Legal Department

James Meza III
Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5561

April 17, 2002

Mrs. Blanca S. Bayo
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 001305-TP (Supra)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to Supra Telecommunications and Information Systems, Inc.'s Motion for Reconsideration of the Denial of its Motion for Rehearing, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return a copy to me. Copies have been served to the parties shown on the attached certificate of service.

Sincerely,

James Meza III (KA)

James Meza III

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 17th day of April, 2002 to the following:

Wayne Knight
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6232
Fax. No. (850) 413-6250
wknight@psc.state.fl.us

Ann Shelfer, Esq.
Supra Telecommunications and
Information Systems, Inc.
1311 Executive Center Drive
Koger Center - Ellis Building
Suite 200
Tallahassee, FL 32301-5027
Tel. No. (850) 402-0510
Fax. No. (850) 402-0522
ashelfer@stis.com

Brian Chaiken
Paul Turner (+)
Kirk Dahlke
Supra Telecommunications and
Information Systems, Inc.
2620 S. W. 27th Avenue
Miami, FL 33133
Tel. No. (305) 476-4248
Fax. No. (305) 443-1078
bchaiken@stis.com
pturner@stis.com
kdahlke@stis.com

James Meza III (LA)

(+) Signed Protective Agreement

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information System, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 001305-TP
	)	Filed: April 17, 2002

BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION FOR RECONSIDERATION OF THE DENIAL OF ITS MOTION FOR REHEARING

For the reasons set forth below, BellSouth Telecommunications, Inc. ("BellSouth") opposes Supra Telecommunications & Information Systems, Inc.'s ("Supra's") Motion seeking reconsideration of this Commission's decision denying Supra's prior Motion for Rehearing.

INTRODUCTION

Supra's Motion offers no legitimate grounds for reconsideration. First, Supra's Motion fails as a matter of law because it does not comply with the standard for reconsideration. The Motion consists solely of new arguments, new information, or arguments previously considered but rejected by the Commission – none of which constitutes a valid ground for reconsideration. Second, even if the Commission could consider the arguments and information contained in Supra's Motion, none of the information or arguments that Supra has presented supports a finding of actual impropriety in Docket No. 001097, the appearance of impropriety in this docket, or any prejudice to Supra in this docket. Supra cannot show any prejudice in this docket because it is undisputed that Ms. Logue, the staff employee whose communications were at issue in Docket No. 001097, had no role in the staff recommendation in this docket.

This Motion is simply Supra's latest attempt to game the system in order to avoid executing a new interconnection agreement with BellSouth. As Chairman Jaber observed at the hearing, under the present circumstances, Supra has no incentive to execute a new agreement. Because the motion for reconsideration is completely without merit, the Commission should deny it.

LAW AND ARGUMENT

A motion for reconsideration cannot be based on new evidence or on new arguments. The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering an order. See Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959) (citing State ex. Rel. Jayatex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Moreover, a motion for reconsideration is not intended to be "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order." Diamond Cab Co., 394 So.2d at 891. Indeed, a motion for reconsideration should not be granted based upon an arbitrary feeling that a mistake may have been made, but should be based on specific factual matter set forth in the record and susceptible to review. Steward Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

Further, it is well settled that it is inappropriate to raise new arguments in a motion for reconsideration or base a motion for reconsideration on information not in the record. In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No.

950984-TP, Order No. PSC 96-1024-FOF-TP, Aug. 7, 1996, 1996 WL 470534 at *3 ("It is not appropriate, on reconsideration, to raise new arguments not mentioned earlier."); In re: Southern States Utilities, Inc., Docket No. 950495-WS, Order No. PSC-96-0347-FOF-WS, Mar. 11, 1996, 1996 WL 116438 at *3 ("Reconsideration is not an opportunity to raise new arguments."); In re: St. George Island Util. Co., Ltd., Docket No. 940109-WU, Order No. PSC-95-0274-FOF-WU, Mar. 1, 1995, 1996 WL 116782 at *2 (striking new evidence attached as an exhibit to a motion for reconsideration because the Commission's "decision, even on reconsideration, must be based solely upon the record.").

