



Public Service Commission  
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DATE: March 20, 2003

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

FROM: OFFICE OF THE GENERAL COUNSEL (TAYLOR, CHRISTENSEN) *BCT*  
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS, SIMMONS) *SAS*  
OFFICE OF MARKET MONITORING & STRATEGIC ANALYSIS (OLLILA) *A.O.*

RE: DOCKET NO. 021249-TP - COMPLAINT OF SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC., AGAINST BELLSOUTH TELECOMMUNICATIONS, INC., FOR NONCOMPLIANCE WITH COMMISSION ORDER PSC-02-0878-FDF-TP.

AGENDA: 04/01/03 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\021249.RCM

CASE BACKGROUND

On December 18, 2002, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) seeking relief for BellSouth's non-compliance with the Commission's Order No. PSC-02-0878-FOF-TP, as clarified in Commission Order No. PSC-02-1453-FOF-TP and Provision 2.16.7 of the parties' Interconnection Agreement.

On January 7, 2003, BellSouth filed a Motion to Dismiss Supra's Complaint.

On January 14, 2003, Supra filed its Response in Opposition to BellSouth's Motion to Dismiss.

### **Supra's Complaint**

Supra has filed a Complaint with the Commission, pursuant to Rule 25-22.036(2), Florida Administrative Code, alleging that BellSouth, by its acts or omissions, has affected Supra's substantial interests by acting in contravention to Commission orders. Specifically, Supra alleges that BellSouth has violated Commission policy regarding FastAccess Internet Service (FastAccess) in the following orders: the FDN Final Order, the Supra Reconsideration Order, and the FDN Clarification Order.

Supra alleges that BellSouth continues to engage in the practice of refusing to provide its FastAccess service to customers who receive voice service from a competing voice provider that the Commission prescribed be discontinued. Supra further alleges that BellSouth's practices are "discriminatory and anti-competitive" because the practices foreclose choice, and directly hamper the ability of alternative local providers to compete in the Florida local market.

### **FDN Final Order<sup>1</sup>**

In Docket No. 010098-TP, the Commission first addressed Florida Digital Network's (FDN) assertions that BellSouth uses its ability to provide its FastAccess Internet Service as leverage to retain voice customers, creating a disincentive for customers to obtain competitive voice service. This leverage arose from BellSouth's routine practice of disconnecting its FastAccess Internet Service whenever one of its customers switches to an ALEC voice provider. FDN suggested that this practice amounted to an unreasonable denial of service that unreasonably discriminates among customers.

In response to the claims, the Commission held that BellSouth's practice of disconnecting its FastAccess service unduly and unreasonably prejudices or penalizes those customers who switch

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<sup>1</sup> In re: Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc., Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP (Issued June 5, 2002) [hereinafter FDN Final Order].

their voice service, as well as their new carrier. FDN Final Order at 10. As a consequence, the Commission ordered BellSouth to continue to provide FastAccess even when BellSouth is no longer the customer's voice provider. FDN Final Order at 10 & 11.

### **Supra Reconsideration Order<sup>2</sup>**

In its consideration of BellSouth's petition for arbitration of certain issues in its interconnection agreement with Supra Telecommunications, the Commission revisited the issue of BellSouth routinely disconnecting its FastAccess service when a customer migrates his voice service to another local provider. Noting that the BellSouth policy criticized in the FDN Final Order was the same policy applied to Supra's customers, see Supra Reconsideration Order at 50-51, the Commission again ordered BellSouth to continue to provide FastAccess even when BellSouth is no longer the customer's voice provider. Supra Reconsideration Order at 51.

### **FDN Clarification Order<sup>3</sup>**

Following the issuance of the FDN Final Order, both FDN and BellSouth filed motions for reconsideration and/or clarification. Responding first to the FDN motion, the Commission clarified that its FDN Final Order ruling was limited only to those BellSouth end users who decided to change their voice provider; for them BellSouth was to *continue* to provide FastAccess. FDN Clarification Order at 4. It was BellSouth's practice of *disconnecting* its FastAccess Service that unreasonably penalized customers who desire to have access to voice service from FDN. FDN Clarification Order at 4. Thus, not all customers served by ALECs were eligible to receive FastAccess from BellSouth under this ruling.

