State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: OCTOBER 9, 2003

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

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (MARSH, RLT)
OFFICE OF THE GENERAL COUNSEL (B. KEATING, CHRISTENSEN) BK

RE: DOCKET NO. 030482-TP - EMERGENCY COMPLAINT OF SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR ALLEGEDLY FILING FALSE USAGE DATA NUMBERS WITH COMMISSION IN DOCKET NO. 990649A-TP.

AGENDA: 10/21/03 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030482.RCM

CASE BACKGROUND

On June 3, 2003, Supra Telecommunications and Information Systems, Inc. (Supra) filed its Emergency Complaint against BellSouth Telecommunications, Inc. (BellSouth) for allegedly filing false usage data numbers with the Commission in Docket No. 990649A-TP (hereafter "UNE Docket"). On June 23, 2003, BellSouth filed its Motion to Dismiss, Motion for Sanctions, and Opposition to Request for Expedited Relief. On June 30, 2003, Supra filed its Response to BellSouth's Motion to Dismiss, Motion for Sanctions, and Opposition to Request for Expedited Relief.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth Telecommunications, Inc.'s Motion to Dismiss?

RECOMMENDATION: Staff recommends that the Motion to Dismiss be granted. **(KEATING, CHRISTENSEN)**

STAFF ANALYSIS: As noted in the Case Background, BellSouth filed its Motion to Dismiss as well as its Motion for Sanctions and Opposition to Request for Expedited Relief on June 23, 2003. This issue addresses BellSouth's Motion to Dismiss (Motion).

Standard of Review

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. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. 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); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id. See also Flye v. Jeffords, 106 So. 2d 229 (1st DCA 1958)(consideration should be confined to the allegations in the petition and the motion). The moving party must specify the grounds for the motion to dismiss, and the Commission must construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

BellSouth's Motion

Initially, BellSouth argues that Supra's Petition is an untimely attack on BellSouth's average usage charge calculations submitted by BellSouth in its April 12, 2002 post-hearing brief as well as its August 26, 2002, Response to AT&T's Petition for Interim Rates in Docket No. 990649A-TP (UNE Docket). BellSouth

asserts that Supra claims without any basis in fact or law that the calculations were false and misleading, because the average charges articulated in its filings were higher than what BellSouth charged Supra for usage in its April and August 2002 bills. While Supra claims that BellSouth violated Section 364.01(4)(g), Florida Statutes, by filing allegedly inaccurate data, BellSouth maintains that this is just the latest in a series of ill-founded attacks against BellSouth that are based upon flawed logic and Supra-created "conspiracy theories." (Motion at 2).

As to the allegations, BellSouth asks the Commission to consider that Supra did not challenge any of BellSouth's calculations in Docket No. 990649A-TP, even though Supra was a party to that Docket. Furthermore, Supra did not participate in the Docket after October 2001, and, in fact, waived its right to further participate in the Docket when, contrary to the Prehearing Order, Supra failed to file a post-hearing statement, thereby waiving its position on all issues. BellSouth argues that it is inappropriate for Supra to now complain about matters in that Docket a full 8 months after that Docket has been closed (except for purposes of appeal), especially when Supra has admitted that it received and reviewed BellSouth's pleadings in the Docket, as well as the pertinent bills.

BellSouth further notes that none of the other parties in the UNE Docket challenged BellSouth's usage calculations, nor did the Commission specifically rely on BellSouth's usage calculations in rendering its final decision. BellSouth adds that it charged Supra the usage rates in the parties' interconnection agreement for each disputed time period, but that Supra has never paid the $28 usage charge for April 2002 about which it complains. BellSouth also emphasizes that Supra does not seek Commission review of its decisions in the UNE Docket, but rather asks the Commission to impose penalties on BellSouth. BellSouth asserts that Supra is essentially requesting that the Commission revisit its final decision in the UNE Docket because of the alleged filing of the misleading information; however, Supra does not indicate how the information was relied upon by the Commission or how the rates should be revised to address the alleged false information.

