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August 31, 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.: 040353-TP

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Opposition to Supra Telecommunications and Information Systems, Inc.'s Motion to Strike, 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,

James Meza III (BSS)

James Meza III

Enclosures

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

CERTIFICATE OF SERVICE
DOCKET NO. 040353-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via First Class U.S. Mail and Electronic Mail this 31st day of August, 2004 to the following:

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(*) Signed Protective Agreement

James Meza III (BSS)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Supra Telecommunications And Information Systems, Inc. to Review And Cancel BellSouth's Promotional Offering Tariffs Offered in Conjunction With Its New Flat Rate Service Known as Preferred Pack	)	Docket No. 040353-TP
	)	Filed: August 31, 2004

BELLSOUTH TELECOMMUNICATIONS, INC.'S OPPOSITION TO SUPRA'S MOTION TO STRIKE

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response to Supra Telecommunications & Information Systems, Inc.'s ("Supra") Motion to Strike Portions of BellSouth's Opposition to Supra's Motion for Summary Final Order ("Motion to Strike" or "Motion"). For the reasons discussed in detail below, the Florida Public Service Commission ("Commission") should refuse to consider and deny this improper Motion.

1. In obvious recognition of their fatal effect on Supra's arguments, Supra requests that the Commission strike from BellSouth Response to Supra's Motion for Summary Final Order ("Response") certain statements and exhibits that address and identify promotions offered by Supra and other carriers. These promotional offerings establish, *inter alia*, that (1) Supra has a tariffed promotion that gives new customers who switch from BellSouth to Supra **one free month** of its Total Solutions service; (2) Supra has another promotion where it gives away the **complete DVD set of "Friends,"** a prize worth over $300, to new customers; and (3) other carriers offer promotions ranging from **free service**, to **credits on bills**, to **cash payments** to entice customers to switch service providers.

2. In support of the Motion to Strike, Supra resurrects an argument that the Commission previously rejected. Specifically, Supra asserts that references to the subject CLEC/Supra promotional offerings should be stricken pursuant to Rule 1.140(f), Florida Rules of Civil Procedure because they are irrelevant and constitute "redundant, immaterial, impertinent or scandalous matter." Motion at 3. Supra takes the position that BellSouth should be prohibited from "littering the record in this proceeding with attempts to shift the Commission's focus away from the issue at hand, whether or not BellSouth's promotional offerings violate Florida Statute or are otherwise illegal." Motion at 7. As set forth in BellSouth's Response and as made clear here, Supra's Motion should be denied because the "litter" Supra seeks to strike is important and relevant as it reveals the fallacies of Surpa's arguments as well as Supra's transparent attempt to insulate itself from the rigors of competition.

Supra's Motion to Strike Is Procedurally Improper.

3. Rule 1.140 provides that "[a] party may move to strike or the court make strike redundant, immaterial, impertinent or scandalous matter from **any pleading** at any time." (emph. added). Rule 1.110(a) provides that the term "pleadings" is limited to complaints, answers, cross claims and counter claims. See Rule 1.110 Fla. R. Civ. P; see also, Soler v. Secondary Holdings, Inc., 771 So. 2d 62, 72 n.3 (Fla. 3rd DCA 2000) (Cope, J., dissenting) (stating that the term "pleading" means complaint); see also, Harris v. Lewis State Bank, 436 So. 2d 338, 340 n.1 (Fla. 1st DCA 1983) (motions are not pleadings).

4. For instance, in Motzner v. Tanner, 561 So. 2d 1336 (Fla. 5th DCA 1990), the trial court struck the plaintiffs' motion to dismiss because the court found it to be a

"sham pleading" pursuant to Rule 1.150. The appellate court, however, found that striking the motion to dismiss was improper because the motion to dismiss was not a pleading and thus was not subject to Rule 1.150.[1] Id. at 1337.

> Although commonly employed, the use of the term "pleading" to describe all of the various papers filed in an action is incorrect. . . Accordingly, the [defendants'] use of a motion to strike the [plaintiff's] motion to dismiss as a sham pleading was improper.

Id. at 1338.

5. In the instant matter, Supra filed a Motion to Strike certain statements and exhibits in BellSouth's Response. Like the motion to dismiss in Motzner v. Tanner, BellSouth's Response is not a complaint, answer, cross claim, or counterclaim. Consequently, BellSouth's Opposition cannot be considered a "pleading" as defined in Rule 1.140(f). Accordingly, under the express language of Rule 1.140(f) and the case of Motzner v. Tanner, supra, Supra's Motion to Strike BellSouth's Opposition is procedurally improper and should be denied.

