements, times, or probabilities that are placed into the cost studies upon which she testifies. BellSouth presented Ms. Caldwell as its corporate

representative with the most knowledge regarding BellSouth's cost studies which support the non-recurring charges which BellSouth seeks to charge Supra for performing UNE-P to UNE-L conversions.

> Mr. Chaiken: Okay, and Ms. Caldwell, you were the person designated by BellSouth Telecommunications, Inc., as the person with most knowledge regarding BellSouth's cost studies which support the non-recurring charges BellSouth seeks to charge Supra for performing UNE-P to UNE-L conversions. Is that correct?
>
> Ms. Caldwell: Correct.

8-18-04 Caldwell Deposition Transcript at p. 5 lines 16 -23.

However, Ms. Caldwell's function is simply to oversee the cost studies, and has no actual knowledge of how the cost studies are derived. Not only does Ms. Caldwell lack personal knowledge as to the basis for how the data found in BellSouth's cost studies is determined, Ms. Caldwell has never even witnessed a hot cut, the essence of this docket, being performed.

> Mr. Chaiken: Okay. Have you ever participated or watched an actual hot cut being performed?
>
> Ms. Caldwell: No.

9-22-04 Caldwell Deposition Transcript at p. 16, lines 9 -11.

Rather than basing her testimony on personal knowledge, as required by Section 90.604, Florida Statutes, Ms. Caldwell is forced to rely on the personal knowledge of other BellSouth employees, employees that have not pre-filed testimony in this docket.

> Mr. Chaiken: Has someone ever explained to you the various method by which a hot cut could be performed?
>
> Ms. Caldwell: They have explained to me the methods associated with a UNE-P to UNE-L conversion and various connections, etcetera, equipment done in the central office, but I have never seen an actual UNE-P to a UNE-L conversion.

> Mr. Chaiken: So you have to rely on somebody else's word to determine whether or not work times are appropriate for various processes in the overall process?
>
> Ms. Caldwell: Oh, yes. The work times are the responsibility of the team members.

9-22-04 Caldwell Deposition Transcript at p. 16, lines 12 -24.

As evidenced by Ms. Caldwell's sworn testimony given at her deposition in this matter, Ms. Caldwell is not the BellSouth representative who has the requisite personal knowledge of the actual work elements or work times involved in the cost studies at issue in this docket. Ms. Caldwell's limited knowledge is based solely on hearsay – what someone who works as part of BellSouth's product team told her was to be put into the cost study. As such, neither Supra nor this Commission has the ability to test the veracity of Ms. Caldwell's assertions, as Ms. Caldwell herself does not know how the inputs were derived. Ms. Caldwell's **only** function in the process of creating the cost study "is to be sure that all the UNEs are covered and that there's no overlapping." 9-22-04 Caldwell Deposition Transcript at p. 14, lines 3 - 4.

As Ms. Caldwell, BellSouth's corporate representative with the most knowledge, could not provide any support for any of the underlying inputs that went into the cost studies at issue, she must be prevented from offering any testimony relating to such inputs at the hearing.

In Snelling and Snelling, Inc. v. Kaplan, 614 So.2d 665 (Fla. 2d DCA 1993), the Court found that the trial court erred in permitting a property manager to testify regarding expenses where his testimony was not based upon personal knowledge but rather on his reliance on ledger sheets which he did not prepare. Similar to Snelling, in this case, Caldwell should not be permitted to testify as to the inputs ("expenses") as she has no personal knowledge as to how such were derived and is relying solely on the cost studies ("ledger"), cost studies for which she simply ensured that "there was no overlapping".

