

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint of Supra Telecommunications and Information Systems, Inc., Against BellSouth Telecommunications, Inc. for violation of the Telecommunications Act of 1996; petition for resolution of disputes as to implementation and interpretation of interconnection, resale and collocation agreements; and petition for emergency relief.

) Docket No. 980119-TP

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Petition for Emergency Relief of Supra Telecommunications and Information Systems, Inc., Against BellSouth Telecommunications, Inc.

) Docket No. 980800-TP

) Filed: September 2, 1998

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.'S MOTION TO DISMISS BELL SOUTH'S MOTION FOR RECONSIDERATION AND CLARIFICATION OF ORDER NO. PSC-98-1001-FOF-TP AND MOTION TO STRIKE BELL SOUTH'S ANSWER IN DOCKET NO. 980800-TP FOR MISCONDUCT

Supra Telecommunications and Information Systems, Inc., ("Supra") hereby files this Motion to Dismiss BellSouth Telecommunications, Inc.'s ("BellSouth's") Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and Motion to Strike BellSouth's Answer in Docket No. 980800-TP for Misconduct and as grounds therefor, states as follows:

1. Supra has previously filed a Response to BellSouth's

Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP, but upon learning that BellSouth has offered a position to a key staff person on these two dockets, Dockets Nos. 980119-TP and 980800-TP, Supra found it imperative to file these motions.

2. BellSouth is involved in two adversary proceedings with

Supra at this time. One proceeding involves Supra's Complaint

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against BellSouth regarding problems in the implementation of the interconnection, resale and collocation agreements by BellSouth in Docket No. 980119-TP and the other proceeding is in Docket No. 980800-TP, which is Supra's Complaint against BellSouth regarding physical collocation issues.

3. Within the past month, while the proceedings in Dockets Nos. 980119-TP and 980800-TP have been pending, BellSouth has offered the lead Commission staff person in both proceedings a position with BellSouth.

4. Based on BellSouth's offer of a position to the lead Commission staff person, this staff person has been automatically removed from both of these dockets on which she has worked.

5. As a result of her removal from Docket No. 980119-TP, this staff person will not be available to work on the pending Motions for Reconsideration that have been filed by Supra and BellSouth in this docket.

6. As a result of her removal from Docket No. 980800-TP, this staff person will not be available to complete the handling of Supra's request for emergency relief on issues involving physical collocation in BellSouth's central offices filed in this docket.

7. In Docket No. 980119-TP, the staff person who was recently offered a position by BellSouth was the key staff person involved in formulating and writing the staff recommendation that was presented to the Commission on June 30, 1998. She has been involved in this docket since early 1998. This same staff person

would have been, but for BellSouth's action, the key staff person involved in formulating and writing the staff's recommendation on the pending motions for reconsideration. This staff person has been employed at the Commission for a substantially longer period of time than the other staff members on the docket and had recently been promoted to a supervisor position as a result of her experience and performance.

8. The decision made by the Commission in Order No. PSC-98-1001-FOF-TP requiring Bellsouth to provide online edit checking capability to Supra will, according to BellSouth, cost BellSouth a great deal of money and cause BellSouth a good deal of trouble. BellSouth will also be required to provide the same capabilities to other alternative local exchange carriers. The stakes for BellSouth if Order No. PSC-98-1001-FOF-TP stands are very high according to BellSouth's Motion for Reconsideration in Docket No. 980119-TP.

9. The key staff person to whom BellSouth has offered a position argued before the Commission in support of the staff's recommendation which was approved by the Commission and incorporated into Order No. PSC-98-1001-FOF-TP. This key staff person signed the staff recommendation as the senior staff person actually working on Docket No. 980119-TP.

10. In Docket No. 980800-TP, this staff person was the key staff person. She had personally visited two BellSouth central offices in Miami and West Palm Beach on July 24, 1998, with both parties. That personal visit took a full day's time for both

parties and four staff persons, as well as incurring travel expenses. The removal of this staff person from this docket will possibly cause greater expense and delay, but, far more significantly, has certainly resulted in an experienced, long term staff person being removed from the lead policy position of this Docket. But for BellSouth's action, this same staff person would have been responsible for formulating and writing the staff recommendation or, possibly, acting as a staff witness in this proceeding.

