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-02-1033-FOF-TP ISSUED: July 30, 2002

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTION FOR STAY

BY THE COMMISSION:

CASE BACKGROUND

On September 1, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for arbitration of certain issues in a new interconnection agreement with Supra Telecommunications and Information Systems, Inc. (Supra). BellSouth's petition raised fifteen disputed issues. Supra filed its response, and this matter was set for hearing. In its response Supra raised an additional fifty-one issues. 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 Commission 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 on January 29, 2001, a motion to dismiss the arbitration proceedings. On February 6, 2001, BellSouth filed its response. By Order No. PSC-01-1180-FOF-TI, issued May 23, 2001, we denied Supra's motion to dismiss, but on our own motion ordered the parties to comply with the terms of their prior agreement by holding an inter-company Review Board meeting. Such a meeting was

to be held within 14 days of the issuance of our order, and a report on the outcome of the meeting was to be filed with us 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 our Order, the parties held meetings on May 29, 2001, June 4, 2001, and June 6, 2001. The parties then filed post-meeting reports. Thereafter, several of the original issues were withdrawn by the parties. An additional twenty issues were withdrawn or resolved by the parties either during mediation or the hearing, or in subsequent meetings. Although some additional issues were settled, thirty-seven disputed issues remained.

We conducted an administrative hearing in this matter on September 26-27, 2001. On February 8, 2002, our staff filed its post-hearing recommendation for our consideration at the February 19, 2002, Agenda Conference. Prior to the Agenda Conference, the item was deferred.

On February 13, 2002, Supra filed a Motion asking that the item not be considered until additional legal briefing could be had addressing the impact of the decision of the United States Court of Appeals, Eleventh Circuit (hereinafter "11th Circuit"), Cir. Order Nos. 00-12809 and 00-12810, the consolidated appeals of BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., D.C. Docket No. 99-00248-CV-JOF-1 and BellSouth Telecommunications, Inc. v. WorldCom Technologies, Inc. and e.spire Communications, Inc., D.C. Docket No. 99-00249-CV-JOF-1, respectively. In the alternative, Supra requested oral argument on the impact of that decision on Issue 1 of the staff's recommendation. By Order No. PSC-02-0202-PCO-TP, issued February 15, 2002, the request for additional briefing was granted. Parties were directed to file their supplemental briefs by February 19, 2002. In rendering our final decision, we noted that we had considered the additional briefing.

Also on February 18, 2002, Supra filed a Motion for Rehearing, Motion for Appointment of a Special Master, Motion for Indefinite Deferral, and Motion for Oral Argument. BellSouth filed its response on February 21, 2002.

On February 21, 2002, Supra filed a Renewed Motion for Indefinite Stay of Docket No. 001305-TP, and an Alternative Renewed Motion for Oral Argument. On February 22, 2002, BellSouth filed its Response in opposition.

On February 27, 2002, Supra filed a Motion for Oral Arguments on Procedural Question Raised by Commission staff and Wrongful Denial of Due Process. BellSouth filed its Response in opposition on March 1, 2002.

By Order No. PSC-02-0413-FOF-TP (Final Order), issued March 26, 2002, we resolved the substantive issues presented for our consideration, as well as several procedural motions filed by Supra on February 18, 21, and 27. A few minor scrivener's errors were corrected by Order No. PSC-02-0413A-FOF-TP, issued March 28, 2002. Pursuant to the Notice of Further Proceedings set forth in Order No. PSC-02-0413-FOF-TP and Rule 25-22.060, Florida Administrative Code, any motion for reconsideration of the Final Order was due on April 10, 2002.

On April 1, 2002, Supra filed a Motion to Extend the Due Date for Filing Motion for Reconsideration of Final Order. By Order No. PSC-02-0464-PCO-TP, issued April 4, 2002, the Motion was denied. On April 8, 2002, Supra filed a Motion for Reconsideration of Commission Order No. PSC-02-0464-PCO-TP. By Order No. PSC-02-0496-PCO-TP, issued April 10, 2002, the Motion for Reconsideration was denied.

On that same day, April 10, Supra filed a Motion for Reconsideration of Denial of its Motion for Rehearing of Order No. PSC-02-0413-FOF-TP. Supra also filed a separate Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP, portions of which were identified as confidential. On April 17, 2002, BellSouth filed responses in opposition to both Motions.

Also on April 17, 2002, Supra filed a Motion to Disqualify and Recuse Commission staff and Commission Panel from All Further Consideration of This Docket and To Refer Docket to DOAH for all Further Proceedings. On April 24, 2002, BellSouth filed its response. This motion was addressed by Orders Nos. PSC-02-0772-PCO-TP, PSC-02-0773-PCO-TP, PSC-02-0797-PCO-TP, PSC-02-0798-PCO-TP, PSC-02-0799-PCO-TP, and PSC-02-0807-PCO-TP.

