

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth
Telecommunications, Inc. for
arbitration of certain issues in
interconnection agreement with
Supra Telecommunications and
Information Systems, Inc.

DOCKET NO. 001305-TP
ORDER NO. PSC-01-2457-PCO-TP
ISSUED: December 17, 2001

ORDER GRANTING MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY
AND STRIKING PORTIONS OF MOTION

II. CASE BACKGROUND

On September 1, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for arbitration of certain issues in an interconnection agreement with Supra Telecommunications and Information Systems, Inc. (Supra). Supra filed its response, and this matter was set for hearing. In an attempt to identify and clarify the issues in this docket, issue identification meetings were held on January 8, 2001, and January 23, 2001. At the conclusion of the January 23 meeting, the parties were asked by staff to prepare a list with the final wording of the issues as they understood them. BellSouth submitted such a list, but Supra did not, choosing instead to file a motion to dismiss the arbitration proceedings, on January 29, 2001. On February 6, 2001, BellSouth filed its response. In Order No. PSC-01-1180-FOF-TI, issued May 23, 2001, the Commission denied Supra's motion to dismiss, but on its own motion ordered the parties to comply with the terms of their prior agreement by holding an Inter-company Review Board meeting. Such meeting was to be held within 14 days of the issuance of the Commission's order, and a report on the outcome of the meeting was to be filed with the Commission within 10 days after completion of the meeting. The parties were placed on notice that the meeting was to comply with Section 252(b)(5) of the Telecommunications Act of 1996 (Act).

Pursuant to the Commission's Order, the parties held meetings on May 29, 2001, June 4, 2001, and June 6, 2001. The parties then filed post-meeting reports with the Commission. Several of the original issues were withdrawn by the parties. These include Issues 2, 3, 6, 8, 30, 36, 37, 39, 43, 50, 54, 56, 58, and 64. A mediation conference was held on September 19, 2001, and an administrative hearing was held on September 26-27, 2001. Twenty

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additional issues were either withdrawn or resolved during the mediation, the hearing, or in subsequent meetings thereafter. These include Issues A, 7, 9, 13, 14, 17, 25A, 25B, 26, 27, 31, 35, 41, 44, 45, 48, 51, 52, 53, and 55. Issues 18 and 57 were partially resolved.

Post-hearing briefs were submitted by the parties on October 26, 2001. On November 14, 2001, Supra entered a Motion for Leave to File Supplemental Authority. On November 21, 2001, BellSouth filed its response to Supra's motion.

Discussion and Determination

Supra asks this Commission to accept, as supplemental authority, the Final Order Granting Petition to Confirm Arbitration Award, Denying Motion to Vacate and Granting Motion to Seal, as entered by the United States District Court, Southern District of Florida, Miami Division, on October 31, 2001. Supra also request that we accept two additional documents it filed under a claim of confidentiality as Attachment-B and Attachment-C.

In its motion, Supra first sets out the procedural background of the above motion. On June 5, 2001, an Arbitral Tribunal issued an Arbitration Award which Supra believes addressed many of the issues in the instant proceeding. On July 31, 2001, Supra sought to confirm the arbitration award in the United States District Court. During the pendency of that motion, a Final Award of the Tribunal in Consolidated Arbitration was issued by the Arbitral Tribunal on October 22, 2001. Then, on October 31, 2001, the District Court granted Supra's Petition to Confirm Arbitration Award Made by Arbitral Tribunal.

Supra acknowledges that the findings of the Arbitral Tribunal are not binding on us, but it believes that several issues in the instant proceeding were either the subject of or were addressed directly or indirectly in the June 5, 2001, award. Supra goes on to outline the areas covered by the award which it feels are also addressed in the instant case and which of the particular numbered issues are affected by the findings of the Tribunal. Supra then argues several points regarding the strength of the findings of the Tribunal and the implied deference to be afforded their findings.

BellSouth argues that while the Commission has no rules or procedures for the filing of supplemental authority, it has generally considered supplemental authority pursuant to the provisions of Rule 9.255, Florida Rules of Appellate Procedure (Rule 9.255). Rule 9.255 provides:

Notices of supplemental authority may be filed with the court before a decision has been rendered to call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief served in the cause. The notice may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument.

BellSouth asserts that in past orders the Commission has rejected notices as argumentative. BellSouth believes the Commission should do the same here, as it believes Supra presented these decisions to the Commission solely to argue that the Commission should come to the same conclusions reached by the Arbitral Tribunal. BellSouth believes that Supra has not merely called to the Commission's attention a ruling made by the Arbitral Tribunal or the United States District Court for the Southern District of Florida. Rather, BellSouth believes Supra requests supplemental authority for the purpose of advancing its argument. BellSouth also believes that the Commission should deny Supra's request to file supplemental authority because it is procedurally improper. BellSouth considers significant the language of Rule 9.255 which permits the filing of supplemental authority that is significant to the issues raised and that has been discovered after the last brief served in the case. Post hearing briefs were filed on October 26, 2001. Accordingly, says BellSouth, both of the Tribunal decisions subject to Supra's motion were issued and sent to Supra prior to the date Supra filed its post-hearing brief. Thus, BellSouth believes that these two Tribunal decisions are improper.

Upon consideration, I find it appropriate to grant Supra's motion in part and deny it in part. In applying Rule 9.255, this Commission has placed particular focus on whether the notice itself

contained argument. While portions of Supra's motion do contain argument, I do not believe that Supra has submitted the rulings of the Arbitral Tribunal and the United States District Court for the Southern District of Florida solely for the purpose of argument. I believe Supra wanted to call our attention to rulings on similar matters to the ones contained in this docket. Although the decisions of the Arbitral Tribunal are not dispositive in this proceeding, we have the discretion to consider those orders and to give each of them the weight they deserve. As such, all argumentative portions of the motion shall be stricken and are not to be considered part of the record. In particular, I find that the indented portion of paragraph three of the motion shall be stricken. The fourth sentence of paragraph four shall be stricken. Paragraphs six and seven shall also be stricken.

Further, this Commission, as well as the Courts of the State of Florida, traditionally have been liberal in allowing leave to file supplemental authority. In Order No. PSC-00-1568-PCO-TP, we granted a BellSouth motion for leave to file supplemental authority that had been filed long before the attendant docket had even proceeded to hearing. We have stated that "a notice of supplemental authority drawing our attention to authority newly discovered and devoid of argument would be properly received." Order No. PSC-97-0283-FOF-WS (citing In Re: Petition for Limited Proceeding to Implement Conservation Plan in Seminole County by Sanlando Utilities Corporation Order No. PSC-94-0987-FOF-WS (August 15, 1994)). Here the order of the Arbitral Tribunal was finalized just days before the post-hearing brief was due on October 26, 2001, and as of the due date of the briefs, the order was facing a challenge to its finality brought by BellSouth. The order of the United States District Court for the Southern District of Florida was issued on October 31, 2001, after the filing of the parties' post-hearing briefs. The rulings fall within very close proximity to the due date of the briefs and so shall be considered.

Based on the foregoing, it is

ORDERED by Commissioner Michael A. Palecki, as Prehearing Officer, that Supra Telecommunications and Information Systems Motion for Leave to File Supplemental Authority is granted in part, and denied as to the portions which are deemed argumentative in the

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body of this Order. Said portions shall be stricken from the record. It is further

ORDERED that this docket shall remain open.

By ORDER of Commissioner Michael A. Palecki, as Prehearing Officer, this 17th day of December, 2001.



MICHAEL A. PALECKI
Commissioner and Prehearing Officer

(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.

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.

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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 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.