Responding next to the BellSouth motion, the Commission was asked to clarify that BellSouth is required to provide FastAccess

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<sup>2</sup> In re: Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc., Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP (Issued July 1, 2002) [hereinafter Supra Reconsideration Order].

<sup>3</sup> In re: Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc., Docket No. 010098-TP, Order No. PSC-02-1453-FOF-TP (Issued October 21, 2002) [hereinafter FDN Clarification Order].

service over a UNE loop or may, instead, provide that service over a new loop that it installs to serve the end user's premises. The Commission stated that a FastAccess customer's Internet access service should not be altered whenever the customer switched voice providers. FDN Clarification Order at 7. Furthermore, while not dictating how the FastAccess service should be provisioned, the Commission "believe[d] that the provision of the FastAccess should not impose an additional charge to the customer." FDN Clarification Order at 7.

### **Supra's Claims**

On August 22, 2002, the Commission approved a new Interconnection Agreement between Supra and BellSouth. In order to implement the Commission's decision involving FastAccess, the parties incorporated Section 2.16.7 into the agreement. Section 2.16.7 reads as follows:

Where a BellSouth voice customer who is subscribing to BellSouth FastAccess Internet service converts its voice service to Supra utilizing a UNE-P line, BellSouth will continue to provide FastAccess service to that end user.<sup>4</sup>

On August 26, 2002, after the Supra Order but before the FDN Clarification Order, a BellSouth representative, Shamron Wilder, sent a letter to Supra announcing that the "stand alone" FastAccess would be available on September 4, 2002. Attached to the letter were conditions for the implementation of the new service. These "conditions" arose from BellSouth's and FDN's discussions directed to implementing the Commission's decisions.

Supra claims that the stated BellSouth conditions contradict the Commission's orders and Section 2.16.7 of the Interconnection Agreement. As evidence of BellSouth's violations, Supra alleges:

- A second line will be installed at the customer's location. Once installed, FastAccess will be moved from the current line to the new line;

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<sup>4</sup> BellSouth Telecommunications, Inc. & Supra Telecommunications and Information Services, Inc., *Interconnection Agreement* at Attachment 2, section 2.16.7 (July 15, 2002).

- The new line will serve for data only, no fax capability and no back-up dialing capacity;
- BellSouth will discuss the new terms and conditions with the customer, not Supra;
- New rates will be charged for customers moving their voice services to Supra; and
- The customer will be required to have a credit card for FastAccess billing.

Supra charges that these BellSouth terms and conditions violate the Commission's orders not to alter service or to impose additional charges. Further, Supra contends the new conditions erect new barriers to competition in the local market.

On November 22, 2002, BellSouth representative Shamron Wilder sent another letter to Supra. Attached to the letter was the "updated process" for the provision of FastAccess. The terms and conditions varied from the August 26<sup>th</sup> letter:

- A second line will still be installed at the customer's location. Once installed, BellSouth will have the option to choose which service (voice or FastAccess) will be assigned to the new line;
- If a second facility is not available for a second line, then BellSouth unilaterally relieves itself of the obligation to continue FastAccess;
- BellSouth will not provide FastAccess to a Supra customer if the customer did not have FastAccess for 60 days prior to switching voice service to Supra;
- Customers will not be eligible for any FastAccess discounts associated with purchasing BellSouth products; and
- The customer will still be required to have a credit card for FastAccess billing and if he or she does not, BellSouth unilaterally relieves itself of the obligation to continue to provide FastAccess.

Supra charges that the BellSouth terms and conditions in the November 22<sup>nd</sup> letter also violate the Commission's orders not to alter service or to impose additional charges. Further, Supra contends the new conditions erect new barriers to competition in the local market.

On December 2, 2002, Shamron Wilder sent another letter to Supra, this time confirming that the processes set out in the November 22<sup>nd</sup> letter set forth the final terms and conditions to be imposed upon former BellSouth customers desiring to continue to obtain FastAccess service when migrating to Supra.

