

State of Florida



## Public Service Commission

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

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**DATE:** January 20, 2005

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Susac)  
Division of Competitive Markets & Enforcement (Vinson, Duffey, Harvey, Dowds)

**RE:** Docket No. 040301-TP Complaint of Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc.

**AGENDA:** 02/01/05 – Regular Agenda – Renewed Motion for Interim Rate Based on Changed Circumstance – Motion for Oral Argument – Participation is at the discretion of the Commission

**CRITICAL DATES:** None.

**SPECIAL INSTRUCTIONS:** Request that this recommendation precede the deferred recommendation from January 18, 2005, Agenda that was filed in Docket Nos. 041338-TP and 040301-TP.

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\040301.RCM.DOC

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### Case Background

On June 23, 2004, Supra Telecommunications and Information Systems, Inc. (Supra) filed its Amended Petition for Arbitration with BellSouth Telecommunications, Inc. (BellSouth). BellSouth filed its Answer and Response on July 21, 2004. The matter was then set for a two-day hearing (December 1 - 2, 2004) and later reduced to a one-day hearing for December 2, 2004.

In its Amended Petition, Supra requested an interim rate, subject to true-up, be established during the pendency of the case. At the September 21, 2004 Agenda conference, the Commission denied the request for an interim rate, and Order No. PSC-04-0942-FOF-TP, was issued September 23, 2004, to reflect that decision.

On November 29, 2004, BellSouth filed an Emergency Motion for Continuance of the hearing in Docket No. 040301-TP. In addition to asking the Commission for a continuance, BellSouth also requested that this docket be consolidated with Docket No. 041338-TP. On November 30, 2004, Supra filed its response. BellSouth's Motion was granted in part, and by Order No. PSC-04-1180-PCO-TP, issued on November 30, 2004, that hearing was continued.

On November 30, 2004, Supra filed an Emergency Motion For Reconsideration of the Prehearing Officer's Order. In addition, on December 6, 2004, Supra filed a Motion For Partial Summary Final Order on Issues 3 and 4. Both motions were denied at the January 18, 2005, Agenda.

On January 3, 2005, Supra filed its Renewed Motion for an Interim Rate for a UNE-P to UNE-L Conversion Based on Changed Circumstances, and on January 13, 2005, Supra filed a Motion for Oral Argument. On January 10, 2005, BellSouth filed its Response to Supra's Motion for an Interim Rate. On January 18, 2005, BellSouth filed its response to Supra's Motion for Oral Argument.

It should be noted that the Commission deferred two issues<sup>1</sup> from the January 18, 2005, Agenda that may be impacted by the decision stemming from this recommendation. Those issues will be taken up immediately following this item.

This recommendation pertains to Supra's Renewed Motion for an Interim Rate for a UNE-P to UNE-L Conversion Based Changed Circumstances and its Motion for Oral Argument.

#### Jurisdiction

The Commission is vested with Jurisdiction in this matter pursuant to Sections 364.161 and 364.162, Florida Statutes, which authorize the Commission to arbitrate unbundling disputes, as well as disputes involving rates, terms and conditions within interconnection agreements.

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<sup>1</sup> (1) Whether to consolidate Docket No. 040301-TP with Docket No. 041338-TP; and (2) Whether to close Docket Nos. 040301-TP and 041338-TP.

### **Discussion of Issues**

**Issue 1:** Should the Commission grant Supra Telecommunications and Information Systems Inc.'s Motion for Oral Argument?

**Recommendation:** Yes. Staff recommends granting Supra's Motion for Oral Argument because staff believes it is beneficial for both parties to address the merits of Supra's Renewed Motion for an Interim Rate for a UNE-P to UNE-L Conversion Based on Changed Circumstances. (Susac)

**Staff Analysis:** Staff recommends granting Supra's Motion for Oral Argument because staff believes it is beneficial for both parties to address the merits of Supra's Renewed Motion for an Interim Rate due to the complex and unusual nature of the request.

#### **Supra**

Supra filed its Renewed Motion for an Interim Rate on January 3, 2005. On January 13, 2005, Supra filed its Motion for Oral Argument pursuant to Rules 25-24.058 and 25-22.058, Florida Administrative Code. Supra's basis for oral argument is to address the merits of its Renewed Motion for an Interim Rate. Supra argues that oral argument would benefit the Commission because it would better help the Commission understand Supra's need for an interim rate. In support of this need, Supra cites the Federal Communication Commission's December 15, 2004, press release, as support for its argument that increased charge for UNE-P creates a change in circumstances that provides a greater need for an interim rate subject to true-up. Also, Supra cites the continuance of the December 2, 2004, hearing as a change in circumstance that requires an interim rate subject to true-up. Last, Supra argues that neither party will be prejudiced by the Commission setting an interim rate subject to true-up, upon a final rate being set.

