

State of Florida



Public Service Commission
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DATE: AUGUST 22, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (ILERI, BROUSSARD, BULECZA-BANKS, CASEY, KELLY, MOSES, VINSON) OFFICE OF THE GENERAL COUNSEL (KEATING)

RE: DOCKET NO. 020611-TP - COMPLAINT OF BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.'S INAPPROPRIATE USE OF LOCAL EXCHANGE NAVIGATION SERVICE (LENS).

AGENDA: 09/03/02 - REGULAR AGENDA - DECISION PRIOR TO HEARING - MOTION TO DISMISS - ORAL ARGUMENT NOT REQUESTED; HOWEVER, ORAL ARGUMENT MAY BE ENTERTAINED AT THE COMMISSION'S DISCRETION UPON THE REQUEST OF A PARTY

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GLC\WP\020611.RCM

CASE BACKGROUND

On June 27, 2002, BellSouth Telecommunications, Inc. (BellSouth) filed a Complaint against Supra Telecommunications and Information Systems, Inc. (Supra) regarding Supra's use of the Local Exchange Navigation Service (LENS), which is an operations support system (OSS) used by ALECs for ordering and preordering activities with BellSouth. BellSouth contends that Supra is logging into the system in an abusive manner aimed at causing problems with the system.

On July 18, 2002, Supra filed its Motion to Dismiss BellSouth's complaint, contending therein that the Commission lacks

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subject matter jurisdiction to address the Complaint because the parties' current interconnection agreement calls for private commercial arbitration of any disputes arising out of the agreement. On July 30, 2002, BellSouth filed its Response in Opposition to Supra's Motion to Dismiss, arguing that subject matter jurisdiction exists.

JURISDICTION

The Commission is vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01 (3), Florida Statutes, the Florida legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, Section 364.01 (4) (g), Florida Statutes, provides, in part, that the Commission shall exercise its exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Supra's Motion to Dismiss BellSouth's Complaint?

RECOMMENDATION: No. Staff recommends that the Motion be denied, but that this matter be set for hearing. **(KEATING)**

STAFF 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. However, staff notes that Supra's Motion to Dismiss questions this Commission's authority to hear the subject matter. Thus, regardless of whether all of BellSouth's allegations in its complaint were facially correct, if the Commission were to determine that it lacks subject matter jurisdiction, the complaint would have to be dismissed.

"Jurisdiction over the subject matter refers to a court's power to hear and determine a controversy. . . . Generally, it is tested by the good faith allegations, initially pled, and is not dependent upon the ultimate disposition of the lawsuit." Calhoun v. New Hampshire Ins. Co., 354 So.2d 882, 883 (Fla. 1978). "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs." Lusker v. Guardianship of Lusker, 434 So.2d 951, 953 (Fla. 2d DCA 1983).

In any cause of action, a court must not only have jurisdiction over the parties but must also be vested with subject matter jurisdiction in order to grant relief. See Keena v. Keena, 245 So.2d 665 (Fla. 1st DCA 1971). Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. See Board of Trustees of Internal Improvement Trust Fund of State v. Mobil Oil Corp., 455 So.2d 412 (Fla. 2d DCA 1984), quashed in part on other grounds by Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339 (Fla. 1986).

Supra's Motion

Supra asserts that the Commission lacks subject matter jurisdiction over this action because BellSouth failed to comply with the procedural requirements of the parties' current, Commission approved Interconnection Agreement. According to Supra, its current interconnection agreement with BellSouth provides in Section 16.1 of the General Terms and Conditions:

16.1 All disputes, claims or disagreements (collectively "Disputes") arising under or related to this Agreement or the breach hereof shall be resolved in accordance with the procedures set forth in Attachment 1, except: (I) dispute arising pursuant to Attachment 6, shall be resolved in

accordance with the Billing Disputes section of Attachment 6. In no event shall the Parties permit the pendency of a Dispute to disrupt service to any AT&T [Supra Telecom] Customer contemplated by this Agreement. . ."

Supra notes that subparagraphs 14.1, 14.1.1, and 14.1.2 provide for an informal dispute resolution process, while Attachment 1, Paragraph 2 to the Agreement further provides for Alternative Dispute Resolution (ADR), which " . . . 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. . . ."

Supra emphasizes that BellSouth alleges a breach of the current Agreement dating back to December 2001. Based on the provisions of the parties' Agreement requiring ADR, Supra contends that this Commission is without jurisdiction to hear the complaint. Supra maintains that the Commission rendered the same decision in Docket No. 001097-TP, in Order No. PSC-00-2250-FOF-TP, wherein the Commission required the parties to arbitrate issues regarding non-payment based on the arbitration clauses in the parties' agreement, and that it should reach the same conclusion in this instance.