With regard to its own Motion to Dismiss, BellSouth acknowledges the applicable standard of review, as stated above, but also notes that the courts have recognized that judicial notice

may be taken of records in another case when considering a motion to dismiss, if the judgment and the record of the case is pleaded in the petition. See generally, Posigian v. American Reliance Ins. Co. of New Jersey, 549 So. 2d 751 753 (Fla. 3rd DCA 1988)(citing Leatherman v. Alta Cliff Co., 153 So. 845 (Fla. 1934)). Thus, BellSouth argues that the Commission can, and should, consider the record in the UNE Docket in rendering its decision on BellSouth's Motion to Dismiss.

A. Failure to State a Cause of Action

As cause for dismissal, BellSouth argues first that Supra has not stated a cause of action under Section 364.01(4)(g), Florida Statutes, the statute upon which Supra relies. The statute provides the Commission with jurisdiction to "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint." Section 364.01(4)(g), Florida Statutes. BellSouth considers Supra's argument that submitting false information equates to anticompetitive behavior to be "warped logic," particularly since Supra has acknowledged that the information submitted was based upon either: (1) the FCC's historic usage characteristics; or (2) average state-specific usage characteristics for all end users in Florida. BellSouth further emphasizes that Supra does not allege how submission of false information results in anticompetitive behavior as contemplated by Section 364.01(4)(g), Florida Statutes, beyond a general statement that BellSouth is using "subterfuge" to gain a competitive advantage.

BellSouth maintains that it can find no instance where the Commission has made a finding of "anticompetitive behavior" based upon the act of filing certain information in a post-hearing brief. BellSouth argues that the Commission has, instead, in the past used Section 364.01(4)(g), Florida Statutes, when the activity addressed was likely to affect a customer's decision to choose a provider. *Citing* Order No. PSC-02-0765-FOF-TP, issued June 5, 2003, in Docket No. 010098-TP (Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.) BellSouth argues that here Supra merely asserts, based on its own bills, that BellSouth acted in a prohibited, anticompetitive manner

by simply filing false data - - without the necessary further demonstration of how that activity would be a barrier to competition. Thus, BellSouth believes that Supra has failed to state a cause of action under Section 364.01(4)(g), Florida Statutes, and as such, the complaint should be dismissed.

B. Procedurally Improper

BellSouth also argues that Supra's complaint is procedurally improper because the decision in Docket No. 990649A-TP has become final for all purposes other than appeal. BellSouth maintains that Supra should have followed the procedure contemplated by Rule 1.540(b), Florida Rules of Civil Procedure, which provides that a party can seek relief from a final judgment due to such things as mistakes, newly discovered evidence, or fraud. Except for instances involving fraud, the motion for such relief should be filed in the action in which the judgment was entered. *Citing* Harris v. National Judgment Recovery Agency, Inc., 819 So. 2d 850, 852 (Fla. 4th DCA 2002). Supra did not file the complaint in Docket No. 990649A-TP; thus, BellSouth argues the complaint is procedurally improper and should be dismissed.

C. Fails to State a Cause of Action for Fraud

BellSouth argues that Supra's complaint is also a procedurally improper vehicle for maintaining an action for fraud. BellSouth argues that Supra has not only failed to specifically lay out the essential facts of fraud, but also has failed to explain why fraud exists such that it would entitle Supra to relief. *Citing* Flemenbaum v. Flemenbaum, 636 So. 2d 579, 580 (Fla. 4th DCA 1994)(wherein the Court noted that fraud can be "described with precision" and if a motion does not do so, relief should not be granted.) BellSouth argues that Supra's mere contention that the filing of false information misled the Commission into believing that the usage cost of UNE-P is lower than what BellSouth charges CLECs does not meet the pleading requirements for fraud; thus, the complaint should be dismissed.[1]

