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December 17, 2004

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

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 for Partial Summary Final Order on Issues 3 and 4, 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 Edenfield, Jr.

Enclosure

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

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 17th day of December, 2004 to the following:

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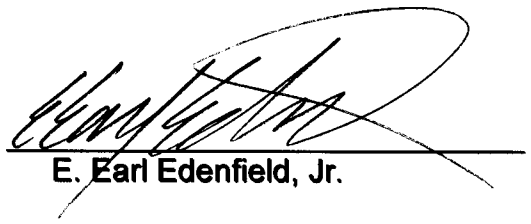

E. Earl Edenfield, Jr.

(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Supra Telecommunications and Information Systems, Inc.'s for arbitration With BellSouth Telecommunications, Inc.	)	Docket No. 040301-TP
	)	Filed: December 17, 2004

BELLSOUTH'S RESPONSE TO SUPRA'S MOTION FOR PARTIAL SUMMARY FINAL ORDER ON ISSUES 3 AND 4

BellSouth Telecommunications, Inc. ("BellSouth") files this response to the Motion for Partial Summary Final Order on Issues 3 and 4 ("*Motion*") filed by Supra Telecommunications and Information Systems, Inc. ("Supra") on December 6, 2004. For the reasons set forth below, the Florida Public Service Commission ("Commission") should deny Supra's Motion.

BACKGROUND

In an amazingly bold attempt at advocacy, Supra has resurrected arguments previously rejected by the Commission and taken sentences from unrelated clauses in the General Terms and Conditions section of the parties' Interconnection Agreement and tried, unsuccessfully, to weave an argument that results in BellSouth providing Supra with UNE-P to UNE-L conversions for free. As discussed below, there are a number of fundamental flaws in Supra's logic and legal arguments; thus, the Commission should reject Supra's *Motion*.

ARGUMENT

I. THERE IS NO CORRELATION BETWEEN SUPRA'S MOTION AND ISSUES 3 AND 4 IN THIS PROCEEDING.

Supra goes to great lengths to craft a legal argument based on out-of-context excerpts from the parties' Interconnection Agreement ("ICA"). However, even a cursory view of Issues 3

and 4 in this proceeding reveal that the issues have nothing whatsoever to do with the parties' ICA. For instance, Issues 3 and 4 provide:

Issue 3: Should a new nonrecurring rate be created that applies for a hot-cut from UNE-P to UNE-L, where the lines being converted are served by copper or UDLC, for (a) SL1 loops and (b) SL2 loops? If so, what should such nonrecurring rates be?

Issue 4: Should a new nonrecurring rate be created that applies for a hot-cut from UNE-P to UNE-L, where the lines being converted are not served by copper or UDLC, for (a) SL1 loops and (b) SL2 loops? If so, what should such nonrecurring rates be?

It is obvious, to most anyway, that Issues 3 and 4 address whether a *new* non-recurring rate should be *created* for UNE-L conversions. The answer to these Issues, of course, has nothing at all to do with the parties' ICA. Supra's arguments, all of which are based on strained interpretations of the ICA, are misplaced and should be rejected.

Equally obvious is the fact that it is Issues 1 and 2 that set forth questions regarding the parties' ICA and the existence of rates for UNE-L conversions in that ICA. Indeed, on September 1, 2004 Supra filed in this proceeding a Motion for Partial Summary Final Order on Contractual Issues which was directed solely to Issues 1 and 2. Clearly, Supra believed that the "contractual issues" in this case were set forth in Issues 1 and 2 or their prior Motion for Partial Summary Final Order would have also encompassed Issues 3 and 4.

Also instructive is the fact that Supra's *Motion* contains a number of allegations of "undisputed facts" that are identical to the allegations made in Supra's September 1, 2004 Motion for Partial Summary Final Order.[1] On October 12, 2004, the Commission denied Supra's September 1, 2004 Motion for Partial Summary Final Order, which would include each of the allegations that Supra now raises in this *Motion*. Thus, paragraphs 6 – 13 of Supra's

[1] Compare identical allegations of "undisputed facts" in Supra's *Motion* (¶¶ 6 through 13) and Supra's September 1, 2004 Motion for Partial Summary Final Order (¶¶ 1 through 5).