#### **BellSouth's Motion to Dismiss**

BellSouth has filed a Motion to Dismiss pursuant to Rule 28-106.204, Florida Administrative Code. BellSouth cites three grounds in its Motion to Dismiss to justify granting its motion: (1) the Commission lacks subject matter jurisdiction over allegations made in Supra's complaint; (2) that Supra's complaint fails to state a cause of action upon which relief may be granted; and (3) that even if Supra's complaint is legally sufficient to state a claim, that claim is not yet "ripe" for adjudication.

#### **Statement of the Law**

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. E.g., Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1<sup>st</sup> DCA 2000); Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993). A plaintiff drafting a complaint must "state a cause of action alleging legal liability." Seminole Tribe of Florida v. Times Publishing Company, Inc., 780 So.2d 310, 314 (Fla. 4<sup>th</sup> DCA 2001). The complaint "must allege a cause of action recognized under law against the defendants; otherwise it does not, in contemplation of the rule, 'inform the defendant of the nature of the cause against him.'" Seminole Tribe, 780 So.2d at 314 [citing, Kislak v. Kreedian, 95 So.2d 510, 514 (Fla. 1957)]

A motion to dismiss admits all well pleaded facts as true, as well as the reasonable inferences arising from those facts; the allegations must be construed in the light most favorable to the non-moving party. Meyers, 754 So.2d at 202; Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A., 742 So.2d 381, 382 (Fla.

4<sup>th</sup> DCA 1999.) Furthermore, when determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, including attachments incorporated, and neither consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. See, City of Gainesville v. Department of Transportation, 778 So. 2d 519, 522 (Fla. 1<sup>st</sup> DCA 2001); Varnes, 624 So. 2d at 350.

Thus, in order to sustain a motion to dismiss, the moving party must demonstrate that, with all factual allegations in the complaint accepted as true, still the complaint fails to state a cause of action for which relief can be granted. See, Russell v. Sherwin-Williams Company, 767 So.2d 592, 593 (Fla. 4<sup>th</sup> DCA 2000), *rev. denied*, 786 So.2d 580 (Fla. 2001); In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995).

One of the elements of BellSouth's Motion to Dismiss directly questions the authority of the Commission to hear this docket due to the Commission's alleged lack of subject matter jurisdiction. If this correct, then the Complaint must be dismissed without further consideration of Supra's allegations. Thus, regardless of the validity of Supra's claims, a lack of subject matter jurisdiction dooms the Complaint to dismissal.<sup>5</sup> Because of the importance of subject matter jurisdiction, this issue will be considered first.

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<sup>5</sup> In re: Complaint of Florida Competitive Carriers Association against BellSouth Telecommunications, Inc. regarding BellSouth's practice of refusing to provide FastAccess Internet Service to customers who receive voice service from a competitive voice provider, and request for expedited relief. Docket No. 020507-TL; Order No. PSC-02-1464-FOF-TL at page 2 (Issued October 23, 2002).

DISCUSSION OF THE ISSUES

**ISSUE 1:** Should the Motion to Dismiss filed by BellSouth Telecommunications Inc. be granted on the grounds that the Commission lacks subject matter jurisdiction over allegations made in Supra's Complaint, thus requiring it to relinquish jurisdiction and refrain from any proceedings touching on the subjects set forth in the Complaint?

**RECOMMENDATION:** BellSouth's Motion to Dismiss should be denied on Issue 1. (TAYLOR, CHRISTENSEN)

**STAFF ANALYSIS:** BellSouth's Motion to Dismiss on Jurisdictional Grounds.

Citing Jesse v. State, 711 So. 2d 1179, 1180 (Fla. 2<sup>nd</sup> DCA 1998), BellSouth correctly asserts that "subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence."<sup>6</sup> BellSouth contends that the Commission lacks subject matter jurisdiction because the Commission does not have constitutional or statutory authority over the non-telecommunications, FastAccess service.