[1]Here, BellSouth emphasizes that these allegations are inaccurate and points out that the Commission apparently did not rely upon the usage information in BellSouth's April 12, 2002 filing or its August 26, 2002, response to AT&T's Petition for

D. Supra's Claims are Time-Barred

BellSouth contends that Supra's complaint is improper in that it is time-barred by virtue of Rule 1.540(b), Florida Rules of Civil Procedure, because the complaint was not filed within a reasonable time after the event that serves as the basis for the complaint. BellSouth argues that Supra's complaint comes a full 14 months after the first bill, April 2002, that Supra has brought into question. BellSouth maintains that Supra had plenty of time to address its concerns to the Commission before now and should have done so in the appropriate procedural vehicle, Docket No. 990649A-TP. Referring to Trawick's Florida Practice and Procedure, BellSouth notes that the reasonableness of the time considered depends upon the circumstances of the case and lack of diligence in filing a motion or in investigating the basis for a motion are important factors to consider. BellSouth maintains that 14 months was more than enough time for Supra to have investigated the issue and filed a motion regarding the usage charges; thus, the complaint should be dismissed.

E. Supra's Complaint is Barred by the Waiver Doctrine

Finally, BellSouth argues that Supra's complaint meets the standards for waiver: (1) Supra's right to challenge the usage calculations is a waivable right[2]; (2) Supra was aware of its right to challenge by virtue of the fact that it was a party to the UNE Docket and was also aware of the dates of the filings; and (3) Supra failed to participate in the UNE Docket proceedings, in spite of the fact that it was a party. Thus, BellSouth argues that the Complaint should be dismissed.

Supra's Response

A. No Basis for Dismissal

Supra contends that BellSouth has not met the standard necessary to sustain a Motion to Dismiss. Supra emphasizes that

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Interim Rates as the basis for any of its decisions.

[2]*Citing* Prehearing Order No. PSC-02-0117-PCO-TP at p. 6.

the Commission's consideration of such a Motion is limited to the four corners of the Complaint, and that the Commission cannot look beyond the complaint in considering the Motion.[3] Supra further emphasizes that the facts in the Complaint must be assumed to be true, and based on this assumption, contends that the only remaining question for the Commission to consider is whether BellSouth did actually file false and misleading information with the Commission contrary to a Commission rule or policy.

Supra also argues that BellSouth's exhibits attached to its Motion are outside the scope of the Commission's consideration of a Motion to Dismiss. Supra contends that the case upon which BellSouth relies, Posigian v. American Reliance Ins. Co. of New Jersey, 549 So. 2d 751 (Fla. 3rd DCA 1988), is inapplicable, because that case stands for the proposition that judicial notice of the record of another case can be taken only when the judgment of the subject case has been pled in the complaint at issue. Here, Supra contends it has not pled the "judgment" in Docket No. 990649A-TP, but rather BellSouth's filings in that Docket. Supra further argues that for the Posigian case to apply, Supra would have had to have asked for the ultimate decision in Docket No. 990649A-TP to have been modified in some way, which is not what Supra is requesting in this case. Supra notes that similarly, Abichandani v. Related Homes of Tampa, Inc., 696 So. 2d 802 (Fla. 2nd DCA 1997), as cited by BellSouth, is inapplicable in that it pertains to the introduction of evidence of portions of another record. Supra contends that introduction of any evidence is inappropriate in the context of considering a Motion to Dismiss.

In addition, Supra argues that it is properly seeking enforcement of a statutory provision, Section 364.01(4)(g), Florida Statutes. Supra contends that the Commission has very broad powers under this statute to ensure that companies are treated fairly in the marketplace, and that these powers include the ability to sanction a company for filing false or misleading data with the Commission. While Supra acknowledges that the Commission has no express power to address such alleged abuses, it believes that the

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[3]*Citing* Varnes v. Dawkins, supra, and Rohatynsky V. Kalogiannis, 763 So. 2d 1173 (Fla. 4th DCA 2000).

