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Matilda Sanders

**From:** Smith, Debbie N. [Debbie.N.Smith@BellSouth.com]  
**Sent:** Wednesday, November 17, 2004 3:44 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Edenfield, Kip; Holland, Robyn P; Nancy Sims; Slaughter, Brenda ; Fatool, Vicki; Bixler, Micheale; Linda Hobbs  
**Subject:** Florida Docket No. 040301-TP  
**Importance:** High

- A. Debbie Smith  
 Legal Secretary for E. Earl Edenfield, Jr.  
 BellSouth Telecommunications, Inc.  
 c/o Nancy Sims  
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 debbie.n.smith@bellsouth.com
- B. Docket No. 040301-TP: In Re: Petition of Supra Telecommunications and Information Systems, Inc. for arbitration with BellSouth Telecommunications, Inc.
- C. BellSouth Telecommunications, Inc.  
 on behalf of E. Earl Edenfield, Jr.
- D. 7 pages total in PDF format
- E. BellSouth Telecommunications, Inc. Response to Supra's Motion in Limine.

<<BST's Resp. to Supra's Motion in Limine>>

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November 17, 2004

Mrs. Blanca S. Bayó  
Division of the Commission Clerk and  
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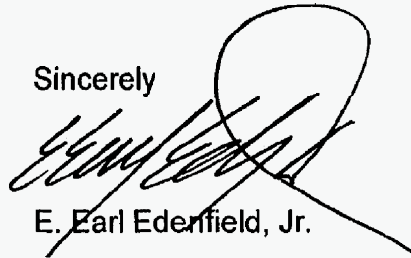
**Re: Docket No.: 040301-TP  
Petition of Supra Telecommunications and Information Systems, Inc. for  
Arbitration with BellSouth Telecommunications, Inc.**

Dear Ms. Bayó:

Enclosed is BellSouth's Response to Supra's Motion in Limine, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely



E. Earl Ederfield, Jr.

Enclosure

cc: All Parties of Record  
Marshall M. Criser III  
Nancy B. White  
R. Douglas Lackey

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

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 17<sup>th</sup> day of November, 2004 to the following:


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**To receive discovery related material  
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\_\_\_\_\_  
E. Earl Edenfield, Jr.

**(+) Signed Protective Agreement**

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Supra	)	
Telecommunications and Information	)	Docket No. 040301-TP
Systems, Inc. for arbitration	)	
With BellSouth Telecommunications, Inc.	)	Filed: November 17, 2004
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**BELLSOUTH'S RESPONSE TO SUPRA'S MOTION IN LIMINE**

BellSouth Telecommunications, Inc. ("BellSouth") files this Response to Supra Telecommunications and Information Systems, Inc.'s ("Supra") Motion in Limine to Prevent BellSouth from Introducing Hearsay Evidence and Unsupported Testimony ("Motion") dated November 5, 2004. For the reasons set forth below, the Florida Public Service Commission ("Commission") should deny Supra's Motion.

**ARGUMENT**

**A. Ms. Caldwell Can Rely on Hearsay Evidence Because she is an Expert Witness.**

Supra's Motion is directed to portions of the testimony of BellSouth's cost expert, Daonne Caldwell. As this Commission is well aware, Ms. Caldwell has testified as a cost expert for BellSouth on numerous occasions and the Commission has often relied upon her testimony in making decisions on UNE rates. Given that, BellSouth can only assume that Supra's Motion is born out of some concern that the Commission will reach same conclusion regarding the comparative competence of Ms. Caldwell and David Nilson (Supra's witness) that the federal court reached when Supra argued that the costs of BellSouth's Privacy Directory® product were already included in the Commission's UNE rates. In denying Supra's challenge, the United States Bankruptcy Court ruled that:

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The Court heard preliminary arguments and proffers on this at the last hearing, which I believe as of June 18th, and set a further evidentiary hearing for the purpose of allowing the debtor -- or I should say set a further evidentiary hearing based on the debtor's proffer that it would be able to show that all of the components of privacy director and all of the costs for those components were included in cost studies that BellSouth presented in order to obtain the UNE charges for the features component and for the local switch port.

