

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Supra
Telecommunications and
Information Systems, Inc.
against BellSouth
Telecommunications, Inc. for
violation of the
Telecommunications Act of 1996;
petition for resolution of
disputes as to implementation
and interpretation of
interconnection, resale and
collocation agreements; and
petition for emergency relief.

DOCKET NO. 980119-TP
ORDER NO. PSC-00-1777-PCO-TP
ISSUED: September 28, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.

ORDER REOPENING RECORD AND DISPOSING OF
PROCEDURAL MOTIONS

BY THE COMMISSION:

I. CASE BACKGROUND

On January 23, 1998, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged violations of the Telecommunications Act of 1996 (Act) and Petition for resolution of certain disputes between BellSouth and Supra regarding interpretation of the Interconnection, Resale, and Collocation Agreements between Supra and BellSouth (Petition). On February 16, 1998, BellSouth filed its Answer and Response to Supra's Petition. On April 30, 1998, we held a hearing in which it received testimony concerning Supra's complaint. By Order No. PSC-98-1001-FOF-TP, issued July 22, 1998, we rendered our final determination regarding the complaint.

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On August 6, 1998, BellSouth filed a Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP. That same day, Supra filed a Motion for Reconsideration and Clarification, as well as a Motion to Take Official Notice of the Record in Docket No. 960786-TL. On August 17, 1998, BellSouth filed its Response to Supra's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TL. BellSouth also filed its Opposition to Supra's Motion to Take Official Recognition of the Record in Docket No. 960786-TL. On August 18, 1998, Supra filed its Response to BellSouth's Motion for Reconsideration and Clarification, as well as a Request for Oral Argument. On August 21, 1998, BellSouth filed its Opposition to Supra's Request for Oral Argument.

On September 2, 1998, Supra filed a Motion to Dismiss BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and Motion to Strike BellSouth's Answer in Docket No. 980800-TP for Misconduct. Supra also requested oral argument on its motion. On September 9, 1998, BellSouth filed its Opposition to Supra's Motion to Dismiss and Motion to Strike and its own Motion to Strike and Motion for Oral Argument. BellSouth also included a Motion for Sanctions in its filing. On September 21, 1998, Supra filed its Response to BellSouth's Motion to Strike Supra's Motion to Dismiss and Motion for Sanctions. Supra also included a request to accept its Response Out of Time. On September 23, 1998, BellSouth filed its Opposition to Supra's request to accept its Response to BellSouth's Motion to Strike. By Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, we denied the motions for reconsideration and to supplement the record, and clarified our post-hearing Order.

Thereafter, on November 24, 1998, BellSouth filed a Complaint in the federal district court for the Northern District of Florida appealing our decision, Case No. 4:98CV4041-WS. The Complaint asked that the above Commission Orders be declared invalid and that enforcement of them be enjoined "to the extent that they require BellSouth to provide Supra with on-line editing capabilities." Complaint, p. 8.

On January 1, 1999, Supra filed with this Commission a Notice that BellSouth had not complied the Commission's final Order. On April 26, 1999, BellSouth filed a Notice of Compliance with our final Order, and asked that we acknowledge BellSouth's compliance.

On June 16, 1999, BellSouth filed a Motion to Hold Proceedings in Abeyance Pending Action in Related Administrative Proceedings seeking to abate its federal appeal to enable us to determine if BellSouth had complied with the Commission's Orders issued in this Docket. Supra opposed the motion. The Court issued an order on September 6, 1999, abating the federal case until December 1, 1999.

On November 22, 1999, the parties and our staff met to discuss and attempt to clarify which, if any, matters in this Commission's Final Order had been complied with or otherwise resolved. Our staff also attempted to mediate a resolution between the parties. During those discussions, BellSouth was asked to provide further information. BellSouth provided the information on December 10, 1999.

Based upon the Notice of Compliance filed by BellSouth, Supra's response, the discovery provided by the parties, and information gained as a result of our staff's November 22, 1999, meeting with the parties, we issued Order No. PSC-00-0288-PCO-TP, on February 11, 2000. Therein, we determined that BellSouth had complied with all portions of our final decision in this case, Order No. PSC-98-1001-FOF-TP, issued July 22, 1998, as clarified by Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, except for the specific requirements that BellSouth must provide Supra with on-line edit checking capability by December 31, 1998. We did, however, acknowledge that BellSouth had made significant developments in its OSS since the time that we rendered our final decision, including the development of TAG, Robo-TAG, and LENS '99.

