BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for resolution of billing disputes.	DOCKET NO. 001097-TP ORDER NO. PSC-01-1585-FOF-TP ISSUED: July 31, 2001

The following Commissioners participated in the disposition of this matter:

LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

APPEARANCES:

NANCY B. WHITE, ESQUIRE, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301-1556
On behalf of BellSouth Telecommunications. Inc.

PAUL TURNER, ESQUIRE, 2620 S.W. 27th Avenue, Miami, Florida 33133
On behalf of Supra Telecommunications and Information Systems, Inc.

C. LEE FORDHAM, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

FINAL ORDER ON COMPLAINT

BY THE COMMISSION:

I. Case Background

BellSouth Telecommunications, Inc. (BellSouth) provides local exchange telecommunications services for resale pursuant to the Telecommunications Act of 1996 and to resale agreements entered into between BellSouth and various Alternative Local Exchange Companies (ALECs). Supra Telecommunications and Information Systems, Inc. (Supra) is an ALEC certified by this Commission to provide local exchange services within Florida. BellSouth and Supra entered into a two year resale agreement on June 1, 1997. On October 5, 1999, Supra adopted the BellSouth/AT&T resale agreement, and that agreement is presently in effect.

On August 9, 2000, BellSouth filed a complaint against Supra, alleging that Supra has violated Attachment 6, Section 13 of their present agreement by refusing to pay non-disputed sums. The complaint also alleges billing disputes arising from the prior resale agreement with Supra. On August 30, 2000, Supra filed a timely Motion to Dismiss or, in the Alternative, to Stay Proceedings and/or Compel Arbitration. Supra also, in a separate document, filed a timely Request for Oral Argument on its Motion. On September 8, 2000, BellSouth filed a timely Response to Supra's Motion to Dismiss or Stay.

On November 28, 2000, we issued Order No. PSC-00-2250-FOF-TP, granting oral argument, and Granting in Part and Denying In Part Supra's Motion to Dismiss. In that proceeding, we ruled that all disputes arising under the 1997 agreement would be resolved by us, and all disputes arising under the 1999 adopted agreement would be resolved pursuant to the arbitration clause contained therein. On November 17, 2000, prior to the issuance of our written Order, Supra filed a Motion for Reconsideration or Clarification of that Order. That motion was denied by Order No. PSC-01-0493-FOF-TP, entered February 27, 2001.

State commissions retain primary authority to enforce the substantive terms of agreements they have approved pursuant to Sections 251 and 252 of the Act. Iowa Utils. Bd. v. Federal Communications Commission, 120 F. 3d 753, 804 (8th Cir. 1997). A Petition has been filed requesting our review of an agreement we

previously approved to determine if the parties are in compliance with that agreement. We have jurisdiction.

II. Controlling Agreement

The first matter which we shall address is the issue of whether the billing disputes before us are governed by the 1997 agreement or the 1999 adopted AT&T agreement. Supra argues that, pursuant to Section XVI, paragraphs B and F of the BellSouth/Supra resale agreement, the terms of any successor agreement that contains more favorable provisions apply from the effective date of the successor agreement until the date that the parties executed same. Furthermore, Supra contends, pursuant to Section 22.10 of the General Terms and Conditions of the AT&T/BellSouth Agreement, that Agreement constitutes the parties' entire agreement and supersedes any prior agreements, including the BellSouth/Supra interconnection, collocation and resale agreements.

BellSouth's position is that the Supra resale agreement effective June 1997 through October 1999, is the agreement in effect during the time frame of the bills in dispute. BellSouth takes the position that, because the AT&T/BellSouth agreement was not adopted by Supra until October 5, 1999, it is not possible for the AT&T/BellSouth agreement to be applicable to this dispute.

BellSouth and Supra entered into a resale agreement for a period of two years beginning June 1, 1997, with the proviso that the contract would be automatically renewed for two additional one year periods, unless either party indicated its intent not to renew the Agreement. The BellSouth/Supra agreement further stipulated that such intent to not renew the June 1997 contract was to be provided, in writing, to the other party no later than 60 days prior to the end of the then-existing contract period. The contract, which Supra voluntarily agreed to enter into with BellSouth, further states that the rates at which Supra is purchasing BellSouth's services are discounted resale rates. Nowhere in the June 1997 resale agreement entered into between BellSouth and Supra does there appear any reference to an AT&T/BellSouth agreement.

