

Timolyn Henry

From: Slaughter, Brenda [Brenda.Slaughter@BellSouth.COM]
Sent: Wednesday, July 21, 2004 10:40 AM
To: Filings@psc.state.fl.us
Cc: Linda Hobbs; Foshee, Lisa; Fatool, Vicki; Holland, Robyn P; Nancy Sims; Bixler, Micheale
Subject: Docket 040301-TP
Importance: High

- A. Brenda Slaughter
 Legal Secretary for Lisa Foshee
 BellSouth Telecommunications, Inc.
 c/o Nancy Sims
 150 South Monroe, Rm. 400
 Tallahassee, Florida 32301-1558
 (404) 335-0714
brenda.slaughter@bellsouth.com
- B. Docket No. 040301-TP: Petition of Supra Telecommunications and Information Systems, Inc. for Arbitration with BellSouth Telecommunications, Inc.
- C. BellSouth Telecommunications, Inc.
 on behalf of Lisa Foshee
- D. 9 pages total (PDF filing with signature)
 7 pages (WORD in lieu of disk)
- E. BellSouth Telecommunications, Inc.'s Motion to Dismiss or, in the Alternative, Partial Motion to Dismiss Supra Telecommunications and Information Systems, Inc.'s First Amended Petition

Brenda Slaughter (sent on behalf of Lisa Foshee)
 BellSouth Telecommunications, Inc.
 Suite 4300 - Legal Department
 675 W. Peachtree Street

CMP Atlanta, GA 30375-0001
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OPC <<040301-TP Motion to Dismiss.pdf>> <<040301-TP BLS Motion to Dismiss amended petition.doc>>
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ORIGINAL

Legal Department

LISA S. FOSHEE
Senior Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0754

July 21, 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

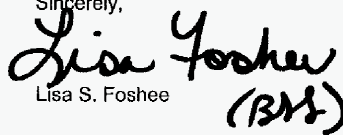
**Re: Docket No.: 040301-TP
Petition of Supra Telecommunications and Information Systems, Inc. for
Arbitration with BellSouth Telecommunications, Inc.**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion to Dismiss or, in the Alternative, Partial Motion to Dismiss Supra Telecommunications and Information Systems, Inc.'s First Amended Petition, 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,


Lisa S. Foshee
(B/S)

Enclosure

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

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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 21st day of July, 2004 to the following:

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Jason Rojas
Jeremy Susac
Staff Counsels
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
Tel No. (850) 413-6179 or 6236
Fax No. (850) 413-6250
jrojas@psc.state.fl.us
Jsusac@psc.state.fl.us

Brian Chaiken
Supra Telecommunications &
Information Systems, Inc.
2620 S. W. 27th Avenue
Miami, FL 33133
Tel. No. (305) 476-4248
Fax. No. (305) 443-1078
bchaiken@stis.com

Ann H. Shelfer
Supra Telecommunications &
Information Systems, Inc.
Koger Center – Ellis Building
1311 Executive Center Drive
Suite 220
Tallahassee, FL 32301-5067
Tel. No. (850) 402-0510
Fax. No. (850) 402-0522
ashelfer@stis.com


Lisa S. Foshee
(B/S)

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: July 21, 2004
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BELLSOUTH'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, PARTIAL MOTION TO DISMISS SUPRA'S FIRST AMENDED PETITION

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Motion to Dismiss Or, In the Alternative, Partial Motion to Dismiss Supra's First Amended Petition and respectfully requests as follows: First, BellSouth requests that the Commission dismiss the entire Amended Petition on the grounds that it impermissibly seeks an order reconsidering the Commission's decision in Docket No. 990649-TP (the "Cost Docket") in a two-party complaint proceeding. In the alternative, BellSouth requests (1) that the Commission dismiss the portion of the Amended Petition seeking expedited relief on the grounds that the Pre-Hearing Officer already denied Supra's request for expedited relief; and (2) that the Commission dismiss the portion of the Amended Petition seeking the imposition of an interim rate on the grounds that the Pre-Hearing Officer already denied Supra's request for an interim rate.