Motion have already been considered and rejected by the Commission; thus, the Commission should simply reject Supra's *Motion*.

II. SUPRA'S *MOTION* DOES NOT MEET THE LEGAL STANDARD FOR A SUMMARY FINAL ORDER.

The remaining allegations of "undisputed facts" upon which Supra bases the *Motion* are either: (1) a nonsensical interpretation of a quote from a deposition; (2) an out-of-context quote from a prior Commission Order; and (3) bizarre interpretations of inapplicable provisions from the General terms and Conditions section of the parties' ICA. Even assuming, *arguendo*, that these additional "undisputed facts" somehow save Supra's *Motion* from the fatal arguments set forth above, they still fail to meet the standards applicable to motions for summary judgment and are equally irrelevant to Issues 3 and 4 in this proceeding.

Rule 206.106.204(4), *Florida Administrative Code* provides that "[a]ny party may move for summary final order whenever there is no genuine issue of material fact." Recently, the Commission, in In re: Verizon Florida, Inc., Order No. PSC0-3-1460-FOF-TL (Dec. 24. 2003), articulated the standard for granting a request for a summary final order:

> The standard for granting a summary final order is **very high**. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the **light most favorable to the party against whom the summary judgment is to be entered**. When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary judgment is proper and should be affirmed. The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. See, Trawick's Florida Practice and Procedure, § 25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (1999).

> Further, under Florida law, "the party moving for summary judgment is required to **conclusively demonstrate the nonexistence of an issue of material fact**, and . . . **every possible inference must be drawn in favor of the party against whom a summary judgment is sought**." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) (citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977). Furthermore, "A summary judgment should not be granted unless the **facts are so crystallized that nothing remains but questions of law**." Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000). (emphasis added).

As discussed in greater detail below, Supra's remaining "undisputed facts" and the arguments based on those "undisputed facts" do not satisfy the "very high" standard for a motion for summary judgment.

For instance, in paragraph 14 of the *Motion* Supra sets forth a quote from the deposition of BellSouth witness Ken Ainsworth taken in this proceeding. Frankly, BellSouth has no idea what point Supra is attempting to make with the quote, or what possible relationship the quote has to Issues 3 and 4. Supra never attempts to ascribe any relevance or context; thus, the Commission should reject this "undisputed fact" as any potential basis for the *Motion*.

Supra also attempts to attribute to the Commission a finding that the ICA does not have an applicable UNE-L conversion rate. Specifically, in paragraph 15 of the Motion, Supra uses the following partial quote as evidence of such a finding by the Commission: "the agreement does not explicitly list a rate for a UNE-P to UNE-L 'hot cut,'". What the Commission actually said, in full context, was:

> In short, we find that although the agreement does not explicitly list a rate for a UNE-P to UNE-L "hot cut," the agreement may contain rates associated with the necessary steps to effectuate such a "hot cut." In other words, an issue of fact exists as to whether this rate covers a UNE-P to UNE-L conversion. Therefore, we deny Supra's Motion for Partial Final Summary Order because

> there is an issue of fact as to whether the current rates in place include the necessary steps to effectuate a hot cut from a UNE-P arrangement to a UNE-L arrangement.

Although such blatant misquotation is a fairly typical Supra trademark, in this instance it is particularly egregious considering the fact that the entire quote, when taken in context, is a ruling that a genuine issue of fact exists as to whether the ICA has rates applicable to a hot cut. Clearly, the Commission should reject paragraph 15 as a basis for Supra's *Motion*.