BellSouth's basic argument can be summarized as follows: since the Florida statutes give the Commission exclusive authority only over "telecommunications" services, and because FastAccess is not a "telecommunications" service, the Commission has no subject matter jurisdiction over FastAccess-type issues. Because this is so, the Commission's prior FastAccess orders can not be the basis for Supra's Complaint, thereby precluding the Commission from hearing Supra's Complaint. In this process of analysis, BellSouth dissects Chapter 364, Florida Statutes, to find Sections 364.01,

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<sup>6</sup> See also Public Service Commission cases holding to this same proposition. Charlotte County v. General Development Utilities, Inc., 653 So.2d 1081, 1085 (Fla. 1<sup>st</sup> DCA 1995) [an agency has only such power as expressly or by necessary implication is granted by legislative enactment]; Sandpiper Homeowners Association, Inc. v. Lake Yale Corporation, Inc., 667 So.2d 921, 926 (Fla. 5<sup>th</sup> DCA 1996).



364.051(5)(a), 364.051(5)(b), 364.10(1), 364.03, 364.08(1) and 364.3381 not conferring jurisdiction upon the Commission to regulate a non-telecommunications, FastAccess-type service.<sup>7</sup>

In addition to the state-law subject matter jurisdiction defense, BellSouth also opines that even if the Commission might have jurisdiction under Florida law, the Federal Communications Commission (FCC) has "preempted" the Commission's authority to act. BellSouth states:

The Complaint should be dismissed for the additional reason that the FCC, and not the Commission, has jurisdiction over BellSouth's DSL service. In fact, in an Order addressing GTE's DSL-Solutions-ADSL Service, the FCC found that "this offering, which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level." See Memorandum Opinion and Order, *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 F.C.C. Rcd 22,466 at ¶1 (October 30, 1998) (emphasis added).

The FCC, BellSouth submits, has exclusive jurisdiction over BellSouth's wholesale DSL service, not the Florida Public Service Commission.

### **Supra's Response**

Supra's response to BellSouth's "lack of subject matter jurisdiction" argument does not, in fact, address the contentions set forth in BellSouth's motion. Instead it states:

This [subject matter] argument should not be considered

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<sup>7</sup> BellSouth also makes the argument that FastAccess is more than a "non-telecommunication" service, it is also "private property" not subject to Commission regulation. Citing to Twin Cities Cable Co. v. Southeastern Tel. Co., 200 So.2d 857 (Fla. 1<sup>st</sup> DCA 1967), BellSouth contends that "there is a distinction between the performance of public duties subject to regulation, and the exercise of purely private rights in the management and control of [a telephone company's] property."

and should be stricken pursuant to the doctrine of *res judicata*. As this issue has been addressed, litigated and resolved on numerous occasions, Supra will not reiterate its response to BellSouth's rejected jurisdictional arguments. Rather Supra merely asserts that the doctrine of *res judicata* applies.

Supra contends that the Commission should not consider BellSouth's subject matter argument as the Commission has already rejected the same arguments before in other dockets.

**STAFF ANALYSIS:** Staff believes that the Commission should reject BellSouth's subject matter jurisdiction on the grounds of administrative *res judicata*.

The doctrine of *res judicata* bars an action based upon a final judgment entered in a prior action where there is an identity: (1) in the thing sued for in both actions; (2) in the cause of action in both actions; (3) of the parties in both actions, and (4) of the capacity of the parties in both actions. Chimerakis v. Sentry Insurance Mutual Company, 804 So.2d 476, 479 (Fla. 3<sup>rd</sup> DCA 2001)[citations omitted]. This doctrine rests upon the sound principle that litigation should come to an end and that "in the interest of the State every justiciable controversy should be settled in one action in order that the courts and the parties will not be bothered for the same cause by interminable litigation." Id. [quoting Gordon v. Gordon, 59 So.2d 40, 44 (Fla. 1952)].

