



Public Service Commission

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DATE: SEPTEMBER 14, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *AK used*
 DIVISION OF COMPETITIVE SERVICES (SIMMONS) *SAS*
 DIVISION OF REGULATORY OVERSIGHT (VINSON) *CV*
 DIVISION OF POLICY ANALYSIS & INTERGOVERNMENTAL LIAISON
 (CLARK-WATTS) *WB*

RE: DOCKET NO. 980119-TP - 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.

AGENDA: 09/26/00 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980119RH.RCM

CASE BACKGROUND

On January 23, 1998, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged violations of the Telecommunications Act of 1996 (Act) and Petition for resolution of certain disputes between BellSouth and Supra regarding interpretation of the Interconnection, Resale, and Collocation Agreements between Supra and BellSouth (Petition). On February 16, 1998, BellSouth filed its Answer and Response to Supra's Petition. On April 30, 1998, the Commission held a hearing in which it received testimony concerning Supra's complaint. By Order

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No. PSC-98-1001-FOF-TP, issued July 22, 1998, the Commission rendered its final determination regarding the complaint.

On August 6, 1998, BellSouth filed a Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP. That same day, Supra filed a Motion for Reconsideration and Clarification, as well as a Motion to Take Official Notice of the Record in Docket No. 960786-TL. On August 17, 1998, BellSouth filed its Response to Supra's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TL. BellSouth also filed its Opposition to Supra's Motion to Take Official Recognition of the Record in Docket No. 960786-TL. On August 18, 1998, Supra filed its Response to BellSouth's Motion for Reconsideration and Clarification, as well as a Request for Oral Argument. On August 21, 1998, BellSouth filed its Opposition to Supra's Request for Oral Argument.

On September 2, 1998, Supra filed a Motion to Dismiss 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. Supra also requested oral argument on its motion. On September 9, 1998, BellSouth filed its Opposition to Supra's Motion to Dismiss and Motion to Strike and its own Motion to Strike and Motion for Oral Argument. BellSouth also included a Motion for Sanctions in its filing. On September 21, 1998, Supra filed its Response to BellSouth's Motion to Strike Supra's Motion to Dismiss and Motion for Sanctions. Supra also included a request to accept its Response Out of Time. On September 23, 1998, BellSouth filed its Opposition to Supra's request to accept its Response to BellSouth's Motion to Strike. By Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, the Commission denied the motions for reconsideration and to supplement the record, and clarified its post-hearing Order.

Thereafter, on November 24, 1998, BellSouth filed a Complaint in the federal district court for the Northern District of Florida appealing the Commission's decision, Case No. 4:98CV4041-WS. The Complaint asked that the above Commission Orders be declared invalid and that enforcement of them be enjoined "to the extent that they require BellSouth to provide Supra with on-line editing capabilities." Complaint, p. 8.

On January 1, 1999, Supra filed with this Commission a Notice that BellSouth had not complied the Commission's final Order. On April 26, 1999, BellSouth filed a Notice of Compliance with the Commission's final Order, and asked that the Commission approve BellSouth's compliance.

On June 16, 1999, BellSouth filed a Motion to Hold Proceedings in Abeyance Pending Action in Related Administrative Proceedings seeking to abate its federal appeal to enable the Commission to determine if BellSouth had complied with the Commission's Orders issued in this Docket. Supra opposed the motion.

On September 3, 1999, the Northern District heard argument on the Motion. Judge Hinkle specifically asked whether three months would be sufficient for the status of BellSouth's compliance to be determined by the Commission. He was advised that three months was sufficient by the Commission attorneys participating.

The Court issued an order on September 6, 1999, abating the federal case until December 1, 1999. Though a discovery schedule was followed to meet that deadline, Supra provided certain discovery responses late, which made the December 1, 1999 deadline impossible to meet. The Commission sought to extend the deadline until February 1, 2000. On December 21, 1999, the Court granted that extension. It should, however, be noted that Supra vigorously opposed any abatement of the federal case on the grounds that it is a delaying tactic on the part of BellSouth.¹

On November 22, 1999, the parties and staff met to discuss the discovery responses, and to clarify which, if any, matters in the Commission's Order had been complied with or otherwise resolved. Staff also attempted to mediate a resolution between the parties. During those discussions, BellSouth was asked to provide further information. BellSouth provided the information on December 10, 1999.