6. Supra should be aware of this legal precedent as the Commission ruled against Supra on this exact issue in Docket No. 001305-TP. In that proceeding, like here, Supra filed a Motion to Strike BellSouth's Opposition to Supra's Motion to Disqualify and Refer pursuant to Rule 1.140(f). The Commission denied Supra's Motion to Strike in Order No. PSC-02-0799-PCO-TP and held that "neither motions nor responses in opposition thereto are 'pleadings.' Therefore, Supra's Motion to Strike

[1] Like Rule 1.140, Rule 1.150 only applies to "pleadings."

Portion of BellSouth's Opposition Response is unauthorized and will not be considered." See Order No. 02-0799-PCO-TP at 1-2.

7. Supra conveniently refuses to acknowledge this adverse precedent and instead raises the same procedural arguments that the Commission previously rejected. Accordingly, the Commission should summarily reject the Motion to Strike.

Supra Fails to Meet the Standard for Striking BellSouth's Opposition

8. Even if Supra's Motion to Strike was procedurally proper, the Commission should deny Supra's Motion because Supra cannot meet the standard under Rule 1.140(f). "'A motion to strike matter as redundant, immaterial or scandalous should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision.'" McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A., 704 So. 2d 214, 216 (Fla. 2nd DCA 1998) (quoting Pentecostal Holiness Church, Inc. v. Mauney, 270 So. 2d 762, 769 (Fla. App. 4th DCA 1972).

9. In McWhirter, Reeves, the court rejected a request to strike certain allegations in the plaintiff's complaint pursuant to Rule 1.140(f) because it found that the "allegations [in the complaint] were relevant and definitely had a bearing on the equities." Id. In the case at hand, Supra has taken issue with BellSouth identifying the proliferation of promotional offerings by BellSouth's competitors, including Supra, designed to do exactly what the subject BellSouth promotions are designed to do – acquire customers in a competitive telecommunications marketplace.

10. Ultimately, the Commission's decision rests on whether the subject BellSouth promotions and service offerings are anticompetitive. In evaluating this issue, the availability of similar promotions offered by BellSouth's competitors is highly relevant to this competitive analysis. The fact that other carriers offer similar promotions establishes that promotional offerings are a common and legitimate tool to acquire customers in a competitive market. Predictably, Supra's claim boils down to an argument that BellSouth is prohibited from making promotional offerings to attract customers but Supra is not. This argument bears directly on the equities in this case and the policy considerations that this Commission must address.

11. Further, the information is directly relevant under Florida law as Section 364.051(5)(a), Florida Statutes expressly states that nothing in Section 364.051 "shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services in a geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together with basic services, using volume discounts and term discounts, and offering individual contracts."

12. Hypocritically, Supra argued in its Motion for Final Summary Order that BellSouth violated Section 364.051(5)(a), Florida Statutes but now takes the position that information regarding the competitive landscape and offerings made by other carriers is irrelevant. Supra cannot have it both ways: it cannot argue that BellSouth is in violation of a statute and then argue that information relevant to the statute should be stricken. Clearly, information relating to offerings made by competitive providers is

relevant to the Commission's analysis under Section 364.051, Florida Statutes and therefore should not be stricken.

13. Moreover, pursuant to the standard governing Motions for a Final Summary Order, BellSouth raised several factual/policy considerations that the Commission will have to consider in its Response, including but not limited to (1) "How will competition be impacted if the Commission interprets Florida law that limits BellSouth's ability to provide bundled services"; (2) "Has competition been harmed by these Promotions"; (3) "Have CLECs adjusted their business plans to address any competitive concerns"; and (4) "Should the Commission allow Supra to use regulatory authority to prevent firms from entering a market, competing, or lowering prices". See Response at 30-31. Information relating to the competitive offerings of Supra and other carriers is directly relevant to these questions of fact/policy that underlie this proceeding.

14. Indeed, an August 30, 2004 editorial in The Wall Street Journal addressed the recent rash of CLEC predatory pricing claims, including the instant proceeding, and confirmed these same policy considerations and concerns:[2]

> Now Verizon, BellSouth and other overseers of wiring the "last mile" of telephone connections into homes are being accused of predatory pricing," or lowering customer rates to drive competitors out of business. Given today's telecom market, however this notion falls somewhere between nonsensical and impossible. For starters, telecommunications is no more susceptible to predation than other industries. And when this illegal activity does occur, which is rare, antitrust laws are in place to stamp it out and punish the wrongdoers. **If there's reason for consumers (and investors) to be concerned, it's that state regulators will jump the gun and enact costly**

[2] A copy of the editorial is attached hereto as Exhibit A.