Also on April 24, 2002, Supra filed a Motion to Extend Due Date for Filing Executed Interconnection Agreement and a Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion for Reconsideration for New Hearing. On May 1, 2002, BellSouth filed its responses. The extension was granted, in part, and denied, in part, by Order No. PSC-02-0637-PCO-TP, issued May 8, 2002. Thereafter, on May 15, 2002, BellSouth asked for reconsideration of that Order. Supra filed its response in opposition on May 22, 2002.

On April 24, 2002, Supra also filed a Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion for Reconsideration for New Hearing. BellSouth filed its response in opposition on May 1, 2002.

On May 7, 2002, Supra filed a Motion for Leave to File Reply to BellSouth's Opposition to Motion to Strike, or in the Alternative, to Strike New Issues Raised in BellSouth's Opposition. On May 16, 2002, BellSouth filed its response in Opposition.

On May 13, 2002, BellSouth filed its Request for Leave to File Supplemental Authority.

On May 24, 2002, BellSouth filed a Motion for Reconsideration of Order No. PSC-02-0663-CFO-TP, wherein the Prehearing Officer denied confidential treatment of certain information contained in an April 1, 2002, letter to Commissioner Palecki.

On May 29, 2002, Supra filed a Motion for Reconsideration of Order No. PSC-02-0700-PCO-TP.

By Order No. PSC-02-0878-FOF-TP, issued July 1, 2002, we rendered our decisions on the identified outstanding procedural Motions and Motions for Reconsideration. Therein, we required the parties to file their final interconnection complying with our decision by July 15, 2002.

On July 8, 2002, Supra filed a Motion for Stay of our Orders Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP. BellSouth responded in opposition on July 12, 2002.

JURISDICTION

This Commission has jurisdiction in this matter pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a State Commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252(e) of the Act reserves the state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we utilize discretion in the exercise of such authority. In addition, Section 120.80(13)(d), Florida Statutes, authorizes this Commission to employ procedures necessary to implement the Act.

We retain jurisdiction of our post-hearing orders for purposes of addressing Motions for Stay pursuant to Rule 25-22.061, Florida Administrative Code.

MOTION FOR STAY

Rule 25-22.061(2), Florida Administrative Code, states that:

> Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:
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> > (a) Whether the petitioner is likely to prevail on appeal;
> > (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and

(c) Whether the delay will cause substantial harm or be contrary to the public interest.

SUPRA

Supra asks that we stay our Final Order resulting from the hearing, Order No. PSC-02-0413-FOF-TP, and our Order on Procedural Motions and Motions for Reconsideration, Order No. PSC-02-0878-FOF-TP. Supra contends that it meets all three criteria of Rule 25-22.061, Florida Administrative Code.

First, Supra argues that it is likely to prevail on appeal, because of the alleged violations of Supra's due process rights that occurred in this proceeding. Citing numerous cases as to the duty of administrative and quasi-judicial bodies to ensure the due process rights of participants, Supra contends that the appellate court will determine that this Commission should be disqualified from rendering a decision in the case, resulting in Supra's success on appeal.[1] Supra further maintains that this Commission was under a duty to resolve the Motions for Recusal before ruling on any matters in the case, but nevertheless issued several procedural orders. For these reasons, Supra believes it will prevail on appeal.

Supra also believes that it will be subjected to irreparable harm if our orders are not stayed. Supra emphasizes that in its October 1999 Interconnection Agreement with BellSouth, the parties included a clause allowing that agreement to remain in effect after the termination date until a new agreement becomes effective. The parties currently operate under the terms of that October 1999 Agreement. Supra contends that if our Orders are not stayed, Supra may be forced by BellSouth to operated under the new agreement until the appeal is decided. Supra maintains that, "It is

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[1]*Citing* Hithrow v. Larkin, 421 U.S. 35 (1975); Rucker v. City of Ocala, 684 So.2d 836 (Fla. 1st DCA 1996); Communications Workers of America v. City of Gainesville, 697 So.2d 167 (Fla. 1st DCA 1997); Jennings v. Dade County, 589 So.2d 1337 (Fla. 3rd DCA 1991); and Miami-Dade County v. Reyes, 772 So.2d 24 (Fla. 3rd DCA 2000).