On February 25, 2000, Supra filed a Motion for Reconsideration of our decision, as well as a Request for Oral Argument. On March 8, 2000, BellSouth filed its Response, which included a request that we reconsider our decision not to proceed to hearing on the limited issue of on-line edit checking capability. Supra did not file a response to this apparent request/cross-motion for reconsideration. By Order No. PSC-00-0798-FOF-TP, issued April 24, 2000, we denied both parties' requests for reconsideration pending the outcome of the federal proceedings.

On May 8, 2000, the federal district court granted BellSouth's voluntary dismissal of its appeal to allow us to address the issue of whether BellSouth is in compliance with the on-line edit checking requirements.

On June 8, 2000, BellSouth filed a Motion for Reconsideration asking that the issue of whether or not BellSouth has complied with the edit checking capability requirements of Order No. PSC-98-1001-FOF-TP be resolved by the third party testing of BellSouth's OSS, which is currently being conducted pursuant to Order No. PSC-00-0104-PAA-TP, in Dockets Nos. 981834-TP and 960786-TL. On July 5, 2000, Supra filed its response and opposition to BellSouth's Motion, as well as a request for oral argument. Thereafter, on July 10, 2000, BellSouth filed a reply to Supra's response. On July 12, 2000, Supra filed a Motion to Strike BellSouth's Reply to Supra's Response, and a Motion to Strike BellSouth's Motion for Reconsideration. BellSouth did not respond to the Motions to Strike.

Our decision on these motions is set forth below.

II. JURISDICTION

We have jurisdiction to resolve this matter pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. See also Iowa Utilities Bd. V. FCC, 120 F. 3d 753, 804 (8th Cir. 1997) (state commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements).

III. SUPRA'S REQUEST FOR ORAL ARGUMENT

Rule 25-22.058, Florida Administrative Code, requires that a request for oral argument must accompany the pleading upon which argument is requested.

BellSouth indicates that it opposes Supra's request for oral argument, because Supra's response, as well as the request for oral argument, were untimely filed.

In this particular case, Supra's request did accompany its response to BellSouth's motion in accordance with the Rule. Supra's response to the motion was, however, late, as explained in Section VI of this Order. Therefore, we find that Supra's request for oral argument must also be considered late. It would seem inconsistent to allow oral argument on an untimely response. Thus, Supra's Request for Oral Argument is denied.

IV. SUPRA'S MOTION TO STRIKE BELLSOUTH'S REPLY BRIEF

Supra argues that the rules governing motions for reconsideration contemplate a motion and a response. Neither provides for a reply brief, such as that filed by BellSouth. Therefore, Supra asks that BellSouth's reply be stricken.

BellSouth did not file a response to the Motion to Strike.

We agree with Supra that neither the Uniform Rules nor our rules contemplate a reply to a response to a Motion. Therefore, the Motion to Strike is granted.

V. SUPRA'S MOTION TO STRIKE BELLSOUTH'S MOTION FOR RECONSIDERATION

In its Motion to Strike, Supra contends that a Motion for Reconsideration must be filed within 15 days of the issuance of the final order, or within 10 days of the issuance of a non-final order, according to Commission rules. Supra emphasizes that this Commission's rules on motions for reconsideration state that failure to timely file constitutes a waiver of the right to do so. Therefore, Supra asks that BellSouth's Motion for Reconsideration be stricken as untimely.

BellSouth did not file a response to the Motion.

Although styled as a Motion for Reconsideration, BellSouth's Motion does not seek reconsideration of any specific Commission Order. Instead, BellSouth asks that we determine that the issue of whether BellSouth has modified the ALEC ordering system, specifically TAG, LENS, and Robo-TAG, so that an ALEC may use them to submit orders in the same manner as BellSouth's retail representatives should be resolved in Dockets Nos. 960786-TL and 981834-TP. BellSouth asks that this be done because circumstances have changed since the time that we issued our original post-hearing order in this Docket, and BellSouth now has interfaces that provide this capability that were not considered by this Commission. Florida courts have held that "[a] pleading will be considered what it is in substance, even though mislabelled." Mendoza v. Board of County Commissioners/Dade County, 221 So. 2d 797, 798 (3rd DCA 1969). See also Sodikoff v. Allen Parker Company, 202 So.2d 4 (Fla.App.1967); Hough v. Menses, 95 , 95 So.2d 581, 582 (Fla. 1957). "Courts should look to the substance of a

motion and not the title alone." Mendoza v. Board of County Commissioners/Dade County, 221 So. 2d 797, 798 (3rd DCA 1969). Thus, we look to the substance of BellSouth's Motion for Reconsideration and find that it is a request to reopen the record of this Docket. As such, we find that Supra's Motion to Strike BellSouth's Motion for Reconsideration shall be denied.

