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July 5, 2002

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 000121A-TP (OSS)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to Supra Telecommunications and Information System's Inc.'s Motion to Dismiss, 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 the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



T. Michael Twomey

(22)

Enclosures

cc: All parties of record
Marshall M. Criser, III
R. Douglas Lackey
Nancy B. White

DOCUMENT NUMBER DATE

06926 JUL-58

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CERTIFICATE OF SERVICE
Docket No. 000121A-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

(*) **Federal Express** and U.S. Mail this 5th day of July, 2002 to the following:

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**(+) Signed Protective
Agreement**

#237366

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the) Docket No. 000121A-TP
Establishment of Operations Support)
Systems Permanent Performance)
Measures for Incumbent Local Exchange)
Telecommunications Companies) Filed: July 5, 2002

OPPOSITION TO SUPRA'S MOTION TO DISMISS

BellSouth Telecommunications, Inc. ("BellSouth"), respectfully submits this Opposition to Supra Telecommunications and Information Systems, Inc.'s ("Supra") Motion to Dismiss BellSouth's Petition ("Motion").

INTRODUCTION

On June 4, 2002, BellSouth filed an Expedited Petition for Temporary Relief of the Requirements of Order No. PSC-01-1819-FOF-TP ("Expedited Petition") pursuant to Rules 28-106.204 and 25-22.036, Florida Administrative Code. In the Expedited Petition, BellSouth requested that it be temporarily relieved of the obligation to make payments to Supra for Tier 1 and Tier 2 non-compliance.

Supra filed its Motion to Dismiss on June 28, 2002, wherein it requested that the Commission dismiss BellSouth's Complaint for two reasons: (1) Supra argues that the Commission lacks subject matter jurisdiction over BellSouth's Expedited Petition; and (2) Supra claimed that BellSouth's utilization of the Commission's complaint procedures was improper because BellSouth was not challenging and the Commission had not issued a preliminary agency action ("PAA")

The Commission should deny Supra's Motion and should allow this matter to proceed to hearing because, as will be established below, the Commission has subject matter jurisdiction over the matters raised by BellSouth and the Commission's rules authorize BellSouth's filing of the Expedited Petition.

LAW AND ARGUMENT

I. Standard for Motion to Dismiss

A motion to dismiss raises as a question of law whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the petition to be true and determine whether the petition states a cause of action upon which relief may be granted. Heekin v. Florida Power & Light Co., Order No. PSC-99-10544-FOF-EI, 1999 WL 521480 *2 (citing to Varnes, 624 So. 2d at 350). All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id. Further, in order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. Id. Applying this standard to the case at hand, it is clear that Supra's Motion to Dismiss must be denied.

II. The Commission Has Subject Matter Jurisdiction

Supra's analysis of the Commission's subject matter jurisdiction is flawed. To consider the merits of BellSouth's petition, the Commission need not "make a finding of fact that BellSouth is actually owed money" as suggested by Supra. Motion at p. 3. There is no dispute that BellSouth is currently providing

wholesale telecommunications services to Supra. There is also no dispute that BellSouth is owed money for those wholesale telecommunications services. And, Supra admits that the parties are presently engaged in an arbitration proceeding concerning Supra's continued failure to pay the monthly bills it receives. Motion at p. 3 ("In fact, the parties' disputes are presently before said arbitrators").

Contrary to Supra's arguments, BellSouth is not asking the Commission to resolve the parties' billing dispute. Rather, BellSouth is merely asking the Commission to allow it to withhold payment to Supra under the Performance Assessment Plan at this time because of the significant amounts the Supra is withholding from BellSouth. Thus, Supra's repetitive arguments about the standards for enforcing commercial arbitration agreements are entirely irrelevant to the issues raised by BellSouth. The Commission need not concern itself with the merits of the parties' pending billing dispute in order to decide whether to grant BellSouth the relief it seeks.

