BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to review and cancel, or in the alternative immediately suspend or postpone, BellSouth Telecommunications, Inc.'s PreferredPack Plan tariffs, by Supra Telecommunications and Information Systems, Inc.	DOCKET NO. 040353-TP ORDER NO. PSC-04-0975-PCO-TP ISSUED: October 8, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION FOR SUMMARY FINAL ORDER

BY THE COMMISSION:

On April 20, 2004, Supra Telecommunications & Information Systems, Inc. (Supra) filed its Petition to Review and Cancel BellSouth's Promotional Offering Tariffs offered in conjunction with its new flat rate service known as the PreferredPack Plan. On May 17, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed its Answer to Supra's Petition. On May 27, 2004, Order No. PSC-04-0549-PCO-TP, was issued to initiate an expedited discovery procedure.

On July 27, 2004, Supra filed its Motion for Summary Final Order requesting we find, pursuant to undisputed facts and as a matter of law, that BellSouth's PreferredPack Plan Tariff (General Subscriber Service Tariff, A.3.4.6) (Tariff) violates Sections 364.08(2) and 364.051(5)(a)(2), Florida Statutes. On July 29, 2004, BellSouth filed an Emergency Motion to Suspend Proceedings or Motion for Extension of Time. On August 6, 2004, Supra filed its response. By Order No. PSC-04-0806-PCO-TP, issued August 19, 2004, BellSouth's motion was granted in part and denied in part, requiring BellSouth to file its response to Supra's motion and any outstanding discovery on August 16, 2004. BellSouth filed its response on August 16, 2004. On August 24, 2004, Supra filed a Motion to Strike Portions of the BellSouth Response. On August 31, 2004, BellSouth filed its response. Supra's Motion was denied.

Supra's Motion for Summary Final Order

Supra argues in its Motion for Summary Final Order that it is undisputed that BellSouth currently offers residential customers the PreferredPack Plan (Tariff No. T-031414, §A3.4.6 Revised page 26.1), which at a retail price of $26.95 includes the following services: (i) a flat-

rate access line with Touch-Tone Capability; (ii) unlimited calling to all exchange access lines within the subscriber's local calling area; (iii) various vertical features; and (iv) savings on select BellSouth products and services of $1 to $7 per month. Additionally, Supra asserts that in conjunction with the PreferredPack Plan it is undisputed that BellSouth offers the following special promotions: (i) $100 Cash Back Offer Tariff (Tariff No. T-031379, §A2.10.2 Revised page 32.1 and 32.2); (ii) $25 Gift Card (Tariff No. T-031380, §A2.10.2 Revised page 32.3); and (iii) Line Connection Charge Waiver (Tariff No. T-031381, §A2.10.2 Revised page 32.4).

Supra contends there is no dispute to any material fact, that BellSouth: (i) provides retail services at prices below that which BellSouth charges for functionally equivalent wholesale services; (ii) provides $165.88 in cash back and other benefits to customers which drives the price of the service even further below cost; and (iii) discriminates among similarly situated customers by providing cash back and other benefits only to certain customers within the same wire center, if those customers currently subscribe to a BellSouth competitor's service. Supra asserts that these facts demonstrate BellSouth is in violation of Sections 364.08(2) and 364.051(5)(a)(2), Florida Statutes, as well as the precedent we established in Order No. PSC-03-0726-FOF-TP, issued June 19, 2003, in Docket No. 020119-TP (Key Customer Order).

Supra asserts that BellSouth must charge consumers a price higher than BellSouth's direct cost of providing the service in order to be compliant with Section 364.051(5)(c), Florida Statutes. Because BellSouth has admitted there are no cost studies for retail products, Supra claims direct costs are appropriately calculated at the TELRIC prices that CLECs pay for the UNEs needed to provide a service offering comparable to the ILEC's, plus the TSLRIC costs of those network elements that are not competitively provided. Utilizing this methodology, Supra asserts the cost to duplicate the PreferredPack Plan offering is $28.14, $1.19 more than BellSouth's retail price. Therefore, Supra contends BellSouth is engaging in anti-competitive pricing, thus creating "an uneven playing field."

Furthermore, Supra alleges by limiting the availability of the promotional offerings to residential customers that are presently served by a CLEC, BellSouth unlawfully discriminates against similarly situated customers and violates Section 364.051(5)(a)(2), Florida Statutes. Supra asserts BellSouth is in violation of the Key Customer Order by failing to make its promotional offerings available to all local telecommunications customers in the same geographic market.

