



Public Service Commission

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**DATE:** OCTOBER 26, 2000

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF LEGAL SERVICES (FORDHAM) *C.S.F. mad*  
DIVISION OF COMPETITIVE SERVICES (SIMMONS) *SAS*

**RE:** DOCKET NO. 001097-TP - REQUEST FOR ARBITRATION CONCERNING COMPLAINT OF BELLSOUTH TELECOMMUNICATIONS, INC. AGAINST SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC. FOR RESOLUTION OF BILLING DISPUTES.

**AGENDA:** NOVEMBER 07, 2000 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\001097.RCM

CASE BACKGROUND

BellSouth Telecommunications, Inc. (BellSouth) provides local exchange telecommunications services for resale pursuant to the Telecommunications Act of 1996, and to resale agreements entered into between BellSouth and various Alternative Local Exchange Companies (ALECs). Supra Telecommunications and Information Systems, Inc. (Supra) is an ALEC certified by this Commission to provide local exchange services within Florida.

On August 9, 2000, BellSouth filed a complaint against Supra, alleging that Supra has violated Attachment 6, Section 13 of their present agreement by refusing to pay non-disputed sums. The complaint also alleges billing disputes arising from the prior resale agreement with Supra. On August 30, 2000, Supra filed a timely Motion to Dismiss or, in the Alternative, to Stay

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Proceedings and/or Compel Arbitration. Supra also, in a separate document, filed a timely Request for Oral Argument on its Motion. On September 8, 2000, BellSouth filed a timely Response to Supra's Motion to Dismiss or Stay. This recommendation addresses Supra's motion and request.

#### JURISDICTION

Pursuant to Section 364.058, Florida Statutes, the Commission may conduct a limited proceeding to consider and act upon any matter within its jurisdiction. Pursuant to Section 364.07(2), Florida Statutes, the Commission is authorized to review contracts for joint provision of intrastate interexchange service, and is authorized to adjudicate disputes of telecommunications companies regarding such contracts or the enforcement thereof. Therefore, the Commission is authorized to proceed in this matter.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should Supra's Request for Oral Argument on its Motion to Dismiss Complaint be granted?

**RECOMMENDATION:** Yes. Regardless of whether the Commission approves staff's recommendation in Issue 2, the parties should be granted oral argument. (FORDHAM)

**STAFF ANALYSIS:** The Complaint and Motion to Dismiss in this Docket are rather fact specific and do not address the details in the depth found in the various attachments and interconnection agreements. Additionally, the history of negotiations between the parties would naturally focus on the areas of strongest disagreement. Supra has complied with Rule 25-22.058 in the filing of this request. Staff believes it would be helpful to this Commission, and otherwise appropriate, to allow oral argument on Supra's Motion to Dismiss.

**ISSUE 2:** Should the Commission grant Supra's Motion to Dismiss or, in the Alternative, to Stay?

**RECOMMENDATION:** The Commission should grant in part and deny in part Supra's Motion to Dismiss or, in the Alternative, to Stay. (FORDHAM, SIMMONS)

**STAFF ANALYSIS:** On August 30, 2000, Supra filed a timely Motion to Dismiss or, in the Alternative, to Stay Proceedings and/or Compel Arbitration. Supra also, in a separate document, filed a Request for Oral Argument on its Motion. On September 8, 2000, BellSouth filed a timely Response to Supra's Motion to Dismiss or Stay.

### Complaint

BellSouth has provided local exchange services for resale by Supra pursuant to a resale agreement approved by this Commission on October 8, 1997, and an interconnection and resale agreement approved by this Commission on November 30, 1999, in which Supra adopted the AT&T agreement. The 1997 agreement was in effect from June 1, 1997, through October 4, 1999, and the AT&T agreement has been in effect from October 5, 1999 to the present.

BellSouth alleges that, under their present agreement, Supra currently owes BellSouth hundreds of thousands of dollars for resale services ordered by Supra, properly rendered and billed by BellSouth, most of which is not disputed by Supra. According to BellSouth, Supra has failed to pay its bills under the present agreement, including the undisputed sums, since January 1, 2000. BellSouth continues to provide service to Supra pursuant to the current agreement and is requesting this Commission to order Supra to pay all outstanding balances on its account and pay BellSouth's bills in a timely manner on a going forward basis. In the alternative, BellSouth seeks permission of this Commission to disconnect Supra from BellSouth's ordering interfaces and to disconnect Supra's end users.