Nowhere in the Performance Assessment Plan did the Commission address the specific issue of an ALEC withholding sums owed to BellSouth and the consequences of such action. To be clear, BellSouth is not suggesting that Supra will never receive payments under the plan. Instead, BellSouth will retain the payments due to Supra at this time and make those payments to Supra, if appropriate, once the parties' pending billing dispute has been adjudicated. Plainly, the Commission has subject matter jurisdiction to entertain BellSouth's

request. Indeed, this request is not limited to Supra. The Commission could address this general issue with regard to any ALEC.

III. BellSouth Has the Procedural Right to Bring the Petition

Supra argues that BellSouth's Expedited Petition should be dismissed because the Commission rules purportedly do not authorize the filing of a complaint absent the issuance of a PAA.¹ Under Supra's warped interpretation of the Commission's rules, a party can file a complaint and request a formal hearing, "only after the person has received notice of the [Commission's] proposed agency action." Motion at 7. Supra argues that because the Commission has not issued a PAA, BellSouth has no procedural right under Rules 28-106.201 and 25-22.036 to bring the Complaint. Id.

In support of this erroneous argument, Supra provides a long-winded and irrelevant analysis of the "Specific Authority" and "Law Implemented" sections that follow the applicable Commission rules. Additionally, Supra cites to Rule 25-22.029, which specifically addresses a party's right to protest a PAA and request a Section 120.569 and 120.57 hearing under the Administrative Procedure Act ("APA). Motion at 8. Id. Supra concludes by stating that, based on the above authority, "ss. 120.569 and 120.57, F.S. require that the Commission first have taken some proposed agency action . . . Rule 25-22.036, F.A.C., [cannot] be cited as a basis for filing its complaint against Supra – in the absence of a Commission order reflecting some proposed agency action." Motion at 13. The Commission should reject this argument for the following reasons.

¹Supra does not challenge BellSouth's compliance with the pleading requirements set forth in the applicable rules, just that BellSouth cannot institute a complaint proceeding based on the rules.

First, Supra's argument conveniently ignores the express language of Rule 25-22.036, which expressly provides BellSouth with the right to file a complaint against Supra. This rule provides in pertinent part:

(2) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

Rule 25-22.036(2), Florida Administrative Code. Contrary to Supra's argument, there is no requirement in Rule 25-22.036 that a complaint can be initiated only after the issuance of a PAA. In fact, the rule provides just the opposite, authorizing a party to file a complaint to complain of an act that violates a "statute enforced by the Commission" or "any Commission rule or order", irrespective of the issuance of a PAA.

BellSouth's Expedited Petition complies with Rule 25-22.036. Specifically, BellSouth brought the Expedited Petition to address the issue of BellSouth's obligations under the Performance Assessment Plan, which was established by the Commission. Thus, Supra's argument is facially deficient and must be rejected. Simply put, notwithstanding Supra's twisted and convoluted argument, the Commission's rules do not limit a party's right to bring a complaint proceeding to the challenge or after the issuance of a PAA.

Second, Commission precedent establishes that a party can initiate a complaint proceeding even in the absence of a PAA. For instance, in In re: Petition of Metropolitan Fiber Systems of Florida, Inc., Order No. 96-1321-FOF-TP, 1996 WL 669854 *2, the Commission determined that a party can use Rule

25-22.036 to address violations of an arbitrated agreement. "If a party to an arbitrated agreement believes the other party is not performing its duties under the agreement, it has remedies under state law. A party may file an appropriate petition or complaint under Rule 25-22.036, Florida Administrative Code." Significantly, the Commission, in interpreting Rule 25-22.036, did not tie a party's right to initiate a complaint proceeding to the issuance of a PAA.

Similarly, in In re: Peninsular Florida, Order No. 99-1716-PCO-EU, 1999 WL 742820 *3, the Commission held, that under 25-22.036(3), the Commission may, on its own motion, issue an order or notice initiating a complaint proceeding. Again, the Commission, in interpreting Rule 25-22.036, did not limit this sua sponte right to initiate a complaint proceeding to only when the Commission issues a PAA.