Commission has inherent power to do so.[4] Supra maintains that there is an expectation that parties will be truthful in administrative proceedings, and BellSouth should be brought to task for not meeting that expectation in the UNE Docket.

In particular, Supra argues that BellSouth's assertions regarding the average usage cost for Florida are inaccurate and designed to mislead the Commission. Supra contends that this is not a matter of just a billing complaint, but a matter of clear discrepancies between what BellSouth filed in the UNE Docket, and what it is now saying those calculations represent. Supra maintains that in a hearing before the U.S. Bankruptcy Court for the Southern District of Florida, BellSouth's witness admitted that BellSouth's position in Docket No. 990649A-TP was that UNE rates should not be lowered below the level at which they were set at that time, even though the purpose of the proceeding was to set the cost for providing the elements at issue. Supra appears to believe that this evidences BellSouth's perjury in the UNE Docket, particularly since the witness in the Bankruptcy proceeding, Mr. Follensbee, conceded that the numbers provided to develop the average costs across all zones were based upon all lines, not just UNE-P. Based upon the rate charged to Supra, Supra believes that the $2.00 rate provided to the Commission in the UNE Docket is inaccurate and misleading.

Supra adds that should the Commission find that the statutory basis upon which Supra proceeds is not the appropriate basis for addressing the concerns Supra has raised, then the Commission should proceed on its own motion using whatever statutory basis the Commission deems most appropriate.

B. Complaint Is Procedurally Proper

Supra also contends that its Complaint is proper. Supra disagrees with BellSouth's contention that there is no remedy for the allegations raised by Supra, because Docket No. 990649A-TP is

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[4] *Citing* Paula Corbin Jones v. William Jefferson Clinton, et al., 36 F. Supp. 1118 (E.D. Arkansas 1999) (for the proposition that "when rules alone do not provide courts with sufficient authority to protect their integrity and prevent abuses of the judicial process, the inherent power fills the gap.") (emphasis by Supra).

now closed, except for purposes of appeal. Supra contends that there are many cases of parties being prosecuted for perjury after a case has settled, been adjudicated, or dismissed. Supra relies upon the example of former President Clinton entering a plea on perjury in a prior settled civil case.

Supra also contends that it is not asking the Commission to modify the Final Order in Docket No. 990649A-TP; rather, it is asking the Commission to sanction BellSouth for filing false information in a proceeding.

C. Fraud Not a Basis for Supra's Complaint

Supra argues that it did not intend to assert fraud as a cause of action in this case, particularly since the Commission is without authority to award damages.

D. Complaint not Time-Barred

Supra contends that its complaint is not time-barred, as argued by BellSouth. Supra contends that the statute of limitations for perjury is 3 years; thus, BellSouth is not protected by the closing of the case. Further, Supra emphasizes that contrary to BellSouth's assertions, Supra could not have known this information during the UNE proceeding, because it only recently obtained the information from BellSouth in October 2002.

E. No Waiver

Supra maintains that BellSouth's waiver arguments are inapplicable in the face of Supra's allegations of perjury. Supra argues that BellSouth misapplies the Commission's procedural statements regarding waiver of a party's position in a proceeding. Supra again emphasizes it is not seeking to change the outcome of Docket No. 990649A-TP, but rather seeking sanctions against BellSouth for abuse of the process in an anticompetitive manner. Supra adds that while a party may waive its rights in a proceeding, at no time does the Commission waive its ability to pursue a party for inappropriate conduct in a proceeding.

For all of the above reasons, Supra argues that BellSouth's Motion to Dismiss should be denied.