I. SUPRA'S MOTION DOES NOT MEET THE STANDARD FOR RECONSIDERATION

As an initial matter and without getting into its substantive defects, Supra's Motion for Reconsideration fails to meet the standard for reconsideration. This is so because it (1) raises the same arguments previously raised and rejected by the Commission; (2) bases its arguments on new information not in the record; and (3) raises new legal arguments.

First, as stated above, a motion for reconsideration must be based on a point of fact or law which was overlooked or which the Commission failed to consider in rendering an order. See Diamond Cab Co., 146 So. 2d at 891. In violation of this standard and despite Supra's repeated attempts to camouflage this fatal defect, Supra's Motion simply reargues the same legal points it raised in its original motion for rehearing – *i.e.* appearance of impropriety, assignment of new hearing to DOAH or Special Master -- and which the Commission considered and rejected. Simply stated, stripped of its lengthy commentary, abusive language, and rhetoric, Supra's Motion for Reconsideration

is nothing more than an attempt by Supra to reargue matters that it originally presented to the Commission and which the Commission rejected. Thus, Supra's Motion for Reconsideration should be rejected as being procedurally defective.

Second, Supra premises its Motion on information that has no relevance to the instant docket and that Supra recently obtained pursuant to several public records requests – requests that were issued after the Commission's March 5, 2002 agenda vote. The overwhelming majority of this information, and specifically Exhibits A, B, D, E, F, G, I, J, K, M, N, O, P, Q, R, S, T, U, V, W, X, Y, and Z, was not presented by Supra in its original Motion for Rehearing and thus constitutes new information that is not contained in the record. In fact, in only 12 pages of the 48 page Motion does Supra address or reference an exhibit that is in the record.

It is well settled that the Commission's decision on reconsideration must be based on information contained in the record. See In re: St. George Island Util. Co., Ltd., , Order No. PSC-95-0274-FOF-WU; see also, In re: Investigation Into Pricing of Unbundled Network Elements, Docket No. 9906490-TP, Order No. PSC-01-2051-FOF-TP, Oct. 18, 2001 (finding that it is inappropriate to consider "extra-record evidence . . . within the context of a Motion for Reconsideration); In re: Application for Transfer of Certificates Nos. 404-W and 341-S in Orange County from Econ Util. Corp. to Wedgefield Util., Inc., Docket No. 960235-WS, Order No. PSC-97-1510-FOF-WS, Nov. 26, 1997 ("A motion for reconsideration is not an appropriate vehicle for mere reargument or to introduce new evidence or arguments which were not previously considered."). Accordingly, the Commission is prohibited from considering or relying on

this new information to support a finding of reconsideration, thereby mandating that Supra's Motion be denied.

As to the information that is contained in the record, like the Affidavit of Ms. Nancy Sims, Supra simply reraises the same argument that it raised in the Motion for Rehearing and which the Commission rejected. Thus, even as to the information contained in the record, Supra's Motion is facially defective and should be rejected.

Third, Supra raises new arguments in its Motion for Reconsideration, including its argument that rehearing is proper under Rule of Civil Procedure 1.540(b). As this Commission has previously stated, "[i]t is not appropriate, on reconsideration, to raise new arguments not mentioned earlier." In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No. 950984-TP, Order No. PSC 96-1024-FOF-TP, Aug. 7, 1996, 1996 WL 470534 at *3. Further, "[r]econsideration is not an opportunity to raise new arguments." In re: Southern States Utilities, Inc., Docket No. 950495-WS, Order No. PSC-96-0347-FOF-WS, Mar. 11, 1996, 1996 WL 116438 at *3. Accordingly, the Commission is prohibited from considering these new arguments, and Supra's Motion for Reconsideration should be rejected.

