BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc.	DOCKET NO. 040301-TP
In re: Joint petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom d/b/a Grapevine; Birch Telecom of the South, Inc. d/b/a Birch Telecom and d/b/a Birch; DIECA Communications, Inc. d/b/a Covad Communications Company; Florida Digital Network, Inc.; LecStar Telecom, Inc.; MCI Communications, Inc.; and Network Telephone Corporation ("Joint CLECs") for generic proceeding to set rates, terms, and conditions for hot cuts and batch hot cuts for UNE-P to UNE-L conversions and for retail to UNE-L conversions in BellSouth Telecommunications, Inc. service area.	DOCKET NO. 041338-TP ORDER NO. PSC-05-0157-PCO-TP ISSUED: February 8, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER GRANTING CONSOLIDATION OF
DOCKET NUMBERS 040301-TP AND 041338-TP, AND
DENYING MOTION FOR PARTIAL FINAL SUMMARY ORDER AND
MOTION FOR RECONSIDERATION

BY THE COMMISSION:

Case Background

On June 23, 2004, Supra Telecommunications and Information Systems, Inc. (Supra) filed its Amended Petition for Arbitration with BellSouth Telecommunications, Inc. (BellSouth). BellSouth filed its Answer and Response on July 21, 2004. The matter was then set for a two-day hearing (December 1 - 2, 2004) and later reduced to a one-day hearing for December 2, 2004.

On November 23, 2004, a joint petition in Docket 041338-TP was filed for a generic proceeding regarding rates, terms and conditions for hot cuts with BellSouth. On November 29, 2004, BellSouth filed an Emergency Motion for Continuance (Motion) of the hearing in Docket 040301-TP. In addition to asking this Commission for a continuance, BellSouth also requested that this docket be consolidated with Docket 041338-TP. On November 30, 2004, Supra filed its response. BellSouth's Motion was granted in part and by Order No. PSC-04-1180-PCO-TP, issued on November 30, 2004, that continued the hearing. No ruling was made on the motion to consolidate.

That same day, Supra filed an Emergency Motion For Reconsideration of the Prehearing Officer's Order. BellSouth filed its opposition to that motion on December 7, 2004.

On December 6, 2004, Supra filed a Motion For Partial Summary Final Order on Issues 3 and 4. BellSouth filed an Unopposed Motion for Extension of Time to respond. The Unopposed Motion was granted and on December 17, 2004, BellSouth filed its Response to Supra's Motion for Partial Summary Final Order on Issues 3 and 4.

This Order pertains to the following motions: (1) BellSouth's Emergency Motion For a Continuance that also asks this Commission to consolidate Docket No. 040301-TP with Docket No. 041338-TP; (2) Supra's Motion for Partial Summary Final Order; and (3) Supra's Emergency Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP, issued on November 30, 2004, and its Request for Oral Argument.

Discussion of Issues

I. Consolidation

This issue addresses whether or not Docket No. 040301-TP and 041338-TP should be consolidated.

A. BellSouth' Position

BellSouth filed an Emergency Motion For Continuance upon learning of a recent petition by a coalition of CLECs requesting the we to consider the rates, terms and conditions for a UNE-P to UNE-L conversion in a generic docket. BellSouth argues that Issues 1 and 2 in this proceeding are the only issues that distinguish Docket No. 040301-TP from Docket No. 041338-TP. However, BellSouth argues that these issues are no longer relevant because Supra has agreed to dismiss Issues 1 and 2 after the hearing. This leaves Issues 3 and 4 in Docket 040301-TP, which BellSouth claims involve the exact same issues surrounding the rates for a UNE-P to UNE-L conversion as set forth in Docket No. 041338-TP. BellSouth points out that, "... the Commission now finds itself in a situation where it can either: (1) go forward with this proceeding as scheduled, which will effectively preclude the participation of other CLECs in any decision regarding rates for UNE-L conversions, or; (2) continue this proceeding so that a decision can be made as to whether the Commission's resources and due process can best be served by having a single proceeding to address the rates for conversions to UNE-L." (Emergency Motion at p.2).

B. Supra's Position

First, Supra argues that BellSouth's Emergency Motion is an attempt to further delay BellSouth's obligation to perform UNE-P to UNE-L conversions at a reasonable, cost-based price. Second, Supra argues that every CLEC in the state of Florida had an opportunity to petition to intervene in this docket but chose not to intervene. Third, Supra argues that it will be severely prejudiced by the delay that would result if BellSouth's Emergency Motion is granted. Supra supports this argument in light of anticipated increased prices it will be charged for UNE-P, and that the current UNE-P to UNE-L conversion rate makes it economically infeasible for Supra to serve a significant number of customers through its own switch. Last, Supra requests that if we grant BellSouth's Motion For Continuance, then this Commission should set an interim rate for a UNE-P to UNE-L conversion subject to a true-up.