Staff's Analysis

At the outset, staff notes that Supra's Complaint and BellSouth's Motion to Dismiss present a question that appears to be a matter of first impression for the Commission, that being: Can the Commission grant relief in the form of sanctions for improper conduct in a case that is closed and on appeal? Were this simply a question of Supra seeking modification of the final decision in Docket No. 990649A-TP, staff believes that the doctrine of administrative finality would clearly apply. That doctrine holds that:

> . . . orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Peoples Gas Sys. V. Mason, 187 So. 2d 335, 338-339 (Fla. 1966). Supra, however, contends that it does not seek modification of the Commission's final decision; rather, Supra seeks penalties against BellSouth for providing allegedly false data in the record of that proceeding, which Supra contends was an anticompetitive act in violation of Section 364.01(4)(g), Florida Statutes. In its response to BellSouth's Motion to Dismiss, Supra more specifically characterizes its allegations against BellSouth as being allegations of perjury. Staff emphasizes, however, that Supra only alleges a violation of Section 364.01(4)(g), Florida Statutes, in its Complaint, and according to the standard for a Motion to Dismiss, it is only the four corners of the Complaint that should be considered.

While the question presented by Supra appears somewhat unique, staff believes that the essential elements of Supra's petition nevertheless do not meet the necessary standard to maintain a cause of action. While Supra asserts that BellSouth's presentation of

false information amounts to a violation of Section 364.01(4)(g), Florida Statutes, for which the Commission can provide a penalty, Supra fails to explain how BellSouth's alleged action results in a violation of that provision. More importantly, Supra does not state how the alleged violation resulted in an injury to Supra, nor does Supra request a remedy that would be contemplated by a statute designed to address barriers to competition. As such, staff does not believe Supra has sufficiently alleged a cause of action under the cited provision.[5] The Motion to Dismiss could, therefore, be granted on this basis alone.

As for the relief requested by Supra, while staff is aware of no specific circumstance in which the Commission has been presented a request for imposition of a penalty for providing false information, the Commission has acknowledged in the past that, ". . .the Supreme Court of Florida has recognized the rule that '[o]rders, decrees, or judgments, made through fraud, collusion, deceit, or mistake, may be opened, vacated, or modified at any time, on the proper showing made by the parties injured.'" Order No. 24989, issued August 29, 1991, in Docket No. 910004-EU, *citing* Davis v. Combination Awning & Shutter Co., 62 So.2d 742, 745 (Fla. 1953). Again, though, Supra is not seeking a modification to the Commission's order, but sanctions imposed upon BellSouth.

Were this a civil action, the law is clear that Supra could not pursue a suit for damages against BellSouth because Florida law does not recognize a right to seek redress for presenting false testimony, and in fact, establishes an absolute privilege for parties, witnesses, and their lawyers for anything said during the course of a judicial proceeding. Regal Marble, Inc. v. Drexel Investment, Inc., 568 So. 2d 1281 (Fla. 4th DCA 1990). Nevertheless,

> This does not mean, however, that a remedy for a participant's misconduct is unavailable in Florida. On

[5]Staff also notes that Section 364.01(4)(g), Florida Statutes, authorizes the Commission to ensure providers are treated fairly by ". . . preventing anticompetitive behavior. . . ." [Emphasis added]. Supra's request for relief is not designed to prevent an ongoing alleged anticompetitive behavior, but to penalize a past alleged violation. Thus, had Supra even sufficiently alleged that BellSouth's alleged violation amounted to an anticompetitive behavior, it is still arguable that Section 364.01(4)(g), Florida Statutes, is not designed to address the particular violation alleged by Supra.

> the contrary, just as "remedies for perjury, slander, and the like committed during judicial proceedings are left to the discipline of the courts, the bar association, and the state," Wright, 446 So. 2d at 1164, other tortious conduct occurring during litigation is equally susceptible to that same discipline. Clearly, a trial judge has the inherent power to do those things necessary to enforce its orders, to conduct its business in a proper manner, and to protect the court from acts obstructing the administration of justice. In particular, a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt. South Dade Farms, Inc. v. Peters, 88 So. 2d 891 (Fla. 1956).