II. SUPRA CANNOT SHOW PREJUDICE IN THIS DOCKET.

Supra has not demonstrated any prejudice to it in this docket. Supra acknowledges that Ms. Logue had no role in drafting the staff recommendation in this proceeding (Supra Motion at 42), but invites the Commission to *infer* that she must have improperly influenced other staff members. Id. Of course, there is no evidence that Ms. Logue actually exerted improper influence on any staff members involved in drafting the Staff recommendation in this docket. Moreover, this Commission did not just blindly

adopt the Staff recommendation. Rather, the parties were afforded the opportunity to brief and argue the issues to the Commission before the Commission rendered its decision.

In suggesting that the Commission should draw an inference of prejudice, Supra cites Cherry Communications, Inc. v. Deason, 652 So. 2d 803 (Fla. 1995). Supra's reliance on this case is misplaced. Cherry Communications involved a situation where a staff legal officer initially prosecuted a quasi-judicial certificate revocation proceeding and then advised the Commission with respect to its decision. There has been no showing that Ms. Logue had a substantive role as either "prosecutor" or decision maker in this proceeding. In fact, it is undisputed that Ms. Logue did not participate in the Staff Recommendation in this docket. Therefore, the Cherry Communications case does not support Supra's request for a rehearing.

III. SUPRA CANNOT ESTABLISH EVEN THE APPEARANCE OF IMPROPRIETY IN THIS DOCKET.

Supra suggests that its motion is based on "new evidence" because Supra has recently obtained various Commission documents relating to the investigation surrounding Ms. Logue's communications in Docket No. 001097-TP. As previously stated, the reliance on new evidence, by itself, is sufficient to defeat Supra's motion because the Commission cannot use new evidence as a basis for granting a motion for reconsideration. See, e.g., In re: St. George Island Util. Co., Ltd., Order No. PSC-95-0274-FOF-WU.

Moreover, although the "new" documents may show greater detail about the circumstances surrounding Ms. Logue's communications in Docket No. 001097-TP and the subsequent staff investigation, they do not establish that the Commission was

incorrect in concluding that Supra had not been prejudiced in that docket. More importantly, none of the allegedly new documents that Supra discusses addresses any events *in this docket.* Although Supra devotes more than thirty pages of its Motion to discussing these documents, neither this discussion, nor any of the numerous exhibits that Supra attached to its motion, relates to this docket.[1]

Unable to establish any facts that suggest even an appearance of impropriety in the present docket, Supra invites the Commission to *infer* that such an impropriety occurred in this docket. As with Supra's original motion for rehearing, Supra's argument starts with an assertion that there was an "appearance of impropriety" in another docket, Docket No. 001097-TP. See Supra Motion at 4 and 20 (quoting Commissioner Jaber as stating that she "did not make a finding that there was inappropriate behavior".) Before long, Supra converts that alleged "appearance of impropriety" into an actual impropriety. See Supra Motion at 18-19 (referring to Ms. Logue's conduct in Docket No. 001097-TP as "completely" "inappropriate" and "wrong'); id. at 24 (discussing alleged "actual impropriety"). Supra also asserts as a *fact*, without any evidentiary support, that Ms. Logue had a "BellSouth bias." Id. at 42.

In sum, contrary to Supra's desperate attempts to link the events associated with Docket No. 001097 to this docket, Supra has presented no evidence, either in the record or otherwise, to support a finding of actual impropriety or "an appearance of impropriety" in this docket. For this reason alone, assuming the Commission could consider all of

[1] The only exception is the affidavit of Ms. Nancy Sims, which was attached to Supra's Motion as Exhibit F. That affidavit was captioned with this docket, but it primarily addresses events in Docket No. 001097-TP. The only reference to this docket is Ms. Sims sworn statement (1) that she did not have any substantive contact with Ms. Logue in connection with Docket No. 001305-TP; (2) that she did not receive any private documents from Ms. Logue in connection with

Supra's new information and new arguments, the Motion for Reconsideration must be rejected.