Supra requests that the interim blended rate be set at $23.09 for SL1 hot cuts and $53.58 for SL2 hot cuts. Supra arrives at these numbers by assuming use of BellSouth's bulk migration process (batch hot cuts), and using the rates BellSouth claims apply to the processes being performed in this proceeding. Supra states that it would pay BellSouth $49.57 for each of the first SL-1 hot cut, and $22.83 for the subsequent 98 hot cuts.

C. Decision:

Upon consideration of the above arguments, we find it appropriate to consolidate Docket Nos. 040301-TP and 041338-TP. We have considered of Supra's arguments that it will be prejudiced by further delay of BellSouth's obligation to perform UNE-P to UNE-L conversions. However, seven other CLECs share the same concerns about BellSouth's obligation to perform UNE-P to UNE-L conversions, and as a result, we find that administrative efficiencies will be gained by a single proceeding.

Only Issues 1 and 2 in Docket 040301-TP are unique to BellSouth and Supra. Supra has agreed to withdraw those issues after the hearing in Docket No. 040301-TP. The remaining issues are virtually identical to the Joint CLEC's petition in Docket 041338-TP. Consolidation will therefore allow all CLECs in the State of Florida to participate in a decision regarding rate(s) for a UNE-P to UNE-L conversion that has industry-wide implications.

We are equally aware of Supra's argument that we previously addressed the possibility of a new rate at the September 21, 2004 Agenda. However, Supra's request for expedited treatment was denied due to the fact that its Amended Petition requested a "cost-based analysis of a very technical nature." See, Order No. PSC-04-0752-PCO-TP, issued on August 4, 2004.

Last, we find that Supra's request for an interim rate is outside the scope of its First Amended Petition. Supra's First Amended Petition relates to an individual rate for a UNE-P to UNE-L conversion, not a rate for a batch hot cut. If Supra now wants a rate for a batch hot cut, then this is an argument more appropriately made in Docket No. 041338-TP.

Based on the foregoing, Dockets Nos. 040301-TP and 041338-TP shall be consolidated due to the fact that administrative efficiencies would be gained by a single proceeding. Consolidation of the dockets will also give the entire CLEC community an opportunity to put forth evidence regarding the UNE-P to UNE-L conversion. However, it should be strongly noted that Issues 1 and 2 put forth in Docket No. 040301-TP will be preserved as company-specific issues within the consolidated proceeding. Docket Nos. 040301-TP and 041338-TP will remain open and proceed to hearing.

II. Motion for Partial Summary Final Order

This issue addresses whether or not Supra's Motion for Partial Summary Final Order should be granted.

A. Supra's Position

Pursuant to Sections 3.1, 3.8 and 3.8.1 of the parties Interconnection Agreement (ICA), and testimony by BellSouth witness Kenneth Ainsworth, Supra argues that this Commission need not establish nonrecurring rates for UNE-P to UNE-L conversions. Supra claims that the parties ICA requires BellSouth to perform UNE-P to UNE-L conversions at BellSouth's own

costs unless a specific rate is identified in the parties' ICA. The fact that BellSouth may incur some expense in performing its contractual obligations does not, and cannot, change the plain and unambiguous language in the parties' ICA. Therefore, Supra contends that we need not make a determination on Issues 3 and 4, regarding whether a new conversion rate for UNE-P to UNE-L should be set.

Supra also argues that BellSouth is trying to incorporate the UNE-P to UNE-L conversion process into its general, all purpose SL1 and SL2 UNE loop cost study. Supra claims that it is undisputed that the cost study allocates costs associated with the construction of new UNE loop service. Supra further claims that BellSouth is trying to redefine and is misinterpreting this cost study to somehow include the cost for the construction of new service, and also for the costs of effectuating UNE-P to UNE-L conversions.

B. BellSouth's Position

First, BellSouth argues that Supra's Motion does not meet the legal standard for a summary final order. BellSouth argues that there is no correlation between Supra's instant Motion and Issues 3 and 4. BellSouth claims that Supra's argument is misplaced because it is predicated upon the parties Interconnection Agreement (ICA) which is not related to Issues 3 and 4. Further, BellSouth argues that paragraphs six through thirteen of Supra's undisputed facts are identical allegations to its previously denied Motion For Partial Summary Final Order on contractual issue.