11. The appearance of impropriety resulting from BellSouth's action is overwhelming. This action by BellSouth is an example of the incredible arrogance of this regulated utility that, in spite of the passage of the Telecommunications Act of 1996, finds itself in a very comfortable position after many decades of absolute monopoly power. BellSouth has the resources to hire anyone it desires. BellSouth currently has literally thousands of employees spread across nine states. It is not an accident that this staff person was offered a position by BellSouth at this point in time. This staff person was responsible for the recommendations incorporated in the Commission's decisions in Order No. PSC-98-1001-FOF-TP in Docket No. 980119-TP that BellSouth wants the Commission to reconsider. BellSouth has made its job offer in time to avoid this staff person's involvement in the evaluation of and recommendation of BellSouth's and Supra's motions for reconsideration in Docket No. 980119-TP.

12. Regarding Docket No. 980800-TP, BellSouth has no desire that this staff person be involved in evaluating its positions regarding the adequacy of space in its central offices in which Supra or other telecommunications carriers may physically collocate. Not only has this staff person demonstrated her capacity and willingness to challenge BellSouth, but by her removal, the Commission is left with much less experienced technical staff to handle this matter.

13. This staff person takes with her valuable information regarding both of these dockets that she gained as an advisor to the Commission and as a neutral regulatory person who was provided access to confidential information from Supra. It is impossible for her not to continue to be aware of this information.

14. While it may be that any Commission staff will do their professional best when assigned to a particular docket, no substituted staff person assigned to handle the Motions for Reconsideration in Docket No. 980119-TP will bring the same level of experience, expertise, and authority to the task. No substituted staff person will have the opportunity to gain the same level of knowledge and familiarity with the evidence in this proceeding that this key Commission staff person gained while going through the entire hearing process. It is not true that each and every Commission staff person is fungible. Each staff person has his or her own ideas and beliefs regarding the issues before the Commission and thus, it is a violation of fundamental

due process for these individuals to be tampered with during a Section 120.57, Florida Statutes, hearing process. That this is so is particularly clear in an instance where the key staff person has formally and publicly advocated her positions on key issues before the Commission as occurred in this proceeding.

15. Supra finds BellSouth's offer of a position with BellSouth to this key Commission staff person in these dockets to be misconduct of the most serious order and Supra strenuously objects.

16. Supra wishes to make clear that it is Supra's view that the individual Staff person involved has done nothing inappropriate. She simply received a job offer, disclosed it, and was removed from these dockets per Commission policy. It is Supra's understanding that this staff person has, in fact, accepted the offer by BellSouth and will shortly be leaving the Commission's employ.

17. The inappropriate action Supra complains of here is the offer of a job made to an agency employee acting as the lead technical staff person in two adversary proceedings being conducted by the agency under Section 120.57(1), Florida Statutes, by a party to the two proceedings.

18. It is a basic principle of Florida and federal administrative law that parties in any administrative proceeding have a right to a fair hearing. For a party to exercise improper influence over the agency staff in any way, including removing a key staff person from the handling of a particular proceeding by

offering that person a position, which offer results in the staff person's removal from a pending docket even if he or she does not accept the position offered, is tantamount to witness or jury tampering in a criminal or civil proceeding.

Indeed, in *Citizens of Florida v. Mayo*, 357 So.2d 731, 732 (Fla. 1978), the Florida Supreme Court stated:

An agenda conference is analogous to jury deliberations in a court trial, or a conference among a panel of judges following oral argument on an appeal.

If an agenda conference is analogous to a jury trial, then it is not at all difficult to see the analogy between a jury trial and a Section 120.57, Florida Statutes, administrative proceeding.

In addressing the role of the Commission staff, the Florida Supreme Court stated in *South Florida Natural Gas v. Florida Public Service Commission*, 534 So.2d 695, 698 (Fla. 1988):

We find that the commission is clearly authorized to utilize its staff to test the validity, credibility and competence of the evidence presented in support of an increase.

Thus, the Florida Supreme Court has recognized the tremendous importance of the Commission staff in the Commission's fulfillment of its statutory mandate. The staff, as a whole, must be protected from any type of contact or influence that could result in even the appearance of impropriety from both a substantive and a procedural standpoint. This protection must extend to not only the staff members as individuals, but to the staff in the aggregate as well.

19. The Florida Legislature recognized the seriousness of

persons and regulated entities hiring agency employees away from an agency only to turn around and utilize those agency employees with their specialized knowledge and personal contacts and influence within those agencies to provide an inappropriate advantage for those persons or regulated entities to the detriment of the administrative process. So serious was this concern that the Florida Legislature enacted Section 112.313(9)(a)4, Florida Statutes, which provides as follows:

No agency employee shall personally represent another person or entity for compensation before the agency with which he or she was employed for a period of 2 years following vacation of position, unless employed by another agency of state government.