incalculable how a Follow-On Agreement that is the product of a fair and impartial process will differ from the present Follow-On Agreement ordered by the Commission in Docket No. 001305-TP." Motion at p. 12. If Supra has to operate under the agreement approved by this Commission, Supra argues that no amount of money damages will be able to compensate Supra for the irreparable injury caused to its business by having to operate under the approved agreement. Among the damaging differences between the two agreements, according to Supra, is that under the new agreement, BellSouth would not have to provide direct access to its OSS to Supra. Other differences emphasized by Supra are that the new agreement does not provide for meet-point billing in the UNE-Combinations environment and that the new agreement does not prevent BellSouth from disconnecting services to Supra during a billing dispute. Supra believes that it will ultimately lose "incalculable numbers of customers" if BellSouth is allowed to unilaterally disconnect services during a billing dispute. Supra cites several cases for the proposition that injury to its business reputation and, consequently, its revenues amounts to irreparable harm.[2]

Finally, Supra argues that a stay will not harm or be otherwise contrary to the public interest. Furthermore, Supra contends that we are bound by our ethical obligations to allow the parties to continue to operate under the status quo until this matter is resolved by the appellate court. Supra notes that no bond is required in this instance, since neither of our Orders at issue awards any monies.

For all these reasons, Supra asks that we stay our Orders No. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP.

BELLSOUTH

BellSouth contends that Supra's Motion for Stay is nearly identical to Motions filed by Supra on June 10, 2002, June 11, 2002, and other motions filed in this Docket. BellSouth contends

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[2]*Citing* Speigel v. City of Houston, 636 F.2d 997 (5th Cir. 1981); and Tally-Ho, Inc. v. Coast Community College District, 889 F.2d 1018 (11th Cir. 1990).

that Supra has presented no new arguments that have not already been considered in the previous motions, and nothing that would present a legitimate basis for a stay.

BellSouth also contends that the Motion is barred by the doctrine of *res judicata*, because the points raised therein have already been addressed and adjudicated by this Commission. BellSouth maintains that Florida case law is clear that repetitive arguments are barred, and continuously raising repetitive arguments can be considered an abuse of process.

BellSouth argues that even if *res judicata* does not apply, Supra has failed to meet the standard for obtaining a stay as identified in Rule 25-22.061(2), Florida Administrative Code. BellSouth asserts that Supra is not likely to prevail on appeal, because we have correctly rendered determinations on Supra's procedural motions, including the Motions to Recuse. Based on Florida case law, BellSouth maintains that we correctly determined that Supra's Motions for Recusal were untimely and were legally insufficient. BellSouth adds that the First District Court of Appeal confirmed our decisions on recusal, which further supports the propriety of our decisions.

BellSouth also argues that Supra's contention that we should not have ruled on procedural motions while the Motions for Recusal were pending fails in view of the fact that several of the procedural motions upon which rulings were had were requests for relief made by Supra itself. BellSouth adds that under Supra's paradoxical logic, Supra should not have been granted an extension of time to file the parties' arbitrated interconnection agreement, and as such, Supra is in violation of our mandate to file the agreement by April 17, 2002, which would subject Supra to substantial penalties.

BellSouth disagrees that Supra will face irreparable harm if this Commission's Orders are not stayed. BellSouth emphasizes that the filing and approval of the final agreement between the parties does not waive Supra's ability to appeal our arbitration decision. BellSouth also disagrees that Supra will suffer harm through the loss of customers and its reputation. BellSouth explains that "irreparable harm does not exist where the potential loss is compensable by money damages." *Citing* Barclays Am. Mtg. Corp. v.

Holmes, 595 So.2d 104, 105 (Fla. 5th DCA 1992). BellSouth contends that any loss suffered by Supra in this case could be compensated by money damages.

BellSouth further maintains that Supra's contentions about differences between the expired agreement and the new agreement are false. In particular, BellSouth contends that the expired agreement does not allow Supra direct access to BellSouth's OSS, and that both the new agreement and the expired agreement do provide for meet point billing in appropriate circumstances. In addition, BellSouth contends that the new agreement does not allow BellSouth to disconnect Supra on a whim; rather, it allows BellSouth only to disconnect Supra for non-payment of undisputed amounts and amounts disputed in bad faith.

BellSouth maintains that a stay of our Orders will cause substantial harm to BellSouth and Florida consumers and is contrary to the public interest. BellSouth emphasizes that if a stay is granted, the parties will continue to operate under the expired agreement, pursuant to which Supra refuses to pay BellSouth for services rendered unless ordered by an appropriate authority. BellSouth asserts that Supra has no incentive to operate under a new agreement, because the expired agreement does not expressly provide for disconnection upon non-payment. BellSouth states that a stay would extend Supra's ability to continue to ignore its payment obligations to BellSouth, result in extreme prejudice to BellSouth.

Further, BellSouth contends that it is contrary to the public interest to grant a stay of our Orders, because while refusing to pay BellSouth, Supra is still requiring payment from its customers and disconnecting service to those customers that do not pay. BellSouth argues that this creates an unearned financial windfall for Supra at the expense of BellSouth and Florida consumers.