Furthermore, similar to Supra's request, BellSouth has previously argued that the Commission should dismiss the testimony of Supra's witness, Mr. David Stahly, in Docket No. 98019-TP as a result of Mr. Stahly's alleged lack of any first–hand (i.e., personal) knowledge. See BellSouth Telecommunications, Inc. Post-Hearing Brief dated September 3, 2004 at p. 11. BellSouth, having once made such an argument to this very Commission, cannot now credibly argue that Ms. Caldwell can testify to matters to which she admittedly has no personal knowledge. BellSouth should not be able to have it both ways. It is simply not credible for BellSouth to argue in one docket that the Commission dismiss Supra's testimony for lack of personal knowledge and then turn around in this docket and have the Commission rely on the testimony of a BellSouth witness that is admittedly devoid of any personal knowledge.

B. Former Testimony of Mr. Stinson is Inadmissible Hearsay

On October 8, 2004, BellSouth filed the Rebuttal Testimony of Ms. Caldwell in this Docket. In support of her Rebuttal Testimony at p. 31 lines 19 – 25, Ms. Caldwell cites to the deposition transcript of another BellSouth employee, Mr. Dan Stinson, dated July 20, 2000 in Docket No. 990649-TP. BellSouth should be prohibited from utilizing any evidence arising from this deposition transcript as such is hearsay and therefore inadmissible. Section 90.801, Florida Statutes, defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 90.802, Florida Statutes, provides that "except, as provided by statute, hearsay evidence is inadmissible."

Here, Mr. Stinson's statements clearly fit the definition of hearsay. BellSouth may argue that Mr. Stinson's statements fall under the hearsay exception rule, Section 90.803(22), Florida Statutes, which provides:

> Former testimony given by the declarant which testimony was given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, provided, however, the court finds that the testimony is not inadmissible pursuant to s. 90.402 or s. 90.403.

In this case, the exception does not apply. The former testimony given is not that of the declarant, Ms. Caldwell, but rather of a different BellSouth employee, Mr. Stinson. BellSouth could have elected to have Mr. Stinson pre-file testimony in this docket, in which case Supra would have sought to take Mr. Stinson's deposition. Rather, BellSouth elected to try to bootstrap Mr. Stinson's testimony into the record through its inclusion in Ms. Caldwell's pre-filed testimony. Ms. Caldwell is not Mr. Stinson, and therefore, pursuant to the Florida Rules of Evidence, cannot offer his testimony for the truth of the matter asserted.

Moreover, BellSouth has not shown that Mr. Stinson is unavailable. "One aspect of due process is the privilege of a party to view and cross-examine a witness." Grabau v. Department of Health, Board of Psychology, 816 So.2d 701, 709 (Fla. 1st DCA 2002) *citing* Finkley v. Lathing, 120 So.2d 9 (Fla.1960). In Grabau, the Court found that Section 90.803(22), Florida Statutes, was unconstitutional and denied due process because is allowed admission of the former testimony without a showing that the declarant was unavailable. Here, BellSouth has made no showing nor offered any evidence asserting that Mr. Stinson is unavailable as defined by Section 90.804, Florida Statutes.

Mr. Stinson did not file either direct or rebuttal testimony in this docket. BellSouth has not proffered any evidence indicating that Mr. Stinson is unavailable. As such, BellSouth can

not be allowed to introduce Mr. Stinson's former testimony. Supra should not be forced to expend additional time and resources deposing Mr. Stinson at this late stage.

CONCLUSION

For the reasons set forth hereinabove, BellSouth should be precluded from submitting the testimonies of Ms. Caldwell as it relates to any work elements, times or probabilities, and as it relates to Mr. Stinson's former deposition testimony.

WHEREFORE, Supra respectfully requests that the Commission enter an Order:

A. Preventing BellSouth from utilizing Ms. Caldwell as a witness to testify on matters of Work Times, Elements, and/or Probabilities, and refusing to admit her pre-filed direct and rebuttal testimonies as it relates to such matters;

B. Preventing BellSouth from introducing the former testimony of Mr. Stinson as evidence in this proceeding;

C. Granting such other and further relief as may be just and proper.

RESPECTFULLY SUBMITTED this 5th day of November 2004.

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