

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Local Circuit Switching for Mass Market Customers.

DOCKET NO. 030851-TP
ORDER NO. PSC-04-0169-PCO-TP
ISSUED: February 18, 2004

ORDER DENYING BELLSOUTH'S
MOTION TO STRIKE SURREBUTTAL TESTIMONY AND EXHIBITS
AND GRANTING SUPRA TELECOM'S
MOTION TO CORRECT SURREBUTTAL TESTIMONY

I. Case Background

In response to the Federal Communications Commission's (FCC) August 21, 2003, Triennial Review Order (TRO), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements.

II. Motions and Arguments

On February 9, 2004, BellSouth filed a Motion to Strike the Surrebuttal Testimony and Exhibits of Supra Telecom's witness David Nilson. Witness Nilson's surrebuttal testimony was filed on January 28, 2004. BellSouth contends that while three exhibits are referenced in witness Nilson's surrebuttal testimony (Exhibits DAN-RT-1, DAN-RT-2, and DAN-RT-3) and are purportedly offered to rebut allegations in BellSouth's witness Ainsworth's testimony, Supra neglected to serve BellSouth with these exhibits and to file them with the Commission. BellSouth notes that it informed Supra of this apparent error by e-mail on February 4, 2004, and thereafter asked Supra's counsel about the exhibits on February 5, 2004, and again on February 6, 2004. BellSouth asserts that on February 8, 2004, it finally received the missing exhibits, but included was yet another exhibit that, to date, had not been identified in witness Nilson's testimony, Exhibit DAN-RT-4. Because of this untimely production, BellSouth argues that it has been unable to adequately review the exhibits. Thus, in order to prevent "trial by ambush," BellSouth asks that all four of the exhibits at issue be stricken, as well as the following portions of witness Nilson's surrebuttal testimony that references these exhibits: (1) Page 2, lines 18-22 through Page 3, lines 1-2 and (2) Page 11, lines 9-14. BellSouth further argues that Supra should not be allowed to rely upon or otherwise introduce these exhibits at hearing.

On February 16, 2004, Supra filed its Response to BellSouth's Motion, as well as a Motion to Correct Surrebuttal Testimony. In its response, Supra argues that its failure to file the referenced exhibits was an inadvertent omission, due in part to witness Nilson's involvement in

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Supra's bankruptcy proceedings. Supra contends that: (1) the exhibits were filed with the Commission on February 9, 2004; (2) the exhibits were e-mailed to BellSouth and staff counsel on Friday, February 6, 2004; (3) BellSouth had the exhibits in sufficient time to cross-examine Mr. Nilson, and in fact, did so during staff's February 11, 2004, deposition of Mr. Nilson; and (4) BellSouth could call its own deposition of Mr. Nilson if it needed to gather additional information about the exhibits, but has declined to do so. In addition, Supra states that witness Nilson's surrebuttal testimony erroneously omitted a reference to Exhibit DAN-RT-4 on page 17, but that Supra is filing a contemporaneous motion to correct this error. Ultimately, Supra argues, no party was prejudiced by Supra's failure to timely file the exhibits or by the error in the testimony.

In addition, in its Motion to Correct Surrebuttal Testimony, Supra asserts that witness Nilson's surrebuttal testimony should have referenced DAN-RT-4, which explains witness Nilson's rebuttal of BellSouth witness Gray's testimony, but the reference was inadvertently omitted. Supra asks that it be allowed to correct the reference in witness Nilson's testimony and maintains that no party will be prejudiced by this correction.

III. Decision

Upon consideration, BellSouth's Motion to Strike is denied, and Supra's Motion to Correct Surrebuttal Testimony is granted. While Supra is admonished for not providing its exhibits in a timely manner, an oversight that should have been readily apparent to Supra and quickly corrected, Supra has now filed the exhibits and served them on all parties in time for discovery to be conducted regarding these exhibits. Furthermore, Supra shall be allowed to correct the surrebuttal testimony of its witness Nilson to include the reference to Exhibit DAN-RT-4. I note that Supra could correct such errors up to the time witness Nilson's testimony is inserted into the record. Recognition and correction of this error prior to hearing can only facilitate an accurate and more complete record. See Order No. PSC-03-0856-PCO-TP, issued in Dockets Nos. 981834-TP and 990321-TP; and Order No. PSC-02-0504-PCO-TP, issued in Docket No. 990649B-TL. Furthermore, I note that this appears to be a case of the proverbial "pot calling the kettle black" in view of BellSouth's own revisions to its BACE model, Exhibit JWS-3, and to Exhibits PAT-5 and PAT-7 to witness Tipton's testimony. As such, I emphasize that all parties should maintain open lines of communication with each other and with our staff. This will ensure not only that errors and omissions of the nature addressed herein are quickly identified and remedied, but also that motions along the lines of BellSouth's Motion to Strike are only filed as a last resort.

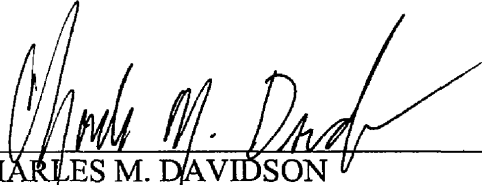
It is therefore

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that BellSouth's Motion to Strike Supra's Surrebuttal Testimony and Exhibits is denied. It is further

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ORDERED that Supra's Motion to Correct Surrebuttal Testimony of David Nilson is granted.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 18th day of February, 2004.



CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

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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.

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; 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.