Finally, BellSouth asks that if we do decide to grant the stay, that we require Supra to post a bond representing all unpaid amounts that Supra has accrued since January 1, 2002, and place all future monthly amounts billed in escrow while the stay continues. BellSouth adds that a corporate undertaking would be insufficient in this instance, based on financial information filed with the North Carolina PSC and the West Virginia PSC.

For the above reasons, BellSouth asks that Supra's Request for Stay be denied.

DECISION

Upon consideration, we do not believe that Supra has established a basis for stay of our decisions in this case. First and foremost, we do not believe that Supra is likely to prevail on appeal. We have thoroughly considered Supra's arguments in several contexts, including its consideration of the hearing issues, the procedural motions, including the motions for reconsideration, and the recusal motions. Supra has not identified any failing in our analysis and decisions.

Also, we do not believe that Supra will be faced with irreparable harm if we do not stay our decisions. At most, Supra will be required to operate under an allegedly less favorable agreement than the October 1999 Agreement, but such a requirement would not constitute irreparable harm. We have considered the evidence in this case and issued a decision requiring the establishment of an interconnection agreement that complies with the current state of the law. We find it implausible that requiring a party to operate under such a wholesale agreement would result in irreparable harm. In particular, we question how operation under the agreement could, by itself, cause harm to a carrier's reputation with its retail customers.

We note that the cases cited by Supra on this point are distinguishable in that they pertain to public injuries to a company's reputation resulting in a loss of customers and potential customers. It is not clear to this Commission how requiring Supra to operate under a new interconnection agreement with BellSouth would result in injury to Supra's reputation, unless some other intervening factor occurred. We also acknowledge the pertinent case law cited by BellSouth that "irreparable harm" cannot be found when the harm incurred can be monetarily compensated, and believe it applicable in this case should any harm actually result.

Finally, we believe that it would be contrary to the public interest for this Commission to stay our decisions in this instance, in that the federal Telecommunications Act of 1996 contemplates timely resolution of arbitration petitions and the

subsequent implementation of an interconnection agreement. As noted in Atlantic Alliance Telecommunication, Inc., v. Bell Atlantic, 2000 U.S. Dist. LEXIS 19649 (U.S. Dist. Ct. E.D. New York 2000):

> The tight schedule set out in the Act manifests an intention of Congress to resolve disputes expeditiously. AT&T Communications Systems v. Pacific Bell, 203 F.3d 1183, 1186 (9th Cir. 2000) ("The strict timelines contained in the Telecommunications Act indicate Congress' desire to open up local exchange markets to competition without undue delay."). Indeed, the legislative history explains that the purpose of the Act is "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition[.]" H.R. Conf. Rep. No. 104-458, at 113 (1996) reprinted in 1996 U.S.C.C.A.N. 10, 124.[3]

This Docket was opened in September 2000 after negotiations between the parties were unsuccessful. Were we to stay our decisions, no agreement would be approved for implementation in accordance with Sections 252(b)(4)(C), 252(c), 252(e)(1), and 252(e)(4).[4] To date, the parties have continued to operate under the terms of an

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[3] See also GTE North Inc. v. Glazer, 989 F. Supp. 922, 924-925 (N.D. Ohio 1997) (stating "the tightly restricted timetables prescribed by § 252 remove any conceivable doubt that Congress intended that State commission administrative processes remain unimpeded until an interconnection agreement is completed and approved"); GTE Northwest, Inc. v. Nelson, 969 F. Supp. 654, 656 (W.D. Washington 1997) (stating "review of determinations that have not been made part of a final agreement would only delay and complicate the tightly regulated process established by the Act"); GTE South Inc. v. Morrison, 957 F. Supp. 800, 805 (E.D. Va. 1997) (stating "absent an agreement, the Court lacks subject matter jurisdiction").

[4] It is noteworthy that pending requests from Supra's own customers regarding DSL service would be frustrated if we were to grant the requested stay.

agreement that would have otherwise expired. The parties have been provided a full and fair opportunity to present evidence in an arbitration before us for a new agreement, and this Commission has since reached our decision in accordance with federal and state law. Supra has not identified any error in nor irreparable harm resulting from our decision, other than the fact that it simply does not like the result.

For all these reasons, we hereby deny Supra's Motion for Stay of Commission Orders Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP.

It is therefore

ORDERED by the Florida Public Service Commission that Supra Telecommunications and Information Systems, Inc.'s Motion for Stay of Orders Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP is hereby denied. It is further

ORDERED that this Docket shall remain open pending approval of an interconnection agreement.

By ORDER of the Florida Public Service Commission this 30th Day of July, 2002.

Blanca S. Bayó

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

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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.