The debtor has not met its burden. The Court has considered the exhibits that were referenced and those that are in evidence that have been referenced, the testimony of Mr. Nilson and Ms. Caldwell. The Court finds that Mr. Nilson's testimony is simply his interpretation of what's included in the cost studies. **I don't believe Mr. Nilson was misrepresenting anything or was trying to deceive in any way. I just don't believe he has a full understanding of what these cost studies include.** (Emphasis added)

**By contrast, Ms. Caldwell is clearly an expert on the components of the cost studies and the methodology of their preparation** and, in fact, a particular excerpt from Exhibit 9 that the debtor was relying on was prepared under her supervision. Specifically, I find that Ms. Caldwell was convincing and credible in her explanation of cost components for privacy director that were not included in the cost studies presented to the Public Service Commission in what I believe was the UNE docket that's been referred to. That is the Public Service Commission docket that determined the \$2.26 features charge and the \$1.17 local switch port charge. (Emphasis added)

Having been recognized as an expert witness by the federal court, and having testified as an expert on numerous occasions before this Commission, Ms. Caldwell's testimony is governed by *Florida Evidence Code* § 90.704, which allows experts to rely on facts or data made known to them at or before trial. Thus, even if Supra's contention that Ms. Caldwell is relying on prior testimony of another BellSouth witness, Dan Stinson, were correct (which it is not), such reliance would be allowed under the Florida Evidence Code. Supra's Motion is unfounded and, accordingly, should be denied.

**B. Ms. Caldwell is Not Relying On Hearsay Evidence.**

Even if Ms. Caldwell was not an expert witness, Supra's Motion should still be denied. Fundamentally, Supra contends that the work times, elements and percentages in the cost study are hearsay evidence as to Ms. Caldwell and, therefore, she cannot testify as to them. Supra's contention is misplaced, incorrect, and misses the point.

First, Ms. Caldwell's testimony relies almost exclusively on the findings and Orders of the Commission in two dockets: the UNE docket (990649-TP) and the Covad Arbitration docket (001797-TP). In those dockets, the Commission considered the evidence before it and determined (among other things) that certain work times, activities and percentages were applicable to setting UNE rates. The evidence taken in those dockets, as well as the Commission's findings and Orders are public records under the exception to the Hearsay Rule as set forth in *Florida Evidence Code* § 90.803(8) and can serve as the basis for either expert or lay opinions. In short, Ms. Caldwell's testimony relies on the public records from those dockets, including the Orders of the Commission and the evidence that was part of the public record.

Second, to the extent Ms. Caldwell's testimony does not rely upon public records, Supra has taken discovery and depositions that, presumably, will be admitted into evidence in this proceeding. That discovery and the depositions of BellSouth witnesses substantiate many, if not all, of the work times, elements and percentages in the cost study. Clearly, Supra has provided any necessary evidentiary foundation through the discovery and depositions it conducted in this proceeding.

Third, some, if not all, of the document discovery in this proceeding are documents that BellSouth keeps in the normal course of business and would fall within the Hearsay Exception regarding records of regularly conducted business activity described in *Florida Evidence Code* §

90.803(6). Thus, the underlying assumptions of the cost study will be supported by witnesses (in addition to Ms. Caldwell) with first hand knowledge.

Finally, BellSouth certainly intends to ask the Commission to take administrative notice in this proceeding of the UNE and Covad Arbitration dockets. If administrative notice is taken, then the evidence and Orders from those proceedings will be in the evidentiary record of this proceeding, including the depositions that Supra appears to challenge.

**C. If the Commission Accepts Supra's Arguments, then Mr. Nilson's Testimony Would Also have to be Stricken.**


The ultimate irony of Supra's argument is that if accepted, it would equally apply to Mr. Nilson's direct and rebuttal testimony. For instance, Mr. Nilson attempts to separate the existing work times, activities and percentages from the UNE and Covad Arbitration cost studies into dispatch and non-dispatch categories. However, Mr. Nilson has no underlying basis in his testimony to confirm that the work times, activities and percentages that he takes from those cost studies are correct from his personal knowledge. Further compounding the problem with Mr. Nilson's testimony is the fact that he is NOT an expert witness on cost studies or the underlying BellSouth work times, activities and percentages. Thus, if the Commission grants Supra's Motion, Mr. Nilson's attempt to develop new hot cut rates (by dissecting the existing cost studies) would likewise have to be stricken.

**CONCLUSION**


For the reasons discussed above, Ms. Caldwell's testimony should not be stricken as it does not suffer from any hearsay deficiencies.

Respectfully submitted this 17<sup>th</sup> day of November 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.



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