20. Section 112.312(22), Florida Statutes, states as follows:

"Represent" or "representation" means actual physical attendance on behalf of a client in an agency proceeding, the writing of letters or filing of documents on behalf of a client, and personal communications made with the officers or employees of any agency on behalf of a client.

21. Section 112.313(9)(a)6c, Florida Statutes, states as follows:

6. This paragraph is not applicable to:

* * * * *

c. A person who was a defined employee of the State University System or the Public Service Commission who held such employment on December 31, 1994;

22. It is clear that Section 112.313(9)(a)6c, Florida Statutes, exempts persons who were "defined employees" of the

Florida Public Service Commission as of December 31, 1994, from the prohibition against representing "persons or entities" for compensation before the Commission for a two year period. Therefore, this individual staff person is free from this particular prohibition. This is also true of this staff person's former supervisor who BellSouth hired earlier this year while he was assigned as the key staff person on Supra's Complaint in Docket No. 980119-TP.

23. It is important to note what the above-cited provisions of Sections 112.312 and 112.313, Florida Statutes, do not say. These provisions do not address the propriety or impropriety of individual staff members accepting an offer of employment with any particular person or entity, of individual staff members accepting an offer of employment with a regulated entity or a party to a proceeding at any particular point in time, nor do they address the propriety or impropriety of individual staff members representing an entity or a party on particular dockets or matters in which an individual staff person had been involved at the time of leaving the employment of the agency and taking employment with that entity or party.

24. The above-cited provisions of Sections 112.312 and 112.313, Florida Statutes, certainly do not authorize a regulated entity who is a party to adversary proceedings under Section 120.57, Florida Statutes, before the Commission to induce key staff, exempt or not, involved in those same adversary proceedings, to leave their Commission employment or to have

those key staff removed from the pending adversary proceedings by the simple offer of a position with that regulated entity.

Neither do the above-cited Sections 112.312 and 112.313, Florida Statutes, authorize Commission staff persons to leave the Commission and immediately represent their new employers in dockets in which both they and their new employers were involved.

25. In May 1995, the Commission enacted Rule 25-21.050, Florida Administrative Code, implementing Section 112.326, Florida Statutes, which permitted the Commission to enact more stringent standards of conduct for Commission staff than are set out in Chapter 112, Part III, Florida Statutes, for other state employees. Rule 25-21.050, Florida Administrative Code, prohibits each Commission staff person from accepting gifts from a regulated entity, a person acting on behalf of a regulated entity, an entity that is currently a party in a Commission proceeding, or an entity that was a party to a Commission proceeding within the preceding twelve months. The purpose of this Rule is to prevent the Commission staff from being improperly influenced by gifts or inducements meant to sway the staff's opinions on the merits of issues or matters in which the staff is involved. This Rule prohibits the Commission staff from accepting gifts valued in excess of \$3.00.

How much more egregious is it for a party with a vested stake in the outcome of a pending motion for reconsideration to totally remove the staff person most responsible for the order being reconsidered from that pending Commission proceeding by

making an offer of employment?

In this instance BellSouth has not attempted to "buy" this staff person's opinions with gifts or inducements. BellSouth has simply removed this staff person handling these dockets in an effort to alter the outcome of these proceedings. The removal of a particular staff person along with her previously-documented and expressed opinions, in-depth expertise, and long experience may very likely alter the outcome of these proceedings by altering the recommendations provided to the Commission on the critical issues involved. Indeed, if an individual staff person cannot affect the outcome of a recommendation or a proceeding, why does the Commission believe it is necessary to remove a staff person from a proceeding once an employment offer has been made to that staff person.

26. As a quasi-judicial body, the Commission has the obligation to ensure that fundamental due process is preserved in its administrative proceedings. The Commission has this obligation as a result of the due process clauses in the U.S. Constitution and the Florida Constitution. Due process of law requires a neutral and impartial fact-finder and a fair fact-finding process. The incidents of a fair fact-finding process in an administrative context include a neutral and impartial staff acting as the arm of the decision maker. This necessarily means that such a staff must not be subject to alteration or tampering by the action of a party to a proceeding, either on an individual basis or in the aggregate by the removal of any individual staff.