In Order No. PSC-00-2250-FOF-TP, issued November 28, 2000, we determined that the relevant agreement in this instant matter is

the resale agreement entered into by BellSouth and Supra on June 26, 1997, approved by us on October 8, 1997, and effective June 1, 1997, through December, 1999. For clarification, we found that those issues in dispute arising on or after October 5, 1999, the effective date of Supra's adoption of the AT&T/BellSouth agreement, were to be addressed by the sole and exclusive remedy available, pursuant to the terms of the adopted agreement, which is private arbitration. We also ordered that we have exclusive jurisdiction to consider disputes arising under the BellSouth/Supra resale agreement, pursuant to Section XI of that agreement.

We find Supra's position that Section XVI, subsections B and F, of the BellSouth/Supra resale agreement support its claim that successor agreements containing more favorable provisions shall apply from the effective date of said successor agreement is without merit. In fact, Section XVI.B of the resale agreement entered into by Supra on June 26, 1997 states, in part,

> In the event that BellSouth, either before or after the effective date of this Agreement enters into an agreement with any other telecommunications carrier (an "Other Resale Agreement") which provides for the provision within the state of . . . Florida . . . of any of the arrangements covered by this Agreement upon rates, terms or conditions that differ in any material respect from the rates, terms and conditions for such arrangements set forth in this agreement ("Other Terms"), BellSouth shall be deemed thereby to have offered such other Resale Agreement to Reseller in its entirety. In the event that Reseller accepts such offer, such Other Terms shall be effective between BellSouth and Reseller as of the date on which Reseller accepts such offer. (emphasis added)

Supra should have known that it was misinterpreting both the terms and intent of Section XVI.B of its resale agreement with BellSouth, specifically in light of the language referenced above.

Supra appears to have also misinterpreted the provisions of Section XVI.F of its resale agreement with BellSouth. Section XVI.F is entitled "Corrective Payment" and provides as follows:

> In the event that (1) BellSouth and Reseller revise this agreement pursuant to Section XVI.A, or (2) Reseller accepts a deemed offer of an Other Resale Agreement or Other Terms, then BellSouth or Reseller, as applicable, shall make a corrective payment to the other party to correct for the difference between the rates set forth herein and the rates in such revised agreement or Other Terms until the date that the parties execute such revised agreement or reseller accepts such Other Terms, plus simple interest at a rate equal to the thirty (30) day commercial paper rate for high-grade, unsecured notes sold through dealers by major corporations in multiples of $1,000.00, as regularly published in *The Wall Street Journal*.

Supra appears to have a mistaken belief that by its subsequent adoption of the AT&T/BellSouth agreement, it was due a "corrective payment" retroactive to the date it initially entered into a resale agreement with BellSouth.

Furthermore, though we have previously determined that the AT&T/BellSouth agreement would not be relevant to this instant matter, Supra explicitly relies on Section 22.10 of the General Terms and Conditions of the AT&T/BellSouth Agreement as an active defense in this issue. The terms of Section 22.10 of the AT&T/BellSouth agreement were specific to the parties of the original agreement, i.e., AT&T and BellSouth, at the time the original agreement was executed. Adoption of agreement terms two years after it becomes effective between the original parties does not mean that said terms and conditions apply to an adopting entity retroactively. Supra should have known that the language "this Agreement . . . constitutes the entire Agreement...and supersedes any prior agreements . . . " referred solely to the original parties. This language did not apply to Supra and BellSouth, as subsequent parties, until October 5, 1999, the day Supra signed its contract with BellSouth adopting the AT&T/BellSouth agreement.

Supra is incorrect in assuming it can apply to itself that which may be more favorable before it has entered into a binding contract for such arrangements. In other words, as a matter of simple contract law and common sense, a party adopting the terms of another party's agreement may not unilaterally apply the terms of

the adopted agreement retroactively to a time period preceding the adoption date of said agreement. We further note that, even after this Commission's specific ruling in Order No. PSC-00-2250-FOF-TP, Supra continued to urge the BellSouth/AT&T agreement as controlling.

