**Matilda Sanders**

**From:** Sheffield, Glenda [Glenda.Sheffield@BellSouth.COM]
**Sent:** Wednesday, March 22, 2006 3:14 PM
**To:** Filings@psc.state.fl.us
**Cc:** Mays, Meredith; Slaughter, Brenda ; Linda Hobbs; Fatool, Vicki; Holland, Robyn P; Nancy Sims; Bixler, Micheale
**Subject:** Florida Docket No. 041269-TL
**Importance:** High
**Attachments:** Response in Opp to Supra Motion.pdf

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
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B. Docket No. 041269-TP

Petition to Establish Generic Docket to Consider Amendments to Interconnection

Agreements Resulting from Changes of Law

C. BellSouth Telecommunications, Inc.
on behalf of Meredith Mays

D. 12 pages total (includes letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc.'s Response in Opposition to Supra's Motion for Reconsideration

<<Response in Opp to Supra Motion.pdf>>

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ORIGINAL

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March 22, 2006

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
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Florida Public Service Commission
2540 Shumard Oak Boulevard
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**Re: Docket No. 041269-TP**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response in Opposition to Supra's Motion for Reconsideration, in the above referenced matter.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Meredith Mays (gk)

Meredith Mays

cc: All Parties of Record
Jerry Hendrix
R. Douglas Lackey
Nancy B. White

627096

**CERTIFICATE OF SERVICE**
**Docket No. 041269-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U. S. Mail this 22nd day of March, 2006 to the following:

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Meredith Mays

**(+ )signed Protective Agreement**
**(*) via FedEx**

ORIGINAL

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| In Re: | ) | |
| | ) | Docket No. 041269-TP |
| Petition to Establish Generic Docket to | ) | |
| Consider Amendments to Interconnection | ) | |
| Agreements Resulting From Changes of Law | ) | Filed: March 22, 2006 |
| | ) | |

**BELLSOUTH TELECOMMUNICATIONS INC.'S**
**RESPONSE IN OPPOSITION TO SUPRA'S MOTION FOR RECONSIDERATION**

BellSouth Telecommunications, Inc. ("BellSouth") opposes the Motion for Reconsideration ("Motion") filed by Supra on March 15, 2006 and asks the Florida Public Service Commission ("Commission") to reject it. Supra's Motion raises no mistake of law or fact that was overlooked or that warrants reconsideration. BellSouth also disagrees that oral argument is necessary. If the Commission desires oral presentation, BellSouth will, of course, be available. However, the issues raised by Supra are neither unusual nor complex, and the staff and the Commission are fully capable of addressing these issues without the need for a protracted discussion. This Commission can and should perfunctorily dismiss Supra's motion.

## DISCUSSION

### A. The Commission Properly Followed Federal Law

Supra primarily objects to this Commission's decision on Section 271 (Issue 7) citing to decisions from Georgia, Kentucky, and Tennessee. Setting aside the incomplete nature of Supra's citations, Supra has failed to show (nor can it) that the Commission erred in not following such decisions. This Commission is not bound by decisions from other state commissions[1] and reconsideration is neither warranted nor appropriate simply because different jurisdictions have reached different outcomes.

[1] *See, e.g.*, Order No. PSC-04-0106-FOF-TP (decisions from New York and Virginia were not binding on this

More significantly, however, Supra disregards the clear statutory limits on a state commission's authority to ensure an interconnection agreement complies with Section 251, and provides no authority over Section 271. Indeed, the vast majority of state commissions and federal courts that have considered the question of state commission authority over Section 271 have ruled as this Commission did. Because this issue has been fully addressed in post-hearing briefs, BellSouth will not reiterate its prior arguments.[2] Instead, BellSouth attaches as Appendix 1 a matrix of court and commission decisions that make clear state commissions have no authority to regulate Section 271 elements, and demonstrating also that in BellSouth's region, this Commission's decision is in accord with decisions of the Alabama, South Carolina, North Carolina, and Louisiana commissions.[3]

Moreover, Supra's implication that the FCC has not addressed this issue is incorrect and likewise fails to justify reconsideration. The FCC has addressed Section 271 in both its *UNE Remand Order* and its *Triennial Review Order.* When the FCC first addressed the interplay between section 251(c) and the competitive checklist network elements of section 271 in its *UNE Remand Order,* the FCC was very clear that "the prices, terms, and conditions set forth under sections 251 and 252 do not presumptively apply to the network elements on the competitive checklist of section 271."[4] In the *Triennial Review Order,* the FCC was also explicit -- once long

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Commission).

[2] Supra's Motion simply reargues this issue, which fails to satisfy the standard for reconsideration.