#### **BellSouth**

BellSouth argues that Supra has waived any rights to request oral argument on the Renewed Motion because Supra failed to comply with mandatory Commission Rules. In support of its argument, BellSouth cites Rule 25-22.058, Florida Administrative Code. BellSouth points out that the Rule states, ". . . A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. . . . Failure to file a timely request for oral argument shall constitute a waiver thereof." BellSouth argues that Supra filed its Renewed Motion on January 3, 2005, and pursuant to Rule 25-22.058, Florida Administrative Code, that Supra waived its right to oral argument because it did not file any request for oral argument on January 3, 2005.

### **Analysis**

Rule 25-22.058(1), F.A.C. indicates that failure to timely file a request for oral argument shall constitute a waiver. However, staff notes that this is a matter prior to hearing and Rule 25-22.0021(1), F.A.C. indicates that parties should be given an opportunity to address matters before the Commission when the matter is taken up prior to hearing. Thus, staff believes that at this point in the proceeding, participation is at the discretion of the Commission. In this instance, staff recommends granting Supra's Motion for Oral Argument because staff believes it is beneficial for both parties to verbally address the merits of Supra's Renewed Motion for an Interim Rate.

**Issue 2:** Should the Commission grant Supra Telecommunications and Information Systems Inc.'s Renewed Motion for an Interim Rate for a UNE-P to UNE-L Conversion Based on Changed Circumstances?

**Recommendation:** No. Staff recommends denying Supra's Renewed Motion for an Interim Rate because the Renewed Motion does not present a sufficient evidence that would justify the Commission to reverse or deviate from its prior ruling in Order No. PSC-04-0942-FOF-TP, issued September 23, 2004. (Susac, Vinson, Duffey, Harvey, Dowds)

### **Supra**

On January 3, 2005, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Renewed Motion for Interim Rate for UNE-P to UNE-L Conversions Based on Change of Circumstances (Renewed Motion). In its Renewed Motion, Supra argues that the December 15, 2004, FCC press release is sufficient change of circumstance to renew its earlier Motion for Interim Rate. Supra contends that this decision will result in an enormous increase in costs and make it economically infeasible for Supra to serve its customers through UNE-P. This anticipated increase, and the continuance of the hearing, calls for an interim rate subject to true-up.

First, Supra requests that the Commission look to the Georgia Public Service Commission's (GPSC's) rate for a UNE-P to UNE-L conversion whereby the GPSC reduced BellSouth's hot cut rate. Supra states that if an interim rate is not set forth in this docket then it is further prejudiced by the delay in converting its embedded customers to its own switch. In addition, Supra cites the continuance of the December 2, 2004, hearing as a change in

circumstance that requires an interim rate subject to true-up. Supra then presents three alternatives for an interim rate.

UNE	BST		Supra		Supra		Supra	Supra
	1 <sup>st</sup> Cut	Add'tl	1 <sup>st</sup> Cut	Add'tl	1 <sup>st</sup> Cut	Add'tl	Alternative 2	Alternative 3
A1.1 NRC (SL-1 loop) (Docket No. 990649-TP)	\$49.57	\$22.83	\$24.79	\$11.42	\$36.66	\$9.92	\$23.09	\$15.00
Electronic Service Order (Docket No. 990649-TP)	\$1.52	---	\$1.52	---	\$1.52	----	\$1.52	\$1.52
Collocation Cross-Connect (H.1.9) (Docket No. 98183-TP)	\$7.32	\$5.37	---	---	---	---	---	---
<b>Total</b>	<b>\$58.41</b>	<b>\$28.20</b>	<b>\$26.31</b>	<b>\$11.42</b>	<b>\$38.18</b>	<b>\$9.92</b>	<b>\$24.61</b>	<b>\$16.52</b>

Note: Where Multiple Hot Cuts appear on a single service order, only one order charge presumably applies.

1. Supra argues that the Commission could reduce the current charge by \$12.91. Supra claims that BellSouth improperly seeks to recover work in the amount of \$5.76 for dispatch as opposed to reusing the facilities that are already in place.<sup>4</sup> Supra also claims that BellSouth charges \$7.15 per A.1.1 SL1 loop for work which is never performed.<sup>5</sup> Supra concludes that this amounts to a cost of \$12.91 for work that either is not, or should not, be performed.