Levine, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, P.A. v. United States Fire Insurance Company, 636 So. 2d 606, 608 (Fla. 1994). The problem, however, is that while a court may have inherent authority to provide a penalty for providing false testimony, the Commission is a creature of statute, and not vested with inherent powers.

The Commission's authority is defined by the laws pursuant to which it acts. See Charlotte County v. General Development Utilities, Inc. 653 So.2d 1081, 1082 (Fla. 1st DCA 1995); State, Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1982); and Florida Bridge Co. v. Bevis, 363 So.2d 799 (Fla. 1978). The Legislature has defined the Commission's ability to penalize a company in Section 364.285(1), Florida Statutes:

> The commission shall have the power to impose upon any entity subject to its jurisdiction under this chapter which is found to have refused to comply with or to have willfully violated any *lawful rule or order or any provision of this chapter* a penalty for each offense of not more than $25,000, which penalty shall be fixed, imposed, and collected by the commission, or may, for any such violation, amend, suspend, or revoke any certificate issued by it. . . . (emphasis added)

As set forth, Section 364.285, Florida Statutes, does not provide the Commission with the specific authority to penalize a company for anything other than a violation of a Commission rule, Order, or provision of Chapter 364. Staff is aware of no provision authorizing the Commission to establish a monetary penalty or revoke a certificate specifically for providing allegedly false information. See also Footnote 5, supra.

That is not to say, however, that should the Commission find in the context of a proceeding that a party has provided false evidence, that the Commission could not take remedial action to address the situation. To the contrary, had the allegations presented by Supra been brought up in the UNE Docket itself, and in a timely manner, a number of options would have been available to the Commission, including allowing additional discovery and cross-examination on the issue, requiring BellSouth to make corrections to its testimony, or perhaps even striking the testimony of the witness proffering the false statements if the allegations were proven. The Commission has dealt with a somewhat similar situation in a past rate case involving West Florida Natural Gas, Docket No. 850503-GU, in which the Commission disallowed certain expenses upon finding that the company had materially misrepresented information in the case.

In this case, though, the Commission has already rendered its final Order, which is currently on appeal. Thus, the Commission no longer has an avenue to provide a remedy within the context of the case itself. Based on the foregoing analysis, BellSouth's Motion to Dismiss should also be granted, because the Commission cannot grant the relief requested by Supra.

Staff emphasizes, nevertheless, that this is an unusual question and one that appears to be a matter of first impression for the Commission. Should the Commission so choose, it could deny the Motion to Dismiss and require the parties to brief the issue of the Commission's authority to grant relief as part of the hearing process.

ISSUE 2: Should BellSouth's Motion for Sanctions be granted?

RECOMMENDATION: No. Sanctions are not justified in that the pleading does not appear to be frivolous as contemplated by Section 120.569(2)(e), Florida Statutes. **(KEATING)**

STAFF ANALYSIS:

Arguments

BellSouth asks that the Commission impose sanctions on Supra for filing a frivolous pleading in violation of Section 120.569(e), Florida Statutes. BellSouth asserts that the pleading is intended solely to harass BellSouth as demonstrated by its basis in pure speculation and conjecture. BellSouth emphasizes that Supra has not informed the Commission in its pleading that in each of its billings to Supra, it charged the appropriate usage rate contained in the parties' interconnection agreement, nor has it informed the Commission that it did not pay either charge. BellSouth further emphasizes that Supra has already litigated the matter of the $6.95 August usage charge before the Bankruptcy Court and lost.

Supra, however, argues that sanctions are not appropriate. Supra emphasizes that its Complaint is not conjecture, but is, instead, based upon BellSouth's own Schedule 8's filed with the Commission. Supra maintains that BellSouth's own data is contradicted by Mr. Follensbee's testimony before the Bankruptcy Court.