[3] Supra's Motion is devoid of any discussion of the recent decisions of the North Carolina, South Carolina, and Louisiana commission on this issue. Moreover, on Tuesday, March 21, 2006, the Georgia Public Service Commission reconsidered, *sua sponte*, its March 10, 2006 decision setting rates for switching provided pursuant to Section 271. The Georgia Commission reversed, in part, its prior decision ruling that it will not set Section 271 switching rates. BellSouth's appeal of the Georgia Commission's exercise of Section 271 authority remains pending. Neither the Tennessee Regulatory Authority nor the Kentucky Public Service Commission has yet addressed the issue of Section 271 authority in parallel change of law dockets in those states, thus CompSouth's reliance on various arbitration decisions – decisions that BellSouth has either already challenged or will appeal -- is premature at best.

[4] *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696, ¶ 469 (1999) (*"UNE Remand Order"*), *petitions for review granted, Unites Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002), *cert. denied,*

distance authority has been granted, "[S]ection 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of [S]ection 271."[5] The FCC made no mention whatsoever of a state commission role in this process; the regulatory agency charged with Section 271 oversight is the FCC.[6]

Indeed, that the FCC has *never stated* state commissions are precluded from addressing Section 271 is most likely due to CLEC regulatory gamesmanship. This is because Momentum Telecom, Inc. ("Momentum")[7] filed a complaint against BellSouth with the FCC's Enforcement Bureau in November 2005 taking issues with the rates, terms and conditions under which BellSouth offers Section 271 switching. Consistent with FCC procedure, a decision was expected in 90 days; however, the parties agreed to extend the deadline for resolution until March 3, 2006.[8] *See Momentum Order,* n. 3. Rather than obtaining an FCC resolution to its complaint, on March 2, 2006, Momentum filed a motion to withdraw its complaint *with prejudice.* It is difficult to imagine why one of Supra's fellow CompSouth members would have elected to withdraw its complaint *with prejudice* absent an anticipated negative FCC outcome. Consequently, Supra is wrong to suggest that it is "critical" that this Commission accord weight to what the FCC has "never stated." Supra has no legally sustainable basis to seek

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123 S. Ct. 1571 (2003). The FCC very clearly stated that

> [i]f a checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. If a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a).

*UNE Remand Order* at 470.

[5] *TRO* ¶ 665.

[6] *See also TRO* at ¶ 663. ("The Supreme Court has held that the last sentence of section 201(b), which authorized the [FCC] 'to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act,' empowers the [FCC] to adopt rules that implement the new provisions of the Communications Act that were added by the Telecommunications Act of 1996. Section 271 is such a provision.") (citations omitted).

[7] Both Momentum and Supra are CompSouth members. *See* Joint CLECs' November 30, 2005 Post-Hearing Brief, n. 1.

[8] A copy of this Order of Dismissal (hereinafter "Momentum Order"), released March 3, 2006 in Docket EB-05-MD-029, DA-06-520 is available at www.fcc.gov.

reconsideration based on FCC inaction, particularly since the inaction as it relates to Section 271 may result from actions taken by Supra's fellow CompSouth member, Momentum.

**B. Supra Has Waived Its Right to Rely Upon State Law**

Having lost its federal law arguments, Supra attempts to show error by audaciously suggesting this Commission "neglected to consider its independent state authority" in making its decision concerning Section 271. Supra's contentions are wholly lacking in support.

Issue 7(a) in this proceeding asked "Does the Commission have the authority to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements *under either state law,* or pursuant to Section 271 or any other federal law other than Section 251?" (emphasis supplied). This Commission issued its pre-hearing order (Order No. PSC-05-1054-PHO-TP), in which it set forth the Joint CLECs' position as "Joint CLECs also believe the Commission has authority to include network elements in ICAs pursuant to state law authority, *but it not requesting the Commission exercise such authority in this proceeding."* (emphasis supplied).

Thus, Supra's claim of error concerning state law cannot withstand scrutiny. Frankly, Supra's suggestion that this Commission has erred is inexcusable given that the CLECs in this case, including Supra, made it crystal clear that state statutory provisions were not at issue. Now that the Commission has rejected the CLECs' federal statutory claims, Supra apparently wants another bite at the apple. Such tactics should be summarily rejected – Supra had ample time to raise any state law arguments well before the issuance of Order No. PSC-06-0172-FOF-TP and has no viable argument that would justify reconsideration now.

Moreover, even if this Commission elected to consider Supra's tardy state law arguments (it should not), reconsideration is not appropriate. Any attempt to include Section 271

obligations in a Section 252 interconnection agreement under some state law theory would simply be inconsistent with federal law. In enacting the 1996 Act, "Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission." *Indiana Bell v. Indiana Utility Regulatory Com'n et al.*, 359 F.3d 493, 494 (7th Cir. 2004). As the Supreme Court has held, Congress "unquestionably" took regulation of local telecommunications competition away from the States on all "matters addressed by the 1996 Act." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

This is especially true with respect to those network elements as to which the FCC has found no impairment and that Congress did not require BOCs to provide as Section 271 elements. Section 271 "does not gratuitously reimpose the very same requirements that" section 251 "has eliminated." *TRO*, at ¶ 659. Nor does it permit return to "virtually unlimited ... unbundling, based on little more than faith that more unbundling is better." *Id.* ¶ 658. Therefore, once the FCC has concluded that such elements need not be provided as UNEs, state commissions (or, for that matter, the FCC, *see* 47 U.S.C. § 271(d)(4)) have no authority to require BOCs to provide unbundled access to those elements.