It is now well-settled that *res judicata* may be applied in administrative proceedings as well as in courts. Thomson v. Department of Environmental Regulation, 511 So.2d 989, 991 (Fla. 1987); Deep Lagoon Boat Club, LTD. v. Sheridan, 784 So.2d 1140, 1143 n.4 (Fla. 2<sup>nd</sup> DCA 2001); Miller v. Booth, 702 So.2d 290, 291 (Fla. 3<sup>rd</sup> DCA 1997) (The doctrine (of administrative *res judicata*) is applicable to rulings or decisions of administrative bodies). This means that the doctrine of *res judicata* can apply to an agency determination made pursuant to the agency's quasi-judicial decision-making authority. Department of Environmental Protection v. Burgess, 667 So.2d 267, 269 (Fla. 1<sup>st</sup> DCA 1995). For *res judicata* to act as a bar to subsequent administrative relitigation, there must be a final agency order in a prior proceeding and identity in

"(1) the thing sued for; (2) ... the cause of action; (3) ... [the] persons and parties of the action; and (4) ... the quality in the person for or against whom the claim is made." Id. [quoting Neidhart v. Pioneer Federal Savings & Loan Ass'n, 498 So.2d 594, 596 (Fla. 2<sup>nd</sup> DCA 1986)].

In this docket Supra is correct. BellSouth has submitted this same legal argument to the Commission on a number of previous occasions in a Supra docket,<sup>8</sup> FDN docket,<sup>9</sup> the FCCA docket,<sup>10</sup> and in pleadings to the United States District Court for the Northern District for Florida.<sup>11</sup> In each of these Commission dockets, the subject of the litigation, the cause of action, the parties to the action and the quality in the person for or against whom the claim is made were all identical. And in each, the Commission determined that it has the subject matter authority to remedy anti-competitive behavior that is detrimental to the development of a competitive telecommunications market.<sup>12</sup>

Indeed, perhaps the most telling indicator of the repetitive presentation of the "subject matter jurisdiction" argument comes from BellSouth's brief filed in this docket. BellSouth admits the following for its "subject matter jurisdiction" argument:

BellSouth understands and appreciates the Commission's previous decisions in other proceedings, wherein it rejected this argument. BellSouth reraises this argument not to belabor the Commission but to inform the Commission of the

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<sup>8</sup> Supra Reconsideration Order at 4.

<sup>9</sup> FDN Final Order at 4; FDN Clarification Order at 5.

<sup>10</sup> See, BellSouth Telecommunications Motion to Dismiss Complaint of the Florida Competitive Carriers Association, Docket No. 020507-TL, (Filed July 2, 2002). [FCCA Order]

<sup>11</sup> BellSouth Telecommunications Inc. v. Supra Telecommunications & Information Systems, Inc., Case No. 4:02-CV-325-SM

<sup>12</sup> FCCA Order 5-6; FDN Final Order at 11; Supra Reconsideration Order at 51.

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jurisdictional deficiencies in its FDN Orders and to preserve BellSouth's rights on appeal.

BellSouth's Motion to Dismiss at 5 n.1.

In as much as BellSouth again "reraises" the issue without new or different facts or legal arguments, staff believes that Supra's *res judicata* defense is well taken. For this reason staff recommends that the Commission reject the subject matter jurisdiction claim and move to the remaining two issues raised by BellSouth's motion to dismiss.

**ISSUE 2:** Should the Commission dismiss Supra's Complaint on the grounds that the facts in Supra's Complaint fail to state a claim upon which relief can be granted?

**RECOMMENDATION:** BellSouth's Motion to Dismiss should be denied on Issue 2. (TAYLOR, CHRISTENSEN)

**STAFF ANALYSIS:** BellSouth's Motion to Dismiss on Failure to State a Claim Upon Which Relief Can Be Granted.

BellSouth recognizes that Supra's Complaint rests upon Supra showing that BellSouth has violated the Commission's Supra and FDN Clarification Orders. Supra proposes to do so by demonstrating that BellSouth is provisioning its FastAccess service to ex-BellSouth/now Supra customers in a manner that contradicts the Commission's orders.

BellSouth's motion to dismiss, however, is predicated on showing that the orders' statements that Supra relies upon "are not essential to the Commission's ultimate holding."<sup>13</sup> Instead, BellSouth emphasizes that:

[c]ontrary to Supra's statements, the Commission refused to order any provisioning methodology in the FDN Orders. Indeed, the Commission expressly stated in the FDN [Clarification] Order that 'the issue of how FastAccess was to be provisioned when a BellSouth customer changes his voice service was not addressed in the Commission's FDN [Final] Order. Additionally, in resolving BellSouth's request for clarification, the Commission "expressly declin[ed] to impose how the FastAccess should be provisioned."