FACTS

On May 25, 2001, the Commission entered Order No. PSC-01-1181-FOF-TP in its generic Cost Docket (the "Cost Order"). In the Cost Order, the Commission established the cost methodology by which UNE rates would be set in Florida. The Commission specifically spent a large part of the Cost Order establishing the methodology applicable to nonrecurring costs for UNEs, including loops. Cost Order, at 279-366. In its discussion of nonrecurring costs for loops the Commission explicitly recognized that BellSouth used probabilities to assign dispatch and non-dispatch provisioning for SL1 loops. *Id.* at page 335 ("one of the changes to the SL1 loop

nonrecurring cost study was an increase in the field dispatch rate from 20 percent to 38 percent ...”) Later in the Cost Order the Commission compared the 100 percent dispatch rate used for xDSL loops with the 38 percent dispatch rate for SL1 loops. *Id.* at 348. While the Commission reduced work times associated with loop provisioning, the Commission did not alter either the 100 percent dispatch probability for xDSL loops or the 38 percent dispatch probability for SL1 loops. *Id.* at 349-350. Thus, the Commission approved the methodology of melding dispatch and nondispatch costs for determining the nonrecurring costs of an SL1 loop.

On April 5, 2004, Supra filed a Petition for Arbitration with BellSouth and Petition for A Full Commission Panel Pursuant to Section 305.01(6) (the “Petition”) seeking a non-recurring rate for a UNE-P to UNE-L conversion. In its original Petition, Supra asserted a claim for expedited relief (*see Petition*, at ¶¶ 6-8) and a claim for an interim rate pending final resolution of the Petition (*see Petition*, at ¶ 21). At the June 14, 2004 Issue Identification, counsel for the Commission informed both parties that the Pre-Hearing Officer had denied Supra’s request for expedited relief and its claim for an interim rate, but had granted Supra’s request for a hearing before the full commission. Neither party filed any objections to these rulings.

On June 23, 2004, Supra filed a Motion for Leave to Amend and a First Amended Petition (the “Amended Petition”). In the Amended Petition, Supra asserted a claim for expedited relief (*Amended Petition*, at ¶¶ 9-13) and a claim for an interim rate (*Amended Petition*, at ¶ 28). Moreover, Supra amended its petition to more accurately reflect what it really wants – namely, two separate non-recurring rates for UNE loops depending on whether or not a dispatch is involved (irrespective of whether the loop is provided from a BellSouth retail customer or a UNE-P line). (*Amended Petition*, at ¶ 27).

ARGUMENT

I. The Commission Should Dismiss The Amended Petition Because It Is An Improper Attempt To Relitigate The Cost Docket.

- A. The “hot cut rate” for an SL1 or SL2 loop is comprised of the nonrecurring rate for the loop, a cross-connect and service order processing.

In the Cost Docket, MCI described nonrecurring costs as follows:

The non-recurring cost of a particular action, then, is simply the sum of the costs of each of the necessary work activities, calculated as the product of (1) the required time, (2) the labor rate, and (3) the probability of occurrence of each work activity.

Cost Order, at p. 291. The process of moving an SL1 or SL2 loop from a BellSouth switch to a CLEC switch is comprised of the work activities necessary to provision these UNE loops. The costs associated with those work activities are captured in the nonrecurring cost for the loop. Thus, the hot cut service that BellSouth provides to CLECs is comprised of the nonrecurring cost of the loop, a cross-connect charge and a service order processing charge. The provisioning costs for an SL1 and SL2 loop are recovered in the nonrecurring rate for the loop.

- B. The Commission established nonrecurring costs for SL1 and SL2 loops in its Cost Docket.

In its *Cost Order*, the Commission established the methodology by which nonrecurring costs would be calculated. *Cost Order*, at pp. 279-366. The Commission-ordered methodology applied to all UNEs, including SL1 and SL2 loops. In accordance with its approved methodology, the Commission generated nonrecurring rates and provided them with the *Cost Order*. The Commission-ordered nonrecurring rates became available to all CLECs in Florida.

Among the rates established by the Commission were recurring and nonrecurring costs (i.e., “hot cut charge”) for SL1 and SL2 loops. While it is a theoretical possibility that a CLEC

could negotiate different rates with BellSouth, as a practical matter the Commission's Cost Order constitutes a UNE price sheet for Florida.

- C. The Commission explicitly approved a nonrecurring cost methodology that melds dispatch and nondispatch.

✱

- 1) The Commission and the parties to the Cost Docket agreed that the calculation of nonrecurring costs included the assignment of probabilities.

During the Cost Docket, the Commission and the parties agreed on the use of probabilities to calculate nonrecurring costs. As described above, MCI specifically enumerated the calculation of "the probability of occurrence of each work activity" as a necessary component of the calculation of nonrecurring costs. *Cost Order*, at p. 291. Critically to this case, the Commission agreed with BellSouth and MCI about the necessity of probabilities. The Commission held that "[w]e also agree with the witnesses that, for this issue, identifying the work activities, work times, and any probabilities that the activities will occur is the appropriate way to study nonrecurring costs." *Cost Order*, at p. 292.