> **prophylactic measures to guard against a phantom menace. . .**
>
> "Rivals, especially inefficient rivals," write the authors, "use predation allegations to protect themselves from vigorous price competition." . . . What's driving telecom pricing today is competition. Companies are offering customers what they want – voice, cable and Internet service "bundles" – at the lowest prices possible. This is not a sign that something's funky in the marketplace; it's a sign that the market is working.

(emphasis added). The evidence that Supra seeks stricken is highly relevant because it establishes that BellSouth's promotional offerings are common competitive practices and that Supra's claims of predatory pricing and anticompetitive behavior are nothing more than a "phantom menace."

CONCLUSION

For the foregoing reasons, the Commission should deny Supra's Motion to Strike.

Respectfully submitted this 31st day of August, 2004.

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succeed him as acting Governor, and New Jersey will avoid a special election in which voters might demonstrate their displeasure with the way they have been treated.

Now comes a story in The Hudson Reporter that Mr. Codey is likely to name Mr.

So, let's see if we get this straight. If Mr. McGreevey holds onto the job in which he's worse than a lame duck, Mr. Codey gets to be governor and Mr. McGreevey may well end up with a nice state-sponsored sinecure. This isn't even honest graft.

Dial M for Market

It's no surprise that the "predation" bugaboo has reared its head in wake of efforts to deregulate the telecom industry. But there is reason to worry if it's taken seriously.

The Baby Bell companies scored a victory in March when a federal court scotched rules forcing them to rent their phone networks to rivals at cut-rate prices. Now Verizon, BellSouth and other overseers of wiring the "last mile" of telephone connections into homes are being accused of "predatory pricing," or lowering customer rates to drive competitors out of business.

Why your phone bill is getting lower.

Given today's telecom market, however, this notion falls somewhere between nonsensical and impossible. For starters, telecommunications is no more susceptible to predation than other industries. And when this illegal activity does occur, which is rare, antitrust laws are in place to stamp it out and punish the wrongdoers. If there's reason for consumers (and investors) to be concerned, it's that state regulators will jump the gun and enact costly prophylactic measures to guard against a phantom menace.

That's exactly what the Bell rivals now crying foul want to happen, even though it would lead to higher phone bills. From New York to Florida to Michigan, the Bells have cut retail prices in an effort to lure back some of the 20 million or so customers lost in the years they've been forced to subsidize their direct competitors.

In a recent Journal article, the co-owner of QuickConnect U.S.A., a Michigan phone company that competes with SBC, said the Bell company was lowering rates to drive his firm into bankruptcy. In Florida, Supra Telecom, another Bell rival, has complained to state regulators that BellSouth's promotional offers constitute "anti-competitive, monopolistic behavior," in the words of Supra CEO Russ Lambert.

To believe this, however, is to ignore all that is happening elsewhere in telecom. Cable companies already offer telephony service—be it traditional circuit-switch or cutting-edge Voice Over Internet Protocol (VOIP)—to 12 million homes nationwide. That number is expected to climb to 24 million by the end of this year and by another 20 million next year. And that's just for their own service. Anyone with access to cable modem service, some 90% of the country, can get VOIP from any number of other providers. Which is to say that the real competition faced by the Bells today is coming from broadband providers that don't depend on the Bell network to reach homes.

The idea that, in a market this dynamic, Verizon or SBC or some other Baby Bell is offering promotional discounts to consumers in hopes of driving all rivals out of business so that it can later raise rates to recoup losses and ultimately gain monopoly status is, well, far-fetched. And that's not including the competition from wireless carriers catering to the country's 157 million cell phone users, 30% of whom are expected to "cut the cord" completely from land lines within four years.

In a recent paper for the Progress & Freedom Foundation, a think tank focused on telecom policy, Raymond Gifford and Adam Peters explain that what's really behind most charges of predatory behavior is a strategic attempt by rivals to maintain a price umbrella. "Rivals, especially inefficient rivals," write the authors, "use predation allegations to protect themselves from vigorous price competition." Moreover, regulation can "inhibit communications markets from ever reaching competitive equilibrium. In the end, measures to impede predation keep consumers' rates higher than they should be."

What's driving telecom pricing today is competition. Companies are offering customers what they want—voice, cable and Internet service "bundles"—at the lowest prices possible. This is not a sign that something's funky in the marketplace; it's a sign that the market is working.

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