BellSouth's Response

In its response, BellSouth contends Supra is not entitled to judgment as a matter of law under either Sections 364.08(2) or 364.051(5)(a)(2), Florida Statutes, and genuine issues of material fact exist. BellSouth asserts Supra's arguments are fundamentally flawed as they are based on incorrect interpretations of Florida law and unsound mathematical calculations.

BellSouth argues that the cost standards Supra is articulating are incorrect. First, BellSouth asserts Supra incorrectly omits the $6.50 each customer is charged for the Subscriber Line Charge (SLC). BellSouth contends the SLC is received and retained as revenue by BellSouth and in fact, BellSouth receives $33.45 a month from PreferredPack Plan subscribers; not the $26.95 Supra utilizes in its cost recovery methodology. BellSouth asserts further that the appropriate cost standard under Section 364.051(5)(c), Florida Statutes, is the retail rate for a single residential line (1FR) plus the TSLRICs for the costs of the features and Privacy Director. Under this cost standard, BellSouth contends its PreferredPack Plan is compensatory because the revenue received clearly exceeds the total monthly cost to BellSouth.

Additionally, BellSouth contends that even if we were to agree with Supra's cost standard and require imputation of prices of monopoly components, Supra's calculations are erroneous as they overstate the monopoly components necessary to provision an equivalent service. BellSouth asserts the only monopoly component that exists with the PreferredPack Plan is the loop. BellSouth asserts further, Privacy Director is not a UNE nor is it a monopoly component and thus its costs are irrelevant to any inquiry under Section 364.051(5)(c).

BellSouth contends that Supra's argument that BellSouth violates Section 364.051(5)(a)(2), by discriminating between similarly-situated customers, is not only without merit but is procedurally improper because Supra failed to raise this issue in its initial complaint. BellSouth asserts legal theories not pled cannot be tried absent consent of the parties. Hart Properties, Inc. v. Slack, 159 So. 2d 236, 239 (Fla. 1964) BellSouth contends it has not consented to litigating the issue, and thus Supra's request for summary judgment on this issue should be denied as a matter of law.

In addition, BellSouth argues that Supra's reliance on the specific factual findings of the Key Customer Order is erroneous because the Key Customer tariffs were entirely different promotions which were targeted to customers in specific wire centers. BellSouth argues our holding regarding similarly-situated customers in relation to a particular geographic market is not applicable in this proceeding as the Preferred Pack Plan does not target a specific geographic market. However, BellSouth contends, factual differences aside, our finding in the Key Customer Order that customers in wire centers with little or no competition are not similarly-situated with customers in "hot wire" centers is analogous to its position that current CLEC customers are not similarly situated with current BellSouth customers, because they face different competitive choices and have different sets of substitute services available to them.

Analysis

Rule 28-106.204(4), Florida Administrative Code, provides:

> Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the most favorable light toward the party against whom the summary judgment is to be entered. When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary judgment is proper and should be affirmed. The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. See Trawick's Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (1999).

The question is whether the record shows an absence of disputed material facts under the substantive law applicable to the action. To decide the question, the applicable substantive law must be determined and then compared with the facts in the record. If the comparison shows a genuinely disputed material factual issue, summary judgment must be denied and the court cannot decide the issue. Even though the facts are not disputed, a summary judgment is improper if differing conclusions or inferences can be drawn from the facts. Id.

In summary, under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)(citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5th DCA 2000).

Decision

It is quite clear from their filings and responses to discovery that the parties differ as to the appropriate manner by which to calculate the costs associated with providing the PreferredPack Plan, as well as whether, under either methodology, BellSouth is covering its costs. This dispute clearly presents a number of mixed questions of fact and law. Since the

motion must be viewed in the light most favorable to the party against whom the motion is directed, we find the Motion must be denied in this case. It is not appropriate at this time to make a determination on the legal or factual issues to be addressed at a future evidentiary hearing. Rather, we find only that the high standard for granting a summary final order has not been met.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Supra Telecommunications & Information Systems, Inc. Motion for Summary Final Order is denied. It is further

ORDERED that this docket shall remain open for an evidentiary hearing on this matter.

By ORDER of the Florida Public Service Commission this 8th day of October, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

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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.