Indeed, research has revealed numerous occasions where parties instituted a Rule 25-22.036 complaint proceeding even in the absence of the issuance of a PAA. See e.g., Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. and Request for Expedited Relief, Docket No. 020578-TP (filing complaint against BellSouth pursuant to Rules 25-22.036(2) 28-106.201); Petition for Structural Separation of BellSouth Telecommunications, Inc., Docket No. 010345-TP (requesting that the Commission structurally separate BellSouth); D.R. Horton Custom Homes, Inc. v. Southlake Utilities, Inc., Docket No. 980992-WS, Order No. PSC-00-1518-SC-WS, 2000 WL 1298798 *2 (filing of a complaint against the utility pursuant to

Rule 25-22.036). Accordingly, Supra's argument is directly contrary to Commission precedent and the practice of parties before the Commission.

Third, in addition to ignoring the express wording of Rule 25-22.036, Supra's argument misinterprets the applicable Commission rules and the APA. At its essence, Supra argues that, pursuant to Rule 25-22.029, complaint proceedings can only be instituted after the issuance of a PAA. Motion at 4. Rule 25-22.029 governs a party's ability to protest a PAA and to request a Section 120.569 or 120.57 hearing under the APA. Supra's erroneous argument appears to be that, because Rule 25-22.029 allows a party to protest a PAA and request a formal hearing, all party initiated proceedings, including complaint proceedings, must be predicated on the issuance of a PAA.

This analysis is simply incorrect. While Rule 25-22.029 does allow a party to protest a PAA, such a right does not translate into a requirement that all formal hearings under the APA must be based on the issuance of a PAA. Rather, it simply means that, in addition to the right to institute a complaint proceeding based on a regulated company's violation of a Commission statute, rule, or order pursuant to Rule 25-22.036, a party can challenge a PAA and request a formal hearing under the APA. Stated another way, the right to initiate a complaint proceeding and the right to protest a PAA are not mutually exclusive – each right exists independent of the other. Indeed, nothing in Sections 120.569 or 12.57, which governs formal hearings under the APA, predicates an administrative hearing on the issuance of a PAA. See Section 120.569, Florida Statutes (“The

provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency. . . .").

Fourth, there is no question that the Commission's has the authority to address the issues raised in BellSouth's Expedited Petition. It is well settled that the Commission has the "authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly." Florida Public Serv. Comm'n v. Bryson, 569 SO. 2d 1253, 1255 (Fla. 1990). In addition, under Section 364.285, Florida Statutes, the Commission has the authority to fine telecommunications company up to \$25,000 for each violation of any rule or order of the commission or any provision of Chapter 364, Florida Statutes. Moreover, the Commission has the authority to ensure "the fair treatment of all telecommunications providers in the telecommunications marketplace." Section 364.337(5); see also, 364.01(g), Florida Statutes (stating that the Commission has the authority "to ensure that all providers of telecommunications services are treated fairly . . .").

In sum, the Commission should reject Supra's argument because it ignores the express wording of the Commission's rules. These rules permit BellSouth to initiate a complaint proceeding against Supra for violating Chapter 364 and the Commission's rules and orders. Further, adoption of Supra's argument would lead to the absurd conclusion that a party has no right to initiate a Rule 25-22.036 proceeding absent the issuance of a PAA, which is in direct conflict with Commission precedent and the practice of all parties before the

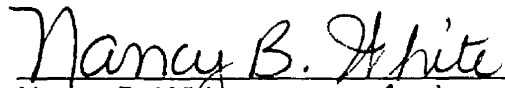
Commission. For all of these reasons, the Commission should deny Supra's Motion to Dismiss.

CONCLUSION

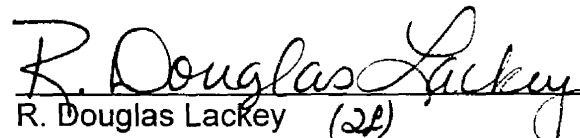
For the foregoing reasons, BellSouth respectfully requests that the Commission deny Supra's Motion to Dismiss.

Respectfully submitted this 5th day of July 2002.

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