Turning to the final set of "undisputed facts" in the *Motion* (specifically paragraphs 1 – 5), Supra crafts what have to be the most outrageous contract construction arguments ever made to this Commission. Frankly, BellSouth is surprised that Supra did not attempt to take individual words from varying parts of the ICA, construct a sentence that says "BellSouth...will...provide...all...services...for...free", and argue that Supra should get all services under the ICA for no charge. Such a shenanigan would be only slightly more outrageous than what Supra has attempted here.

For instance, Supra quotes §3.1 of the ICA's General Terms and Conditions (not Attachment 2, which addresses unbundled network elements) for the proposition that BellSouth is obligated "to cooperate in terminating services and elements and transitioning customers to Supra services." (Motion at ¶ 1) Even a cursory glance at §3.1 of the General Terms and Conditions reveals that this provision applies only when a CLEC is either terminating the entire ICA, or a specific ICA Attachment. Because Supra is not terminating an ICA Attachment, or the entire ICA, this provision is inapplicable to UNE-L conversions. Even if Supra was correct (which it is not), this

provision says nothing about the costs of such a transition and it makes no sense at all to assume BellSouth would agree to bear such costs.

Supra's next argument is that §22.1 of the ICA's General Terms and Conditions provides that if a party "has an obligation to do something" that party is responsible for its own costs in doing it. Again, a quick glance at the specific provision reveals that the provision applies to situations where a license, or permit, etc is required as a prerequisite to performance. As with the prior interpretation, Supra's desperation has driven it to absurd reasoning. Interestingly, Supra made this same argument (that Supra should get free service as a result of §22.1) to the bankruptcy court in the context of the Order that Supra seems to always cite.[2]

> THE COURT: All right. So what -- I'm not sure I'm clear on what you think governs the rates, or you think that you don't have to pay anything for them to do this work?
>
> MR. CHAIKEN: Judge, I think that the contract provides in 22.1 of the general terms and conditions that we don't have to pay anything extra to do this service, but for purpose of adequate assurance ---
>
> THE COURT: What do you mean extra? How does anything you're paying now possibly relate to, essentially, what has to take -- I mean, this isn't somebody punching in software. This is a technician actually moving wires, right?
>
> MR. CHAIKEN: Right. This is a technician taking two wires ---
>
> THE COURT: And somehow that's absorbed in what you're paying them? That doesn't really make logical sense, does it?

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[2] CASE NO. 02-41250-BKC-RAM *Continued First True-Up Hearing And All Motions On The Calendar* dated June 25th, 2003, pages 803-804.

MR. CHAIKEN: Well, Judge, the contract says what the contract says. I didn't draft this contract.

THE COURT: Well, in 500 pages of text, I'm sure you can find something that arguably on its words could apply, but there has to be some logical overlay. (Emphasis added)

Obviously, the Court recognized Supra's misguided contract manipulation and summarily rejected Supra's argument that the ICA allows Supra to get hot cuts for free. Instead, the Court ordered Supra to pay the same rates that BellSouth said applied. Likewise, the Commission should reject these ridiculous arguments.

The final argument Supra makes involves §3.8.1 of Attachment 2 of the ICA, which addresses hot cuts. This argument is part and parcel of prior arguments Supra makes regarding the lack of a specific rate that has the words "hot cut" associated with it. This argument has already been rejected by the Commission in dealing with Supra's prior Motion for Partial Summary Judgment.

CONCLUSION

For the reasons set forth herein, BellSouth respectfully requests that the Commission deny Supra's *Motion*.

Respectfully submitted this 17th day of December 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

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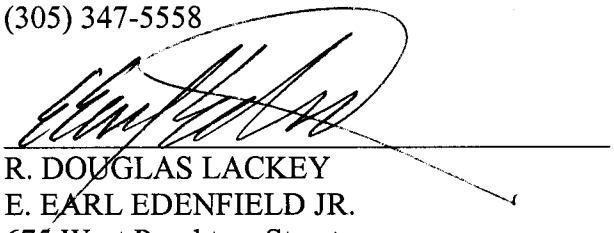

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