Supra argues that case law supports that arbitration provisions should be interpreted liberally to require arbitration of disputes.¹ Supra contends that BellSouth has never raised this issue with the commercial arbitrators, as required, and only now brings this complaint because LENS is an "inferior interface" not designed to handle the volume of orders submitted by a company like Supra.

Supra acknowledges that it has developed a program to monitor the downtime of LENS, but explains that the program is only designed to access the LENS homepage. As such, Supra argues that if LENS were, in fact, an adequate CLEC interface, Supra's program would not result in the LENS problems that BellSouth ascribes to it. Supra asserts that the problems identified by BellSouth simply highlight the inadequacy of the LENS interface.

¹Citing Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); Roe v. Amica Mutual Insurance Co., 533 So.2d 279 (Fla. 1988); and Ronbeck Construction Co., Inc. v. Savanna Club Corp., 592 So.2d 344 (Fla. 4th DCA 1992).

For these reasons, Supra asks that BellSouth's Complaint be dismissed because the parties' Agreement provides for commercial arbitration of this dispute. Supra notes that damages should also not be awarded, as requested by BellSouth, because the Commission is without authority to do so.

BellSouth's Response

In its response, BellSouth contends that Supra's arguments regarding the commercial arbitration provisions in their interconnection agreement are irrelevant. BellSouth maintains that it did not file its complaint because of a breach of the interconnection agreement; rather, BellSouth argues that it filed its complaint seeking relief under Section 364.01(4)(g), Florida Statutes, pursuant to which the Commission is to ensure that all telecommunications providers are treated fairly and that anticompetitive behavior is prevented.

BellSouth explains that the Commission clearly has jurisdiction in this matter, because the alleged injury at issue affects other ALECs operating in Florida. BellSouth notes, as stated in its complaint, that Supra's activity degrades the reliability of LENS for all ALECs. Thus, the complaint is beyond the confines of the parties' agreement. BellSouth argues that Supra's conclusion that carriers can only file complaints pursuant to interconnection agreements is "absurd" and should not be entertained by the Commission.

BellSouth adds that the remainder of Supra's allegations in its Motion go to the merits of BellSouth's complaint. Since the standard for a motion to dismiss contemplates that all the facts in the petition or complaint be taken as true, BellSouth contends that it believes these allegations should be addressed in Supra's Answer to the Complaint.

For these reasons, BellSouth contends that Supra's Motion to Dismiss should be denied.

Staff's Analysis

Supra argues that the 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 So.2d 281(Fla. 1st DCA 1981). See also Order No. PSC-00-2250-FOF-TP at p. 4. As noted by Supra, the Commission has in past cases found the provisions requiring commercial arbitration of disputes arising under the current agreement controlling, and therefore, granted Supra's Motion to Dismiss the portions of BellSouth's complaint arising under the current agreement. Order No. PSC-00-2250-FOF-TP at pgs. 4-5.

Upon review of the parties' pleadings presented here, however, staff believes that this case presents a different situation. Looking at the four-corners of the pleadings and the cross-referenced interconnection agreement, it appears that the specific allegations raised by BellSouth in this Docket are not "arising under or related to this Agreement" as required by the ADR provisions in the Agreement. Rather, it appears that the issues relating to Supra's testing and alleged misuse of LENS are beyond the scope of the parties' interconnection agreement. While the agreement provides that BellSouth will provide access to electronic interfaces, staff is unable to identify any portion of the agreement that relates to down-time testing of LENS or any other electronic interface. Neither party has identified any portion of the agreement that they believe is at issue in this dispute; Supra only identifies the ADR provisions. Therefore, staff believes that the ADR provisions in the parties' interconnection agreement are not controlling in this instance. Therefore, nothing precludes the Commission from addressing this complaint pursuant to its authority set forth in Chapter 364, Florida Statutes.

In addition, Supra has not identified any other basis for dismissal other than that the Commission lacks subject matter jurisdiction. While Supra has asserted that the Commission lacks authority to award damages as requested by BellSouth, BellSouth's complaint does also ask for "all other relief deemed appropriate under the law." Clearly, even if the Commission cannot award

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damages, the Commission has the ability to provide other relief within its range of authority.

Based on the foregoing, staff recommends that the Motion to Dismiss be denied and that this matter be set for hearing. BellSouth does appear to have stated a cause of action upon which relief can be granted by the Commission. Furthermore, the Commission has subject matter jurisdiction based on Chapter 364, Florida Statutes, which is not preempted by the parties' interconnection agreement provisions on ADR, because the subject matter of the complaint does not appear to be "arising under or related to" the parties' Agreement.

ISSUE 2: Should this Docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendation in Issue 1, this Docket should be set for hearing.
(KEATING)

STAFF'S ANALYSIS: If the Commission approves staff's recommendation in Issue 1, this Docket should be set for hearing.