IV. SUPRA IS NOT ENTITLED TO A REHEARING.

Supra argues that in denying the motion for rehearing, the Commission applied the improper legal standard by requiring Supra to show prejudice before being entitled to a rehearing. Supra argues that the appropriate legal standard is the appearance of impropriety, and that under such a standard, Supra need not show that it was prejudiced before being entitled to a new hearing. Supra misapplies the legal standard and should not be granted a new hearing because it is unable to demonstrate any prejudice in this proceeding.

Supra cites to no legal support for its contention that it is automatically entitled to a rehearing upon a showing of an alleged appearance of impropriety. Supra relies exclusively on Commissioner Jaber's decision to grant a rehearing in Docket No. 001097-TP, after concluding that there might have been an appearance of impropriety, although no showing of actual prejudice. The fundamental problem with Supra's legal analysis is that it attempts to convert a matter of Commission *discretion* into a rigid, mandatory rule. The permissive standards under which the Commission *may* elect to grant a rehearing are not the same as the mandatory standards under which the Commission *must* grant a rehearing. Few would argue that the Commission *must* grant a new hearing if actual prejudice to a party has been demonstrated. C.f. Reynolds v. Chapman, 253 F.3d 1337 (11th Cir. 2001) (discussed in Order No. PSC-02-0413-FOF-TP at 20).

Docket No. 001305-TP; and (3) that no one from BellSouth drafted any questions for the Staff or the Commission in Docket No. 001305-TP. See Exhibit F at paragraphs 9, 10 and 13.

Contrary to that mandatory standard, in the exercise of its vast discretion, the Commission *may* grant a rehearing upon a lesser showing, such as the suggestion of an appearance of impropriety, even without a showing of prejudice, as Commission Jaber ordered in Docket No. 001097-TP. The fact that the Commission *may*, upon considering all the pertinent factors, grant a rehearing pursuant to an appearance of impropriety standard does not mean that the Commission *must* grant a rehearing every time a party believes that there is an appearance of impropriety, regardless of the circumstances involved. The Commission should reject Supra's attempt to establish mandatory standards that would constrain the Commission's discretion in this fashion.

V. SUPRA'S RULE 1.540 ARGUMENT IS A RED HERRING AND SHOULD BE REJECTED.

Even if the Commission could consider Supra's new legal argument – that reconsideration is proper under Florida Rule of Civil Procedure 1.540(b) – the Commission should reject it. First, this rule, on its face, provides that "*the court* may relieve a party . . . from a final judgment, order, decree, or proceeding . . . ." (emphasis added). It does not provide a basis for an administrative body, such as this Commission, to reconsider an order denying a rehearing, and research has revealed no instance where the Commission has previously applied this rule.

But even if Rule 1.540(b) did apply, it does not warrant the relief that Supra seeks. It is well settled that a party must demonstrate fraud by "a preponderance or greater weight of the evidence" to justify relief from judgment under Rule 1.540(b). See Furney v. Furney, 659 So.2d 364, 365 (Fla. Ct. App. 1 Dist. 1995). Here, Supra has offered absolutely no evidence of fraud or misconduct – much less by a preponderance of the evidence. At best, Supra has shown the possible appearance of impropriety, and even

that evidence is associated with *another docket* that, as discussed in detail below, has been voluntarily dismissed by Supra. Simply put, there is no evidence of any fraud or misconduct in this docket and thus, assuming arguendo that the Commission could consider Supra's Rule 1.540 argument, it should be rejected.

VI. SUPRA SHOULD NOT BE ALLOWED TO BENEFIT FROM ITS DELIBERATE DELAY IN RAISING ITS COMPLAINT ABOUT THE APPEARANCE OF IMPROPRIETY.