Supra also notes that while BellSouth's assertions that Supra has not paid the rates at issue is irrelevant, Supra was not contractually obligated to pay disputed amounts. Furthermore, Supra argues that BellSouth's assertion that Supra has already argued this matter before the Bankruptcy Court and "lost" is misleading. Supra asserts that instead the Bankruptcy Court has allowed Supra to initiate a separate proceeding to address usage.

Finally, Supra disputes BellSouth's allegation that this complaint is just a litigation tactic. Supra notes that all of its open dockets against BellSouth have a legitimate basis. Supra adds that it appears BellSouth would like the Commission to sanction Supra for raising too many legitimate issues about BellSouth's

conduct. Supra maintains that the pleadings are not without basis and are not served for improper purpose.

For all these reasons, Supra asks that BellSouth's request for sanctions be denied.

Analysis

In Order No. PSC-96-1320-FOF-WS, the Commission relied on Mercedes Lighting and Elec. Supply, Inc. v. State, Dep't of General Services, 567 So. 2d 272, 278 (Fla. 1st DCA 1990) in rendering its decision on a request for attorney's fees and costs. There, the Commission noted that in Mercedes Lighting, the court stated:

> The rule [against frivolous or improper pleadings contained in Rule 11, Federal Rules of Civil Procedure] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court further noted, that "a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition."

Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. The Commission further considered the court's holding that improper purpose in a pleading "may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." Id. at 278. The Commission then added that ". . . it is important to consider what was reasonable at the time the pleading was filed." Order No. PSC-96-1320-FOF-WS at p. 20. The Commission further stated that there must be some legal justification for the filing in question. Id. at p. 21.

While staff believes that BellSouth's Motion to Dismiss should be granted, staff does not believe that the Complaint filed by Supra meets the standard for a "sham" or "frivolous" pleading. The pleading is apparently based upon information Supra believes to be accurate and to identify a discrepancy in information provided to the Commission by BellSouth in a case to which Supra was a party. While staff disagrees with the legal basis for Supra's pleading, staff acknowledges that there is legal justification for it. As such, the pleading does not appear to be interposed solely for

purposes of harassment or to increase costs of litigation. Therefore, staff recommends that the request for sanctions be denied.

ISSUE 3: Should Supra's Request for Expedited Relief be granted?

RECOMMENDATION: If the Commission approves staff's recommendation in Issue 1, Supra's request for expedited treatment of its complaint is rendered moot. If, however, the Commission rejects staff's recommendation in Issue 1, staff recommends that the request for expedited relief be denied. **(KEATING)**

STAFF ANALYSIS: BellSouth asks that Supra's request for expedited relief be denied. BellSouth argues that Supra's complaint does not fit the guidelines previously used by the Commission for expedited complaints, particularly since this is not a dispute regarding an interconnection agreement. Furthermore, since the complaint involves a "host of legal and factual disputes," BellSouth believes that expedited treatment should be denied.

Supra argues that expedited treatment is appropriate, based upon Section 364.058, Florida Statutes. Supra also believes that the previous guidelines regarding expedited treatment are applicable here, because the issues involve not only Supra and BellSouth's interconnection agreement, but many other parties' agreements. Supra adds that an expedited hearing is appropriate as it was in Docket No. 030200-TP, Emergency petition of AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaksm Service d/b/a AT&T for cease and desist order and other sanctions against Supra Telecommunications and Information Systems, Inc., wherein AT&T was granted an expedited hearing.[6]

[6]Staff notes the procedural schedule in that case has since been suspended.

If the Commission denies staff's recommendation in Issue 1, staff believes that this matter should be set for hearing, but does not require expedited treatment. The alleged harm at issue is not ongoing and expedited treatment of the Complaint will not provide additional relief to Supra. Thus, staff recommends that the Request for Expedited Treatment be denied.

ISSUE 4: Should this Docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, this Docket should be closed. **(KEATING)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, this Docket should be closed as no further action by the Commission will be required.