Based upon Notice filed by BellSouth, Supra's response, the discovery provided by the parties, and information gained as a result of staff's November 22, 1999, meeting with the parties, the Commission issued Order No. PSC-00-0288-PCO-TP, on February 11, 2000. Therein, the Commission determined that BellSouth had complied with all portions of the Commission's final decision in this case, Order No. PSC-98-1001-FOF-TP, issued July 22, 1998, as clarified by Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, except for the specific requirements that BellSouth should provide Supra with on-line edit checking capability by December 31, 1998. The Commission did, however, acknowledge that BellSouth had made

¹ The Court did subsequently grant a brief extension for BellSouth to file its brief on the merits, and on February 25, 2000, BellSouth filed its Initial Brief on the Merits.

significant developments in its OSS since the time that we rendered our final decision, including TAG, Robo-TAG, and LENS '99.

On February 25, 2000, Supra filed a Motion for Reconsideration of the Commission's decision, as well as a Request for Oral Argument. On March 8, 2000, BellSouth filed its Response, which included a request that the Commission reconsider its decision not to proceed to hearing on the limited issue of on-line edit checking capability. Supra did not file a response to this apparent request/cross-motion for reconsideration. By Order No. PSC-00-0798-FOF-TP, issued April 24, 2000, the Commission denied both parties' requests for reconsideration pending the outcome of the federal proceedings.

On May 8, 2000, the federal district court granted BellSouth's voluntary dismissal of its appeal to allow the Commission to address the issue of whether BellSouth is in compliance with the on-line edit checking requirements.

On June 8, 2000, BellSouth filed a Motion for Reconsideration of the Commission's decision, and requested that the issue of whether or not BellSouth has complied with the edit checking capability requirements of Order No. PSC-98-1001-FOF-TP be resolved by the third party testing of BellSouth's OSS, which is currently being conducted pursuant to Order No. PSC-00-0104-PAA-TP, in Dockets Nos. 981834-TP and 960786-TL. On July 5, 2000, Supra filed its response and opposition to BellSouth's Motion, as well as a request for oral argument. Thereafter, on July 10, 2000, BellSouth filed a reply to Supra's response. On July 12, 2000, Supra filed a Motion to Strike BellSouth's Reply to Supra's Response, and a Motion to Strike BellSouth's Motion for Reconsideration. BellSouth did not respond to the Motions to Strike. This is staff's recommendation on these Motions.

JURISDICTION

The Commission has jurisdiction to resolve this dispute pursuant to Sections 251 and 252 of the Telecommunications Act of 1996. See also Iowa Utilities Bd. V. FCC, 120 F. 3d 753, 804 (8th Cir. 1997) (state commissions' authority under the Act to approve agreements carries with it the authority to enforce the agreements).

DISCUSSION OF ISSUES

ISSUE 1: Should Supra's Motion for Oral Argument be granted?

RECOMMENDATION: As set forth in Issue 4 of this recommendation, staff believes Supra's response to BellSouth's Motion was untimely; thus, staff believes that Supra's request for oral argument was also untimely. Staff recommends, therefore, that the Motion for Oral Argument be denied. (B. KEATING)

STAFF ANALYSIS: Rule 25-22.058, Florida Administrative Code, requires that a request for oral argument must accompany the pleading upon which argument is requested.

BellSouth indicates that it opposes Supra's request for oral argument, because Supra's response, as well as the request for oral argument, were untimely filed.

In this particular case, Supra's request did accompany its response to BellSouth's motion in accordance with the Rule. Supra's response to the motion was, however, late, as explained in Issue 4. Therefore, staff believes that Supra's request for oral argument should also be considered late. It would seem inconsistent to allow oral argument on an untimely response. Thus, staff recommends that Supra's Request for Oral Argument be denied.