BellSouth argues that paragraphs one through five of Supra's Motion are faulty contract construction. For instance, BellSouth contends that Supra's quotes from section 3.1 of the ICA apply to terminating the entire ICA or a specific ICA attachment, which in not the case in Docket No. 040301-TP. Because Supra is not terminating the ICA or an attachment thereof, BellSouth argues that this argument is inapplicable to UNE-L conversions. BellSouth also contends that the remaining allegations listed as undisputed facts are interpretations of quotes taken out of context and/or incorrect interpretations of inapplicable provisions from the General Terms and Conditions section of the parties' ICA.

BellSouth argues that this Commission should reject Supra's argument that under Section 22.1 of the ICA, BellSouth must provide hot cuts for free. BellSouth bases its reasoning on a decision made in bankruptcy court, where Supra made the same argument and was ultimately required to pay the same rates as BellSouth puts forth for a UNE-P to UNE-L conversion.

C. Decision

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may

be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

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.[1] The burden is on the movant to demonstrate that the opposing party cannot prevail.[2] "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."[3] "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[4] If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[5] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[6]

Moreover, we have recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[7] this Commission found that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
>
> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus

[1] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).

[2] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

[3] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

[4] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[5] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[6] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

[7] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

> foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

In the case at hand, Supra claims that the current agreement does not contain a rate for a UNE-P to UNE-L conversion and therefore it should receive such conversions for free. It is therefore Supra's burden to demonstrate that BellSouth cannot prevail on this issue,[8] and that not the slightest doubt exists as to whether the agreement contains a rate for a UNE-P to UNE-L hot cut. Supra has failed to meet this burden, because although the agreement does not explicitly list a rate for a UNE-P to UNE-L "hot cut," the agreement may contain appropriate rates associated with the necessary steps to effectuate such a "hot cut." In other words, an issue of fact exists as to whether an appropriate rate for a UNE-P to UNE-L conversion is contained in the parties' ICA. Therefore, we deny Supra's Motion for Partial Final Summary Order.

III. Motion for Reconsideration

This issue addresses whether or not Supra's Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP, issued November 30, 2004, should be granted.

A. Supra's Position

Supra argues that it will be severely prejudiced by the delay that would result if BellSouth's Emergency Motion for Continuance is granted. Supra argues that this is especially true in light of anticipated increased prices they will be charged for UNE-P, and that the current UNE-P to UNE-L conversion rate makes it economically infeasible for Supra to serve a significant number of customers through its own switch. Further, Supra argues that it would be severely prejudiced should it wait longer to proceed to trial and would need to re-prepare and re-incur the costs it has already expended.

B. BellSouth's Position

BellSouth states that Supra has failed to meet any of the legal requisites for granting reconsideration. First, BellSouth states that the Prehearing Officer had ample time to consider the underlying motion and response. Next, BellSouth contends that Supra fails to identify any fact or law that overlooked by the Pre-hearing Officer. Further, BellSouth argues that nothing in the underlying Order suggests that this Commission will not ultimately have a ratemaking proceeding to consider the appropriate rate for a UNE-P to UNE-L conversion. BellSouth states that granting the continuance merely gives this Commission more time to decide whether the issue should be considered on a state-wide basis in a generic proceeding as requested by the

[8] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

coalition of CLECs. Last, BellSouth argues that the passing of the hearing dates has rendered the motion for reconsideration moot.

C. Decision

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., 294 So. 2d at 317. Last, it is well-established that it is inappropriate to raise new arguments in a motion for reconsideration. In re: Established Nondiscriminatory Rates, Terms and Conditions, Docket 950984-TP, Order No. PSC-96-1024-FOF-TP; August 7, 1996. This standard is equally applicable to Orders issued by the Prehearing Officer.

Supra fails to identify any point of fact or law that the Prehearing Officer failed to consider in rendering his Order. Supra's arguments have been considered and rejected by the Prehearing Officer. In addition, the arguments have been rendered moot by passage of time.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Emergency Motion For a Continuance is granted to the extent it asks us to consolidate Docket No. 040301-TP with Docket No. 041338-TP. It is further

ORDERED that Supra Telecommunications and Information Systems, Inc.'s Motion for Partial Summary Final Order is hereby denied. It is further,

ORDERED that Supra Telecommunications and Information Systems, Inc.'s Emergency Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP, issued on November 30, 2004, and its Request for Oral Argument are denied.

By ORDER of the Florida Public Service Commission this 8th day of February, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

JLS/FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order regarding consolidation and denial of the motion for summary final order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final action denying the motion for reconsideration in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.