VI. BELLSOUTH'S MOTION FOR RECONSIDERATION

A. Supra's Response

Although BellSouth filed its Motion on June 8, 2000, Supra did not file a response until July 5, 2000. Pursuant to Rule 28-106.204(1), Florida Administrative Code, responses to motions must be filed within seven days, with five additional days allowed for service by mail. Therefore, Supra's response was actually due by June 20, 2000. As such, Supra's response was filed a full two weeks late. Supra did not accompany its response with a request to accept its late-filed response, nor did it include any explanation of its failure to timely file within the context of its response. Therefore, we shall not consider Supra's response in rendering our decision on BellSouth's Motion.

B. BellSouth's Motion

As explained in the previous section of this Order, BellSouth's Motion does not seek reconsideration of any specific Commission Order. Instead, BellSouth asks that we determine that the issue of whether BellSouth has modified the ALEC ordering systems, specifically TAG, LENS, and Robo-TAG, so that an ALEC may use them to submit orders in the same manner as BellSouth's retail representatives should be resolved in Dockets Nos. 960786-TL and 981834-TP. As noted previously, BellSouth asks that this be done because circumstances have changed since the time that we issued our original post-hearing order in this Docket, and BellSouth now has interfaces that provide this capability that were not considered by us in our prior proceeding.

Although we are generally hesitant to reopen the record of any proceeding, in view of the specific changed circumstances alleged by BellSouth, we believe it is appropriate to reopen the record of this case to consider whether BellSouth's ALEC ordering system can provide on-line edit checking capability to Supra. See McCaw Communications of Florida, Inc., Appellant, vs. Susan F. Clark, 679

So. 2d 1177 (Fla. 1996). We have already acknowledged that we might find that an evidentiary proceeding is warranted based on changed circumstances, and noted that an argument could be made that the development of TAG, LENS, and Robo-TAG amounts to changed circumstances, thereby, providing a basis for rehearing by us in this case, citing McCaw Communications of Florida, Inc., Appellant vs. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996).¹ We did not preclude the possibility that should the federal proceeding be dismissed, we might find that an evidentiary proceeding is warranted based on changed circumstances. Orders Nos. PSC-00-0288-PCO-TP, issued February 11, 2000, at p. 11; and PSC-00-0798-FOF-TP, issued April 24, 2000, at pgs. 11-12.

Due to the technical complexity of the primary issue to be determined, we will postpone any administrative hearing on whether or not BellSouth's OSS provide on-line edit checking capability until the third-party OSS testing is completed in order to avoid duplicative proceedings. Once that testing is done, the information and determinations made in that proceeding will be employed in this Docket to the fullest extent possible. We note that both BellSouth and Supra are parties to Docket No. 981834-TP. Once third-party OSS testing is completed, we will consider whether the third-party testing of BellSouth's OSS has resolved the issue in dispute, or whether we should proceed to a hearing in this Docket to address any unresolved matters, including the issue of whether BellSouth timely complied with our post-hearing orders. Therefore, this Docket shall remain open pending the outcome of the third-party OSS testing being conducted in Dockets Nos. 960786-TL and 981834-TP.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that Supra Telecommunications and Information Systems, Inc.'s Request for Oral Argument is denied. It is further

¹ The McCaw Communications Court, in upholding our decision to revisit the issue of MSP interconnection rates and IXC access charges due to changed circumstances, cautioned that agencies should not take "too doctrinaire" an approach to the application of the doctrine of administrative finality. Id.

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ORDERED that Supra Telecommunications and Information Systems, Inc.'s Motion to Strike BellSouth Telecommunications, Inc.'s Reply Brief is granted. It is further

ORDERED that Supra Telecommunications and Information Systems, Inc.'s Motion to Strike BellSouth Telecommunications, Inc.'s Motion for Reconsideration is denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is granted to the extent set forth in the body of this Order. It is further

ORDERED that this Docket shall remain open pending the outcome of the third-party OSS testing being conducted in Dockets Nos. 960786-TL and 981834-TP.

By ORDER of the Florida Public Service Commission this 28th day of September, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

BK

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.

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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, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 Records and Reporting, 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.