2. Supra asserts that another viable alternative is for an interim blended rate to be established at \$23.09 for SL1 hot cuts and \$53.58 for SL2 hot cuts. Supra arrives at these numbers by using BellSouth Telecommunications, Inc.'s (BellSouth's) bulk migration process and using the rates BellSouth claims apply to the processes being performed in this proceeding. Supra submits that it would pay BellSouth \$49.57 for the first hot cut, and \$22.83 for the subsequent 98 hot cuts, as Supra only intends to issue bulk migration orders. (Renewed Motion,

<sup>2</sup> 50% of BellSouth's proposed rates.

<sup>3</sup> Reduced NRC by \$12.91

<sup>4</sup> Deposition transcript of James McCracken, page 26, line 18 – 28; page 28, line 3.

<sup>5</sup> Deposition transcript of James Ennis, pages 46-47.

p. 13-14) Supra further suggests that no charge be allowed for the cross-connect (\$7.22). Supra agrees that the mechanized OSS ordering charge applies and will pay that charge in full.

3. Next, Supra proposes an interim rate of \$15 based on the testimony of its witness David Nilson and a BellSouth/MCI agreement regarding CLEC to CLEC conversions which is arguably identical to a UNE-P to UNE-L conversion.

Last, Supra states that the Commission has previously ordered interim rates in Docket No. 990649-TP, Order No. PSC-00-0380-S-TP, issued February 22, 2000. Furthermore, Supra argues that Sections 364.01(4)(b), 364.01(4)(f), and 364.01(4)(i), Florida Statutes, give the Commission the latitude to order interim rates.

Supra claims this interim rate is necessary given high churn rates caused by BellSouth's winback programs triggered by the very LSR used to order the UNE-L loop. If Supra and other CLECs cannot recover the BellSouth's non-recurring charge for switching a customer to their network within a reasonable time-frame, then facilities-based competition will never succeed in Florida.

### **BellSouth**

On January 10, 2005, BellSouth filed its Opposition to Supra's Renewed Motion for Interim Rate (Opposition papers). BellSouth argues that Supra's Motion is both procedurally and substantively deficient. First, BellSouth argues that Supra's Motion is an untimely motion for reconsideration and an attempt to have the Commission reconsider an issue that the Commission already decided at the September 21, 2004 Agenda. Supra never sought reconsideration, nor appealed that Order and therefore is precluded from raising the issue again. BellSouth states that there is nothing in the Commission's Rules or the Florida Rules of Civil Procedure allowing a renewed motion on substantive issues such as an interim rate.

BellSouth also argues that Supra's Motion is substantively deficient because it offers no argument that the Commission had not previously considered nor does it suggest a sufficient change in circumstances has occurred to require the Commission to revisit the underlying rationale of its September 23, 2004, Order. BellSouth argues that a FCC press release does not constitute an actual Order from the FCC; thus, the entirety of the Motion is flawed. Further, Supra's timeline for the conversion of UNE-P lines is flawed because any such timeline will more than likely not begin until 30 days from the date the FCC's Order is published in the Federal Register.

### **Analysis**

Staff recommends that the changed circumstances asserted by Supra are sufficient to hear and review Supra's Renewed Motion, but staff recommends denying the Renewed Motion because it does not offer sufficient evidence that would require the Commission to deviate from its prior ruling in Order No. PSC-04-0942-FOF-TP, issued September 23, 2004. It is clear that Supra has offered more analysis in its instant Renewed Motion, but it is staff's belief that Supra

has not put forth a compelling reason an interim rate is necessary or a cost-related basis for the interim rate.

For example, Supra argues that the current rate for a UNE-P to UNE-L conversion is cost-prohibitive but does not address why it is cost-prohibitive. In one alternative, Supra argues that the charge should be reduced by \$12.91. Presumably a \$12.91 reduction alleviates Supra's concern that the BellSouth rate is cost-prohibitive, but it does not address why. Further, in its second alternative, Supra's rationale is based on BellSouth's batch hot cut process, which is outside the scope of Supra's First Amended Complaint,<sup>6</sup> and therefore, should not be considered.

As for Supra's proposed rate of \$15, Supra does not cite to any specific portion of witness David Nilson's testimony, nor does it provide the BellSouth/MCI agreement regarding CLEC to CLEC conversions and how this conversion is identical to a UNE-P to UNE-L conversion.

Therefore, staff recommends denying Supra's Renewed Motion, because it does not present sufficient evidence that would justify the Commission to reverse or deviate from its prior ruling in Order No. PSC-04-0942-FOF-TP, issued September 23, 2004.

**Issue 3:** Should the docket be closed?

**Recommendation:** No. Staff believes this docket should remain open to address the merits of Supra's First Amended Complaint. (Susac)

**Staff Analysis:** Staff believes this docket should remain open to address the merits of Supra's First Amended Complaint.

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<sup>6</sup> Supra's First Amended Complaint calls for an individual UNE-P to UNE-L conversion, not a batch hot cut process.