ISSUE 2: Should the Commission grant Supra's Motion to Strike BellSouth's reply to Supra's Answer and Opposition to BellSouth's Motion for Reconsideration?

RECOMMENDATION: Yes. Neither the Uniform Rules nor Commission rules contemplate a reply to a response to a Motion. Therefore, the Motion to Strike should be granted.

STAFF ANALYSIS: Supra argues that the rules governing motions for reconsideration contemplate a motion and a response. Neither provides for a reply brief, such as that filed by BellSouth. Therefore, Supra asks that BellSouth's reply be stricken.

BellSouth did not file a response to the Motion to Strike.

Staff agrees with Supra that neither the Uniform Rules nor Commission rules contemplate a reply to a response to a Motion. Therefore, the Motion to Strike should be granted.

ISSUE 3: Should the Commission grant Supra's Motion to Strike BellSouth's Motion for Reconsideration?

RECOMMENDATION: No. Although improperly styled as a Motion for Reconsideration, BellSouth's Motion does not seek reconsideration of any specific Commission Order, but instead asks that the record of this case be reopened to address changed circumstances. Thus, the Motion should be accepted.

STAFF ANALYSIS: In its Motion to Strike, Supra contends that a Motion for Reconsideration must be filed within 15 days of the issuance of the final order, or within 10 days of the issuance of a non-final order, according to Commission rules. Supra emphasizes that the Commission's rules on motions for reconsideration state that failure to timely file constitutes a waiver of the right to do so. Therefore, Supra asks that BellSouth's Motion for Reconsideration be stricken as untimely.

BellSouth did not file a response to the Motion.

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Although styled as a Motion for Reconsideration, BellSouth's Motion does not seek reconsideration of any specific Commission Order. Instead, BellSouth asks that the Commission determine that the issue of whether BellSouth has modified the ALEC ordering system, specifically TAG, LENS, and Robo-TAG so that an ALEC may use them to submit orders in the same manner as BellSouth's retail representatives should be resolved in Dockets Nos. 960786-TL and 981834-TP. BellSouth asks that this be done because circumstances have changed since the time that the Commission issued its original post-hearing order in this Docket, and BellSouth now has interfaces that provide this capability that were not considered by the Commission. Florida courts have held that "[a] pleading will be considered what it is in substance, even though mislabelled." Mendoza v. Board of County Commissioners/Dade County, 221 So. 2d 797, 798 (3rd DCA 1969). See also Sodikoff v. Allen Parker Company, 202 So.2d 4 (Fla.App.1967); Hough v. Menses, 95 , 95 So.2d 581, 582 (Fla. 1957). "Courts should look to the substance of a motion and not the title alone." Mendoza v. Board of County Commissioners/Dade County, 221 So. 2d 797, 798 (3rd DCA 1969). Staff, therefore, recommends that Supra's Motion to Strike BellSouth's Motion for Reconsideration be denied.

ISSUE 4: Should the Commission grant BellSouth's Motion for Reconsideration?

RECOMMENDATION: Staff recommends that BellSouth's request to reopen the record of this case be granted. Staff also recommends that the Commission postpone any hearing on whether or not BellSouth's OSS provides on-line edit checking capability until the third-party OSS testing is completed in order to avoid duplicative proceedings. Once that testing is done, staff recommends that the information and determinations made in that proceeding be employed in this Docket to the fullest extent possible. Once third-party OSS testing is completed, staff would prepare a recommendation for the Commission's consideration addressing whether the third-party testing of BellSouth's OSS has resolved the issue in dispute, or whether the Commission should proceed to a hearing in this Docket to address any unresolved matters, including the issue of whether BellSouth timely complied with the Commission's post-hearing orders.