The BellSouth/AT&T agreement is simply not applicable in this matter. The relevant underlying agreement for purpose of this complaint is the 1997 BellSouth/Supra resale agreement, entered into on June 26, 1997 between the parties and approved by this Commission on October 8, 1997, by Order No. PSC-97-1213-FOF-TP in Docket No. 970783-TP. Accordingly, the rates and charges contained in the 1997 AT&T/BellSouth Agreement do not apply to the BellSouth bills at issue in this Docket.

III. End User Common Line Charges

BellSouth's first dispute with Supra involves Supra's allegation that it should not have been billed End User Common Line charges ("EUCL") from the period June 1, 1997 through and including December 1999. The amount Supra claims it was improperly billed, pursuant to BellSouth's complaint, is $224,287.79. BellSouth alleges that Supra was correctly billed EUCLs, consistent not only with the terms of its 1997 agreement with Supra, but also pursuant to 47 C.F.R. §51.617 (1999), which states,

> (a) Notwithstanding the provision in §69.104(a) of this chapter that the EUCL shall be assessed upon end users, an incumbent LEC shall assess this charge, and the charge for changing the primary interexchange carrier, upon requesting carriers that purchase telephone exchange service for resale. The specific EUCL to be assessed will depend upon the identity of the end user served by the requesting carrier. (emphasis added)
> (b) When an incumbent LEC provides telephone exchange service to a requesting carrier at wholesale rates for resale, the incumbent LEC shall continue to assess the interstate access charges provided in Part 69 of this chapter, other than the EUCL, upon IXCs that use the incumbent LEC's facilities to provide interstate or international telecommunications services to the IXC's subscribers. (emphasis added)

BellSouth further alleges that "interstate access and related services are governed by the tariffs on file with the Federal Communications Commission, not the interconnection and resale agreements."

Section VII(L) of the applicable agreement, the 1997 BellSouth/ Supra resale agreement, states,

> L. Pursuant to 47 C.F.R. Section 51.617, the Company will bill the charges shown below which are identical to the EUCL rates billed by BST to its end users.

	Monthly Rate
1. Residential (a) Each Individual Line or Trunk	$3.50
2. Single Line Business (b) Each Individual Line or Trunk	$3.50
3. Multi-Line Business (c) Each Individual Line or Trunk	$6.00

Additionally, the rates provided by BellSouth and agreed to by Supra, are in accordance, at a minimum, with 47 C.F.R. §69.104(d)through(f).

Supra has previously attempted to use the fact that it is also an IXC as its defense for not paying EUCL charges. However, Supra entered into a resale agreement with BellSouth as a reseller of local exchange service. To represent itself as anything other than a reseller of local exchange service in this context is inaccurate. Supra's adoption of the AT&T/BellSouth agreement was effective October 5, 1999. Only for purposes of determining the termination date of the AT&T/BellSouth agreement, and thus termination of Supra's adoption thereof, does the June 10, 1997 date come into play. The termination date for the original parties and all parties later adopting an agreement, is calculated from the effective date agreed to by the original parties.

We also point out that while Supra may dispute the basis for the calculations of amounts due, it does not dispute the calculations themselves. Supra witness Bentley states that, "the

new agreement has no provision for service order charges, no provision for unauthorized service change charges and no provision for Network Access Charges. The previous agreement specifically calls out the terms for these charges." Witness Bentley's reference to the "new agreement" refers, however, to the AT&T/BellSouth agreement, which is not applicable. Nevertheless, witness Bentley does correctly identify that the "previous agreement" specifically identifies when and how the charges in dispute are to be assessed. Such a statement appears to clearly identify Supra's knowledge that the BellSouth/Supra resale agreement states the basis, conditions and calculation of eucls and the other charges in question.

Accordingly, we find that BellSouth appropriately billed Supra for EUCLs pursuant to Section VII(L) of the BellSouth/Supra resale agreement, entered into by Supra and effective June 1, 1997.