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<sup>13</sup> BellSouth makes no mention of the several letters and process schedules attached to the complaint. Nevertheless, the content of these documents are a part of the record to be considered when evaluating a motion to dismiss. See, City of Gainesville v. Department of Transportation, 778 So. 2d 519 (Fla. 1<sup>st</sup> DCA 2001).

Thus, in as much as the Commission has refused to order any *specific* manner to implement the FastAccess service, BellSouth asserts that it cannot possibly be in violation of the Commission's orders. For this reason, Supra's Complaint fails to state a cause of action upon which relief can be granted and the Complaint should be dismissed.

### **Supra's Response**

Supra responds to BellSouth's motion first by pointing out that BellSouth has quoted the Commission's orders out of context. It counters BellSouth's statements by showing that the Commission did describe some methods of FastAccess installation even if all other specifics were left to the parties to resolve in further negotiations. Principally, Supra states that the Commission rejected BellSouth's proposal to use a second, separate line for FastAccess, expected that services would not be altered by the installation, saw no need for additional costs, and expected a "seamless transition" for the customer.

Second, Supra, relying upon its Complaint and the attachments to the Complaint, detailed the facts as to how BellSouth's plans to install FastAccess which it contends violate the content of the Commission's orders. The facts set forth in the Complaint and its attachments, assumed by law to be true, Supra contends, sufficiently raise valid claims that BellSouth is violating the orders, thus entitling Supra to relief from the Commission.

**STAFF ANALYSIS:** Section 120.69, Florida Statutes, and Rule 25-22.036(2), Florida Administrative Code, create a method for enforcement of agency action. See, Stuart v. State ex rel. Miller, 629 So. 2d 288, 289 (Fla. 3<sup>rd</sup> DCA 1993). A complaint may be filed with the Commission by any person who complains of an act or omission by a person subject to the Commission's jurisdiction when the act substantially affects the complainant's interests and the injury arises out of a violation of a Commission rule or order. Rule 25-22.036(2), Florida Administrative Code; Stuart, 629 So. 2d at 289. Supra has filed a complaint here alleging violations of Commission orders.

As was stated above, during consideration of the BellSouth clarification motion in the FDN docket, the Commission was asked to clarify whether BellSouth is required to provide FastAccess service over a UNE loop or whether it could provide the service over a new loop that it installed to serve the end user's premises. The Commission answered the question in the negative stating that a FastAccess customer's Internet access service would not be altered when the customer switched voice providers. FDN Clarification Order at 7. Furthermore, while not dictating how the FastAccess service should be provisioned, "we believe that the provision of the FastAccess should not impose an additional charge to the customer." FDN Clarification Order at 7.

Thus, while BellSouth is correct when stating that the Commission's orders did not detail the methods to provision the FastAccess service, Supra is also correct when it observed that the Commission gave some guidance of the parameters of implementing FastAccess service. For the Complaint filed here, Supra does allege facts that directly address the few areas of Commission specificity; no alteration of Internet service, the installation "should not impose an additional charge to the customer," and there should be a "seamless transition for the customer changing voice service."

Taking the allegations in the Complaint and attachments as true, the activity of BellSouth in its implementation of FastAccess to Supra customers may be in violation of the Commission's orders. As such, the Motion to Dismiss should be denied on this point.

**ISSUE 3:** Should the Commission dismiss Supra's Complaint because, even if it is legally sufficient to state a claim for relief, that claim is not yet "ripe" for adjudication?

**RECOMMENDATION:** BellSouth's Motion to Dismiss should be denied on Issue 3. (TAYLOR, CHRISTENSEN)

**STAFF ANALYSIS: BellSouth's Motion to Dismiss on "Ripeness" Grounds.**

BellSouth's final claim in its motion to dismiss is that Supra's Complaint is "premature" and not "ripe for adjudication." BellSouth argues that whatever Supra wants for its FastAccess service is totally dependent upon the Commission's decision in the FDN/BellSouth Docket. BellSouth alleges that, because it should not be expected to provide FastAccess for Supra end-users in any manner different from that which it provides to FDN end-users, Supra should wait until the conclusion of the FDN/BellSouth negotiations before complaining about the implementation of the FastAccess processes.