Staff also recommends that Supra's response to the Motion not be accepted, as it was untimely filed and no request for leave to accept the untimely response was submitted. (B. KEATING)

STAFF ANALYSIS:
Supra's Response

Although BellSouth filed its Motion on June 8, 2000, Supra did not file a response until July 5, 2000. Pursuant to Rule 28-106.204(1), Florida Administrative Code, responses to motions must be filed within seven days, with five additional days allowed for service by mail. Therefore, Supra's response was actually due by June 20, 2000. As such, Supra's response was filed a full two weeks late. Supra did not accompany its response with a request to accept its late-filed response, nor did it include any explanation of its failure to timely file within the context of its response. Staff recommends, therefore, that the Commission not consider Supra's response in rendering its decision on BellSouth's Motion.

BellSouth's Motion

As explained in the previous issue, BellSouth's Motion does not seek reconsideration of any specific Commission Order. Instead, BellSouth asks that the Commission determine that the issue of whether BellSouth has modified the ALEC ordering systems, specifically TAG, LENS, and Robo-TAG so that an ALEC may use them to submit orders in the same manner as BellSouth's retail

representatives should be resolved in Dockets Nos. 960786-TL and 981834-TP. BellSouth asks that this be done because circumstances have changed since the time that the Commission issued its original post-hearing order in this Docket, and BellSouth now has interfaces that provide this capability that were not considered by the Commission.

Recommendation

In view of the changed circumstances alleged by BellSouth, staff believes it is appropriate to reopen the record of this case to consider whether BellSouth's ALEC ordering system can provide on-line edit checking capability to Supra. See McCaw Communications of Florida, Inc., Appellant, vs. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996). The Commission has already acknowledged that it might find that an evidentiary proceeding is warranted based on changed circumstances, and noted that an argument could be made that the development of TAG, LENS, and Robo-TAG amounts to changed circumstances, thereby, providing a basis for rehearing by the Commission in this case, citing McCaw Communications of Florida, Inc., Appellant vs. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996).² Order at p. 11. The Commission did not preclude the possibility that should the federal proceeding be dismissed, the Commission might find that an evidentiary proceeding is warranted based on changed circumstances. Orders Nos. PSC-00-0288-PCO-TP, issued February 11, 2000, at p. 11; and PSC-00-0798-FOF-TP, issued April 24, 2000, at pgs. 11-12.

Due to the technical complexity of the primary issue to be determined, staff also recommends that the Commission postpone any hearing on whether or not BellSouth's OSS provide on-line edit checking capability until the third-party OSS testing is completed in order to avoid duplicative proceedings. Once that testing is done, staff recommends that the information and determinations made in that proceeding be employed in this Docket to the fullest extent possible. Staff notes that both BellSouth and Supra are parties to Docket No. 981834-TP. Once third-party OSS testing is completed, staff would prepare a recommendation for the Commission's consideration addressing whether the third-party testing of

² The McCaw Communications Court, in upholding the Commission's decision to revisit the issue of MSP interconnection rates and IXC access charges due to changed circumstances, cautioned that agencies should not take "too doctrinaire" an approach to the application of the doctrine of administrative finality. Id.

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BellSouth's OSS has resolved the issue in dispute, or whether the Commission should proceed to a hearing in this Docket to address any unresolved matters, including the issue of whether BellSouth timely complied with the Commission's post-hearing orders.

ISSUE 5: Should this Docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issues 3 and 4, this Docket should remain open pending the outcome of the third-party OSS testing being conducted in Dockets Nos. 960786-TL and 981834-TP. Thereafter, the Commission should determine whether it is necessary to proceed to hearing on the additional issue of BellSouth's timely compliance with the requirements of Orders Nos. PSC-98-1001-FOF-TP and PSC-98-1467-FOF-TP. (B. KEATING)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issues 3 and 4, this Docket should remain open pending the outcome of the third-party OSS testing being conducted in Dockets Nos. 960786-TL and 981834-TP. Thereafter, the Commission should determine whether it is necessary to proceed to hearing on the additional issue of BellSouth's timely compliance with the requirements of Orders Nos. PSC-98-1001-FOF-TP and PSC-98-1467-FOF-TP.