IV. Other Charges and Credits

The second dispute relates to "charges for processing changes in services and unauthorized local service changes and reconnections." These types of charges are "other charges and credits ("OCC")." BellSouth alleges it properly billed Supra the amount of $48,917.60 in OCC. The dispute covers the period September 1997 through December 1999. BellSouth claims that Section VI(F) of the 1997 agreement provides for the assessment of OCCs should an unauthorized change in local service occur. The amount charged per unauthorized change is $19.41, pursuant to Section VI(F) of the 1997 agreement. The billing of the charges in question is in accordance with Section VI(F) of the controlling agreement, the BellSouth/Supra resale agreement of June 1997. Section VI(F) states,

> F. If the Company determines that an unauthorized change in local service to Reseller has occurred, the Company will reestablish service with the appropriate local service providers and will assess Reseller as the OLEC initiating the unauthorized change, an unauthorized change charge, similar to that described in F.C.C. Tariff No. 1, Section 13.3.3. Appropriate nonrecurring charges, as set forth in Section A4 of the General Subscriber Service Tariff, will also be assessed to Reseller. These

> charges can be adjusted if Reseller provides satisfactory proof of authorization.
>
> | | Nonrecurring Charge |
> |---|---|
> | (a) each Residence or Business Line | $19.41 |

Supra again incorrectly applies the AT&T/BellSouth agreement to this instant matter. As stated earlier, the AT&T/BellSouth agreement is inapplicable. Supra's witness Bentley correctly identifies that the "previous agreement" specifically concludes when and how the charges in dispute are to be assessed.

Therefore, we find that BellSouth billed Supra appropriately for changes in services, unauthorized local service changes and reconnections pursuant to the parties' resale agreement.

V. Secondary Service Charges

BellSouth further alleges it properly billed Supra $33,352.94 for secondary service charges for authorized changes in customers' service. BellSouth alleges such services are correctly assessed, pursuant to the 1997 agreement and Section A4.2.4 of BellSouth's General Subscriber Service Tariff. (Id.) In Section IV(B) of the BellSouth/Supra resale agreement, BellSouth's Provision of Services to Reseller states:

> (B) Resold services can only be used in the same manner as specified in the Company's Tariff. Resold services are subject to the same terms and conditions as are specified for such services when furnished to an individual end user of the Company in the appropriate section of the Company's Tariffs. Specific tariff features, e.g. a usage allowance per month, shall not be aggregated across multiple resold services. Resold services cannot be used to aggregate traffic from more than one end user customer except as specified in Section A23 of the Company's Tariff referring to Shared Tenant Service. (Exh. 3, Exh. 1 to BellSouth's's complaint, p.5)

Supra, again, takes the position that the AT&T/BellSouth agreement is the "controlling" or "new" agreement and that, pursuant to said agreement, no provisions exist for the charges in

dispute in this issue. Supra further states, in support of its position, that the charges in question are not accurately billed, that the effective date of the AT&T/BellSouth agreement is June 10, 1997 and that Supra adopted said agreement. Accordingly, Supra believes the "effective date of the new agreement between Supra and BellSouth is June 10, 1997" and, therefore, "BellSouth must make a corrective payment to Supra for charges billed that no longer apply."

As previously explained, however, the Supra adoption of the AT&T/BellSouth agreement is only effective between Supra and BellSouth from the date of the adoption through the termination date in the original underlying agreement. The 1997 BellSouth/Supra agreement clearly provides for those charges. Thus, we find that BellSouth appropriately billed Supra for secondary service charges pursuant to the parties' resale agreement as approved in Order No. PSC-97-1213-FOF-TP, dated October 8, 1997.

VI. Termination of Service

In its Complaint, BellSouth raised the issue of terminating Supra's service if payment was not made. Section VI, Establishment of Service, of the parties' agreement states, "K. In the event that Reseller defaults on its account, service to Reseller will be terminated and any deposits held will be applied to its account." Additionally, Section VII, Payment and Billing Arrangements states, "C. Payment of all charges will be the responsibility of Reseller. Reseller shall make payment to the Company for all services billed." (Id.) Section VII(F) stipulates, "the payment will be due by the next bill date (i.e., same date in the following month as the bill date) and is payable in immediately available funds. Payment is considered to have been made when received by the Company." (Id., p.8) Accordingly, we find that BellSouth may exercise its right to terminate service to Supra in the event timely payment is not made.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each issue contained within the complaint filed by BellSouth Telecommunications, Inc. against Supra Telecommunications and

Information Systems, Inc. is resolved as detailed in the body of this Order. It is further

ORDERED by the Florida Public Service Commission that this docket shall be closed upon issuance of this Order.

By ORDER of the Florida Public Service Commission this 31st Day of July, 2001.

Blanca S. Bayó

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

(S E A L)

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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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services 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.