Additionally, BellSouth seeks resolution of certain billing disputes raised by Supra which occurred under the old resale agreement. Supra claims BellSouth should pay Supra a total of \$305,560.04, plus interest in the amount of approximately \$150,000, as reimbursement for charges Supra claims were unwarranted under the old agreement. The questioned charges fall into two primary categories; 1) Supra claims that it was improperly billed by

BellSouth for End User Common Line charges in the amount of \$224,287.79, and, 2) Supra claims that it was improperly billed \$48,917.60 for processing changes in services and unauthorized local service changes and reconnections.

Motion to Dismiss

Supra's Motion to Dismiss points out that the Complaint specifically alleges in paragraph 5 that this proceeding arises under "an interconnection and resale agreement filed with the Commission November 10, 1999 and approved by the Commission on November 30, 1999, in which Supra adopted the AT&T agreement." Also, "[t]he AT&T agreement adopted by Supra has been in effect from October 5, 1999 to the present." Supra notes that the Complaint alleges in paragraph 7 that "Supra has violated Attachment 6, Section 13, of the [current] agreement by refusing to pay non-disputed sums."

Attachment 1 to the current interconnection agreement is also attached to the Complaint, and provides for Alternative Dispute Resolution for all disputes arising under the present agreement. Paragraph 2 of Attachment 1 states in pertinent part that "[n]egotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between BellSouth and AT&T [Supra Telecom] arising under or related to this Agreement, including its breach..."

Based upon the above, Supra urges that it is clear that the Complaint alleges a dispute arising under or related to the current interconnection agreement, and that pursuant to that interconnection agreement, the sole and exclusive remedy available to the parties is private arbitration.

Analysis

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

Supra, however, argues that this Commission is preempted from consideration of this complaint by the exclusive arbitration clause contained within the agreement wherein the breach occurred. Under both Florida and Federal law, private arbitration provisions are valid, binding and enforceable. Federal Arbitration Act, 9 U.S.C. §§ 1-14; Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 74 L.Ed.2d 765, 103 S.Ct. 927(1983); Fla. Stat. § 682.02; Cone Constructors, Inc. V. Drummon Community Bank, 754 So.2d 779(Fla. 1st DCA 2000); Old Dominion Insurance Co. V. Dependable Reinsurance., 472 So.2d 1365(Fla. 1st DCA 1985); Zac Smith & Co. V. Moonspinner Condominium Association, Inc., 472 So.2d 1324(Fla. 1st DCA 1985); Physicians Weight Loss Centers of America, Inc. V. Payne, 461 So.2d 977(Fla. 1st DCA 1984); Miller Construction Co. V. The American Insurance Co., 396 So2d 281(Fla. 1st DCA 1981).

The Complaint requested relief in two separate categories; 1) Supra's breach of the present agreement, containing the arbitration clause, and 2) "billing disputes" arising under the prior agreement, which contained no arbitration clause. In BellSouth's response to Supra's Motion to Dismiss, BellSouth argues that it would be "unfair and inefficient to require the parties to endure the added delay and expense of resolving this issue in a separate forum."

While recognizing that it may be more efficient to address all issues in a single forum, staff feels that the dispute resolution provisions in each of the agreements should be strictly followed. To do otherwise would invite the questions of which provision should be ignored, and why, does either of the procedures favor one of the parties more than the other, and whether one of the provisions may legally be ignored in the interest of efficiency.

Accordingly, it is recommended that Supra's Motion to Dismiss be granted as to the portion of the Complaint alleging Supra's failure to pay for services received under the present agreement, because of the exclusive arbitration clause. As to the "billing disputes" arising under the previous agreement, however, staff recommends that the Motion to Dismiss be denied. Section XI of the prior agreement provides that all disputes shall be resolved by petition to the Florida Public Service Commission. This Commission, therefore, clearly has exclusive jurisdiction to consider disputes arising under the earlier agreement.

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**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No. If the Commission approves staff's recommendations in Issues 1 and 2, this docket should remain open pending resolution of BellSouth's complaint. (FORDHAM)

**STAFF ANALYSIS:** If the Commission approves staff's recommendations in Issues 1 and 2, this docket should remain open pending resolution of BellSouth's complaint.