2. The Commission approved the use of a melded dispatch/nondispatch nonrecurring rate for SL1 and SL2 loops.

In the Cost Docket, the Commission approved a probability of 38 percent dispatch (or 62 percent nondispatch) for use in the calculation of the non-recurring cost for an SL1 loop.¹ *Cost Order*, at 349-350. This means, of course, that the Commission-ordered nonrecurring rate blends the costs for dispatch and nondispatch into a single melded rate. **The Commission-approved** nonrecurring cost methodology fully accounts for variations in dispatch and nondispatch provisioning by applying the 38/62 probability. It is precisely this decision that *Supra* seeks to relitigate in this case. Notably, the Cost Order does not reflect one CLEC challenge to the SL1 probabilities specifically, nor to the use of probabilities for dispatch/nondispatch generally.

¹ Because an SL2 is a design circuit, BellSouth used 100 percent dispatch probability for SL2 loops. The probability methodology is identical to that approved for the xDSL loops.

D. Supra's Petition Impermissibly Seeks To Undo the Cost Order and Establish Separate Rates for Dispatch and Non-dispatch Provisioning In Lieu of Probabilities In a Two-Party Proceeding

Supra's entire claim that it wants a "new rate" for a UNE-P to UNE-L conversion was nothing more than a smokescreen for what it really wants --- two nonrecurring costs for SL1 loops, one for 100% dispatch and one for 100% nondispatch. The relative merits of Supra's position on this issue are irrelevant. All that is relevant is that Supra is attempting to use the Commission two-party Complaint process to reverse a Commission decision issued in an industry-wide generic docket over three years ago. Allowing Supra to pursue this claim would not only be legally unsustainable but would jeopardize the finality of every Commission order issued in a generic docket.

The following facts cannot be disputed: (1) the Commission established nonrecurring rates for SL1 and SL2 loops; (2) the Commission-approved methodology for calculating those rates used dispatch/non-dispatch probabilities; (3) all CLECs had an opportunity to participate in the docket, and all CLECs in Florida are bound by the results of that docket. Given those undisputed (or what should be undisputed) facts, it is clear that the Commission cannot allow Supra to attempt to undo the Cost Order in a two-party complaint proceeding.

If Supra is serious about its attempt to relitigate an issue on which there was little disagreement amongst the parties or the Commission, Supra must petition the Commission to reopen the cost docket.² The Commission has already decided the precise issue Supra is trying to raise in its Amended Petition in the context of a generic proceeding. To reverse its decision in the context of a limited two-party complaint would be legally unsustainable and open the flood

² Certainly, BellSouth reserves the right to comment on the appropriateness of such action should such a petition be filed. There should be no doubt, however, that such a petition is the only appropriate procedural vehicle for Supra's claim.

gates for post hoc “appeals” of generic commission dockets. Consequently, the Commission must dismiss Supra’s Amended Petition.

II. In the Alternative, The Commission Should Enter A Partial Dismissal Of Supra’s Claims For Expedited Relief and Interim Rate.

Supra’s claims in its Amended Petition for expedited relief and the establishment of an interim rate are barred by the doctrine of collateral estoppel. *Mobil Oil Corp. v. Shevin*, 354 So.2d 372, 374 (Fla. 1977) (collateral estoppel “is a judicial doctrine which in general terms prevents identical parties from relitigating issues that have previously been decided between them”).³ In its initial Petition, Supra made identical claims for expedited relief and the establishment of an interim rate. The Pre-Hearing Officer denied both of Supra’s requests. (Oral ruling, Issue Identification, June 14, 2004). The filing of an Amended Petition does not give Supra another bite at the apple on relief the Commission already has denied. Consequently, in the event the Commission does not dismiss the entire Amended Petition, the Commission should dismiss Supra’s claims for expedited treatment and the establishment of an interim rate.

CONCLUSION

For the reasons set forth herein, BellSouth respectfully requests that the Commission dismiss Supra’s Amended Petition in its entirety or, in the alternative, dismiss Supra’s claims for expedited relief and the establishment of an interim rate.

³ The essential elements of collateral estoppel are that the parties and issues be identical, and that the particular matter be fully litigated and a final decision rendered. Obviously, the parties and the issues are identical between the first petition and the Amended Petition, and the Pre-Hearing Officer’s decision denying expedited relief and an interim rate constituted a final decision on the matter.

This 21st day of July, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy White
NANCY B. WHITE (BTS)

c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301-1558
(305) 347-5558

Lisa Foshee
R. DOUGLAS LACKEY (BTS)

E. EARL EDENFIELD, JR.
LISA S. FOSHEE
675 West Peachtree Street
Suite 4300
Atlanta, Georgia 30375-0001
(404) 335-0754

543270