BellSouth states that it and FDN have agreed to most of the terms that would govern the process for BellSouth to comply with the FDN Orders. There are but a few issues left to be resolved before reaching complete agreement and these last issues have been submitted to the Commission for resolution. BellSouth argues that since the Commission has not yet ruled on the parties' submissions, Supra's complaint is premature.<sup>14</sup>

**Supra's Response**

Supra responds by noting that the FDN Clarification Order was issued on October 21, 2002, and the policies set forth therein apply immediately to the Commission-approved Interconnection Agreement between Supra and BellSouth. Thus, any non-compliance of the orders is a violation affecting Supra regardless of what

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<sup>14</sup> The Commission decided on March 4, 2003, the parties' issues in the FDN docket. The written order is pending.



happens between BellSouth and FDN. Consequently, the Supra docket is not dependent upon the FDN docket but, rather, is independent of whatever happens in the subsequent voluntary negotiations between FDN and BellSouth.

Supra also observes that it has followed the FDN/BellSouth arbitration proceedings. It notes that, although the "two-loop" provision was explicitly rejected by the Commission, see, FDN Clarification Order at 7, FDN has, nevertheless, voluntarily accepted the "two loop" approach to provide FastAccess to its customers. It has done so, according to Supra, in order to obtain other favorable concessions from BellSouth in other parts of the interconnection agreement. Supra does not believe that these voluntary concessions by FDN defeat the applicability of the Commission's overarching policy decisions as applied to Supra's case.

Supra sees the FDN/BellSouth Interconnection Agreement as a ploy whereby BellSouth wants to use this FDN negotiated concession as binding authority to impose the same anti-competitive pre-condition on Supra. In Supra's opinion, "BellSouth's ploy is transparent and unpersuasive."

**STAFF ANALYSIS:**

A claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed, may not occur at all." Texas v. U.S., 523 U.S. 296, 300 (1998) quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 581 (1985). There must be a real and substantial controversy with specific relief through a conclusive decree, as distinguished from an opinion advising what the law would be based upon a hypothetical set of facts. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937). In order to determine if a case is ripe for adjudication, the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration should be assessed. Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967).

Because the Supra Reconsideration and FDN Clarification orders were policy statements of the Commission, Supra Reconsideration Order at 50-51, staff believes that the orders apply to Supra whenever former BellSouth customers with FastAccess service migrate to Supra for voice services. In its Complaint, Supra has documented specific current and ongoing practices and procedures by BellSouth which it alleges violate the Commission's orders. Because BellSouth's practices directly affect Supra's customers, there is a "real and substantial controversy" that is ripe for adjudication by the Commission.<sup>15</sup>

While staff does not believe that the lack of "ripeness" serves as an adequate basis for dismissal of Supra's Complaint, staff does believe that the Commission's orders on this issue demonstrate a clear intent for the parties to engage in good faith negotiations to iron-out the details of the implementation of the Commission's decisions. Based upon the letters included with Supra's Complaint, it does not appear to staff that the parties have engaged in such good faith negotiations. Staff recommends that any further proceedings in this Docket be held in abeyance for a period of 60 days to allow the parties to negotiate for full and specific implementation of the Commission's Fast Access decisions. Thereafter, if no resolution is forthcoming, this docket should be set for a hearing.

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<sup>15</sup> BellSouth and Supra have agreed that the Public Service Commission is the proper forum to resolve their disputes. BellSouth Telecommunications, Inc. & Supra Telecommunications and Information Services, Inc., *Interconnection Agreement* at 16.1 (July 15, 2002):

Dispute Resolution Process: The appropriate forum for the resolution of disputes arising out of this Agreement is before the Florida Public Service Commission. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

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**ISSUE 4:** Should this docket be closed?

**RECOMMENDATION:** No, this docket should remain open pending further negotiations by the parties and a possible evidentiary hearing on this matter. (TAYLOR, CHRISTENSEN)

**STAFF ANALYSIS:** This docket should remain open for an evidentiary hearing on this matter.