**C. Supra's Procedural Arguments Are Meritless**

Supra's procedural arguments are equally without merit. This docket began after BellSouth filed a petition seeking to address changes necessary to implement certain FCC decisions. Neither BellSouth nor any other party invoked the provisions of Section 350.01(6), Florida Statutes, which subsection permits parties to file requests seeking the assignment of matters to the full commission. Consequently, this Commission had the discretion to manage Commissioner assignments as it deemed necessary to maintain timely agency decision-making.

Moreover, the Commission Staff issued a staff recommendation addressing BellSouth's Motion for Summary Judgment as one of many items to be addressed at the Commission's October 4, 2005 Agenda Conference.[9] Those minutes show that a panel of Commissioners, rather than the full Commission, was assigned to this docket.[10] Consequently, the parties were on notice that this matter was assigned to a panel on October 4, 2005. Following the October 4, 2005 Agenda, Supra filed an emergency motion, which was included as an item to be addressed at the October 18, 2005 agenda session.[11] Again, the October 18, 2005 minutes continued to show that a panel of Commissioners rather than the full Commission was assigned to this docket.

Then, on October 19, 2005, the prehearing conference in this docket took place. Florida law requires prehearing conferences, in part so that parties can resolve "procedural matters" before hearings. *See* Rule 28-106.209, Florida Administrative Code. During the prehearing conference no party objected to having the hearing in this docket conducted in front of a panel rather than the full commission.

Finally, the hearing in this docket began on November 2, 2005. At the outset of the hearing, the panel took up outstanding motions. In discussions, Commissioner Deason referred to his recent assignment to the panel.[12] Commissioner Edgar indicated that BellSouth's Motion for Summary Final Order was best addressed by "a full *panel* for the matters to come before us, and we needed a little more time to be able to be in that posture procedurally."[13] No party sought

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[9] *See* http://www.floridapsc.com/agendas/agendaminutes/oct0405.pdf.
[10] BellSouth recognizes that the minutes reflect past agenda sessions. However, prior to each agenda session the items to be addressed, along with the Commissioner assignments to a particular docket, are publicly available. Consequently, *before* October 4, 2005 all parties were on notice that this docket had been assigned to a panel.
[11] *See* http://www.floridapsc.com/agendas/agendaminutes/oct1805.pdf.
[12] Tr. Vol. I, at 43 (available at http://www.floridapsc.com/library//FILINGS/05/10922-05/10922-05.PDF).
[13] *See* Tr., Vol. I at 45 (emphasis added).

to delay the hearing before evidence and witness testimony was entered into the record and no party objected to proceeding before the panel.[14]

Consequently, Supra has no legitimate basis to assert that Section 350.01(5) justifies reconsideration. Florida law clearly allows a panel of Commissioners to decide a disputed case. *See* Section 350.01(5), Florida Statutes. Florida law also clearly provides the Commission with discretion to modify Commissioner assignments to pending dockets to appropriately balance its workload. *Id.* Here, it was obvious that this docket had been assigned to a panel, and not the full Commission, before the hearing began; indeed, the panel assignment was publicly known on, if not before, October 4, 2005. Whether this matter was originally assigned to the entire Commission is beside the point. Because the Commission has the legal authority and discretion to fairly "distribute [its] workload" and to "expedite [its] Commission's calendar" through Commissioner assignments and because no party had ever invoked the "full commission" subsection of Section 350.01(6), no party could have legitimately expected that the hearing would take place before the full commission and reconsideration must be denied.[15]

## CONCLUSION

This Commission should reject Supra's Motion for Reconsideration, which fails completely to satisfy the standard for reconsideration and seeks to make the Commission responsible for Supra's strategic decisions. At some point in time, Supra must simply accept that changes in law that the FCC mandated, and stop trying to delay the inevitable. Supra's attempt to politicize Commissioner Arriaga's comments into alleged error is unjustifiable.

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[14] Notably, one of Supra's counsel advocating the Motion for Reconsideration - Ms. Marva Brown Johnson - was present throughout the hearing.

[15] Consequently, it was well within the Commission's discretion to decrease the number of Commissioner assignments from a panel of five to a panel of two and thereafter to a panel of three since the "full commission" clause of Section 350.01(6) was never invoked.

Respectfully submitted, this 22nd day of March, 2006.

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