Supra knew about the communications between a Commission staff member and a BellSouth employee in connection with Docket No. 001097-TP by October 4, 2001 (Supra Motion at 20), yet Supra did not complain about its alleged impact on the present proceeding until February 18, 2002, over four months after it knew of the events in question. In other words, instead of raising the issue in a timely manner, Supra deliberately held the issue in reserve for use in the event that it was dissatisfied with the Staff Recommendation, which was issued on February 8, 2002. Further, Supra waited until after the Commission's vote in this docket before issuing its public records request. Supra submitted the requests at that time even though Supra's counsel, the same counsel who submitted the public records request, informed this Commission at the March 5, 2002 agenda conference that Supra had submitted its public records request prior to the agenda conference.

> COMMISSIONER PALECKI: And what was your timing on that public document request?
>
> MR. CHAIKEN: It was very recent, in the last few days.

See March 5, 2002 agenda transcript at 44.

If Supra truly believed that it was going to be prejudiced, or even that there was an appearance of impropriety in this docket, it had an obligation to act in a timely

manner, soon after learning of the situation on October 4 rather than lying in wait. Moreover, Supra should not benefit from its dilatory actions and misstatements to the Commission as to when it began its investigation and submitted its public records requests. Supra gives no explanation for its delay. This omission is not surprising. It is obvious that Supra decided to delay in bringing its motion for tactical reasons.

Moreover, Supra has filed its motion solely for purposes of harassment and delay in contravention of Section 120.595, Florida Statutes. This is not the first time that Supra has made accusations with no legal basis or jurisdiction. In Order No. PSC-98-1467-FOF-TP, issued on October 28, 1998, this Commission found that Supra had made allegations of misconduct concerning a BellSouth employee without any factual or legal support. While the Commission denied BellSouth's request for sanctions, the Commission stated that "further pursuit by Supra of such legally and factually deficient theories shall not be considered lightly." Id. at p.10. Supra has ignored the Commission's admonition and once again filed a pleading solely intended to harass BellSouth and delay the decision making process of the Commission. Supra's flagrant disregard of the Commission's previous order should not be tolerated here.

Evidence of Supra's true intent with the filing of this Motion and its other delay tactics can be readily seen from its actions in Docket No. 001097 – the docket in which the Commission ordered a rehearing and to which all of the information regarding the communications between BellSouth and Staff member Logue, old and new, is limited. After Commissioner Jaber ordered a new hearing in Docket No. 0010997 because of the "appearance of impropriety" in that docket, Supra filed a Joint Motion of Voluntary Dismissal Without Prejudice, which the Commission has granted. Accordingly, Supra

has dismissed the very proceeding in which the Commission has previously ordered a rehearing.

Ironically, despite its voluntary dismissal of Docket No. 001097, Supra is continuing to use information from that proceeding and the Commission's ruling in that proceeding to justify a rehearing in this case. It defies logic to suggest that Supra has grave concerns about the facts giving rise to the rehearing in Docket No. 001097 -- facts that Supra suggests the Commission should impute to this separate docket – yet voluntarily agreed to dismiss Docket No. 001097. If Supra were truly concerned about its due process rights or alleged bias, Supra presumably would not have agreed to voluntarily dismiss the one docket where the Commission found an "appearance of impropriety."

Supra's voluntary dismissal of Docket No. 001097 leads to one inescapable conclusion – Supra's only motive in filing this Motion for Reconsideration is to avoid entering into a new interconnection agreement with BellSouth.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission deny Supra's Motion for Reconsideration. Supra's Motion is procedurally defective and should be summarily rejected. In addition, Supra has shown no appearance of impropriety in the present proceeding, much less any actual prejudice, that would warrant the extraordinary relief of granting a new hearing and further delaying the adoption of a follow-on agreement to replace one that expired almost two years ago.

Respectfully submitted, this 17th day of April, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B White (LKA)

Nancy B. White
James Meza III
150 West Flagler Street
Suite 1910, Museum Tower
Miami, Florida 33130
(305)347-5568

R. Douglas Lackey (LKA)

R. Douglas Lackey
T. Michael Twomey
Suite 4300
675 W. Peachtree Street, N.E.
Atlanta, Georgia 30375
(404)335-0750