The Commission has no rule addressing this specific problem just as it has no rule addressing the impropriety of an action by a regulated entity to have a Commissioner reassign the staff for a particular proceeding with the purpose of altering the outcome. The reason there is no such rule is that the issue simply has not come up. No rule is required to identify this type of misconduct.

27. Although the Florida Rules of Civil Procedure do not set out an exhaustive list of the infinite possible actions that might constitute misconduct by an individual party, Rule 1.540(b) provides an avenue for a party to obtain relief from any order of a court based on the misconduct of an adverse party. Rule 1.540(b), Florida Rules of Civil Procedure, states:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:

* * * * *

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, **or other misconduct of an adverse party;**

If the Commission is empowered by the Florida Rules of Civil Procedure to grant relief from a final order on the basis of the misconduct of a party to a proceeding, the Commission is certainly empowered to dismiss a motion for reconsideration and to strike a party's answer for that same reason.

28. Supra requests that the Commission dismiss BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-

1001-FOF-TP filed in Docket No. 980119-TP. This is the only remedy that can be provided to Supra. The reconsideration process has been tainted by BellSouth's action.

29. Supra requests to be granted the relief it seeks in Docket No. 980800-TP by the Commission striking BellSouth's Answer to Supra's Complaint in that Docket. BellSouth took an action that was completely inappropriate and that has tainted this docket by trying to influence the outcome of the proceeding by hiring away the lead Commission staff person on the docket and, therefore, this is the only appropriate remedy.

30. Supra requests that BellSouth be prohibited from utilizing this Commission staff person in any form or fashion on any dockets she was assigned to as Commission staff in which BellSouth and Supra are involved. It would also be appropriate to prohibit BellSouth from utilizing this Commission staff person on any dockets she was assigned to in which BellSouth is involved.

31. It is not Supra's view that it is necessary to prohibit all employment opportunities with utilities or telecommunications carriers for Commission staff. It is simply that the Commission must place restrictions on parties to adversary proceedings regarding offers of employment to Commission staff assigned to those proceedings. If this particular staff person had not been involved in an adversary proceeding in which BellSouth is involved, this job offer would not constitute a serious problem for Supra. Commission staff could be appropriately offered

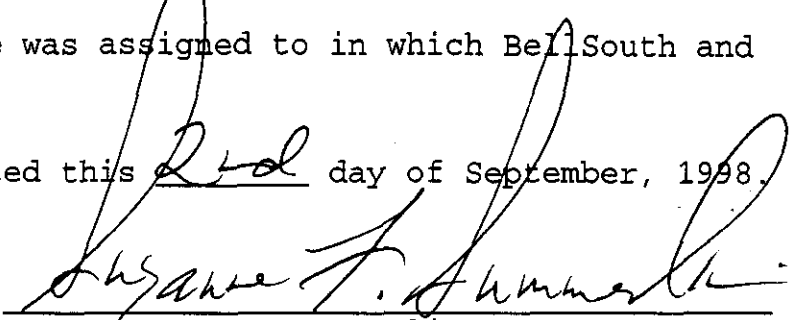
positions by companies with which they are not involved in an adversary proceeding (although, of course, the restrictions in Section 112.313(9)(a)4, Florida Statutes, might apply depending on the date of their employment with the Commission). Supra is not interested in limiting the Commission's staff's job opportunities. Supra is merely interested in an administrative process that provides fundamental due process.

32. It is critical to recognize that this misconduct by BellSouth is premeditated, targeted, and abusive of the process. The Florida Public Service Commission, as a quasi-judicial body involved in fact-finding in proceedings under Section 120.57, Florida Statutes, has an obligation to assure that the administrative process is free from any improper external influence. If the Commission does not fulfill this obligation, the administrative process at the Commission will be so tainted by improper influence and misconduct that no telecommunications carrier will receive a fair hearing nor will any telecommunications carrier or the public have any basis for confidence in the fairness or justice of the Commission's proceedings or orders.

WHEREFORE, Supra Telecommunications & Information Systems, Inc., respectfully requests the Commission to dismiss BellSouth Telecommunications, Inc.'s Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP, to strike BellSouth Telecommunications, Inc.'s Answer to Supra's Complaint in Docket No. 980800-TP, and to prohibit BellSouth from utilizing

this Commission staff person to represent BellSouth in any form or fashion in dockets she was assigned to in which BellSouth and Supra are involved.

Respectfully submitted this 2nd day of September, 1998.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to the following parties of record this 2nd day of September, 1998:

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