State of Florida

Public Service Commission

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

DATE: January 6, 2005

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

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

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

Docket No 041338-TP – Joint Petition by ITC DeltaCom Communications, Inc. d/b/a ITC DeltaCom d/b/a Grapevine; Birch Telecom of the South, Inc. d/b/a Birch Telecom and d/b/a Birch; DIECA Communications, Inc. d/b/a/ Covad Communications Company; Florida Digital Network, Inc.; LecStar Telecom, Inc; MCI Communications, Inc.; and Network Telephone Corporation ("Joint CLECs") for generic proceeding to set rates, terms and conditions for hot cuts and batch hot cuts for UNE-P to UNE-L conversions and for retail to UNE-L conversions in BellSouth Telecommunications, Inc.'s service area

AGENDA: 01/18/05 – Regular Agenda – Emergency Motion For a Continuance – Motion For Reconsideration – Motion For Summary Final Order - Oral Argument Requested on Motion For Reconsideration – Participation at the discretion of the Commission

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

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

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 on December 2, 2004.

On November 23, 2004, a joint petition in Docket 041338-TP was filed for a generic proceeding regarding rates, terms and conditions for hot cuts with BellSouth. On November 29, 2004, BellSouth filed an Emergency Motion for Continuance (Motion) of the hearing in Docket 040301-TP. In addition to asking the Commission for a continuance, BellSouth also requested that this docket be consolidated with Docket 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 continued the hearing. No ruling was made on the motion to consolidate.

That same day, Supra filed an Emergency Motion For Reconsideration of the Prehearing Officer's Order. BellSouth filed its opposition to that motion on December 7, 2004.

On December 6, 2004, Supra filed a Motion For Partial Summary Final Order on Issues 3 and 4. BellSouth filed an Unopposed Motion for Extension of Time to respond. The Unopposed Motion was granted and on December 17, 2004, BellSouth filed its Response to Supra's Motion for Partial Summary Final Order on Issues 3 and 4.

This recommendation pertains to the following motions: (1) BellSouth's Emergency Motion For a Continuance that also asks the Commission to consolidate Docket No. 040301-TP with Docket No. 041338-TP; (2) Supra's Motion for Partial Summary Final Order on Issues 3 and 4; and (3) Supra's Emergency Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP, issued on November 30, 2004, and its Request for Oral Argument.

Discussion of Issues

Issue 1: Should BellSouth Telecommunications, Inc.'s Emergency Motion For Continuance be granted to the extent that it requests the Commission to consolidate Docket Nos. 040301-TP and 041338-TP?

Recommendation: Yes. Staff recommends consolidating the two dockets due to the fact that both dockets share virtually identical issues of law and fact relating to the rates, terms and conditions for a UNE-P to UNE-L conversion. Further, the consolidation of the dockets will also give the entire CLEC community an opportunity to put forth evidence regarding the UNE-P to UNE-L conversion. Last, administrative efficiency will be gained by consolidating Docket Nos. 040301-TP and 041338-TP.

Staff Analysis:

BellSouth

BellSouth filed an Emergency Motion For Continuance upon learning of a recent petition by a coalition of CLECs requesting the Commission to consider the rates, terms and conditions for a UNE-P to UNE-L conversion in a generic docket. BellSouth argues that Issues one and two in this proceeding are the only issues that distinguish Docket No. 040301-TP from Docket No. 041338-TP. However, BellSouth argues that issues one and two are no longer relevant because Supra has agreed to dismiss Issues 1 and 2 after the hearing. This leaves Issues three and four in Docket 040301-TP, which BellSouth claims involve the exact same issues surrounding the rates for a UNE-P to UNE-L conversion as set forth in Docket No. 041338-TP. BellSouth points out that, "… the Commission now finds itself in a situation where it can either: (1) go forward with this proceeding as scheduled, which will effectively preclude the participation of other CLECs in any decision regarding rates for UNE-L conversions, or; (2) continue this proceeding so that a decision can be made as to whether the Commission's resources and due process can best be served by having a single proceeding to address the rates for conversions to UNE-L." (Emergency Motion at p.2).

Supra

First, Supra argues that BellSouth's Emergency Motion is an attempt to further delay BellSouth's obligation to perform UNE-P to UNE-L conversions at a reasonable, cost-based price. Second, Supra argues that every CLEC in the state of Florida had an opportunity to petition to intervene in this docket but chose not to intervene. Third, Supra argues that it will be severely prejudiced by the delay that would result if BellSouth's Emergency Motion is granted. Supra supports this argument in light of anticipated increased prices it will be charged for UNE-P, and that the current UNE-P to UNE-L conversion rate makes it economically infeasible for Supra to serve a significant number of customers through its own switch. Third, Supra points out that the Commission has previously acknowledged the need for setting a new rate on an expedited basis and cites dialogue from the September 21, 2004, Agenda in support of the need

for a quick resolution.[1] Last, Supra requests that if the Commission grants BellSouth's Motion For Continuance, the Commission should then set an interim rate for a UNE-P to UNE-L conversion subject to a true-up.

Supra requests that the interim blended rate be set at $23.09 for SL1 hot cuts and $53.58 for SL2 hot cuts. Supra arrives at these numbers by assuming use of BellSouth's bulk migration process (batch hot cuts), and using the rates BellSouth claims apply to the processes being performed in this proceeding. Supra states that it would pay BellSouth $49.57 for each of the first SL-1 hot cut, and $22.83 for the subsequent 98 hot cuts.

Analysis:

Staff recommends consolidating Docket Nos. 040301-TP and 041338-TP. Staff is aware of Supra's arguements that it will be prejudiced by further delay of BellSouth's obligation to perform UNE-P to UNE-L conversions, and that other CLECs could have intervened in Docket No. 040301-TP. However, seven other CLECs share the same concerns BellSouth's obligation to perform UNE-P to UNE-L conversaions, and as a result, staff believes administrative efficiencies will be gained by a single proceeding.

In addition, staff previously contemplated whether to seek rates, terms and conditions for a UNE-P to UNE-L conversion in a generic docket, but ultimately did not recommend a generic docket because the parties dispute arose from their interconnection agreement (ICA). However, the reason for keeping Docket No. 040301-TP a two-party proceeding no longer exists.

Only Issues 1 and 2 in Docket 040301-TP are unique to BellSouth and Supra because the issues require the Commission to interpret the parties' ICA.[2] However, Supra has agreed to withdraw those issues after the hearing in Docket No. 040301-TP. This leaves the Commission to address only Issues 3 and 4, which ask whether a new non-recurring rate should be created for a UNE-P to UNE-L conversion where the lines are being served via IDLC and non-IDLC. These issues are virtually identical to the Joint CLEC's petition in Docket 041338-TP. This would also allow all CLECs in the State of Florida to participate in a decision regarding rate(s) for a UNE-P to UNE-L conversion that has industry-wide implications.

Staff is equally aware of Supra's argument that the Commission previously addressed the possibility of a new rate at the September 21, 2004 Agenda. However, Supra's request for expedited treatment was denied due to the fact that its Amended Petition requested a "cost-based analysis of a very technical nature." See, Order No. PSC-04-0752-PCO-TP, issued on August 4, 2004.

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[1] See, September 21, 2004 Agenda hearing transcript at page 14, whereby Commission Davidson stated, "… I mean, this not going to get postponed for a year," and Mr. Susac replied, "No, Commissioner, you are correct."

[2] This was also the reason the Prehearing Officer ruling that Supra's Amended Petition should be styled as a Complaint and not an Arbitration. See Order No. PSC-04-0752-PCO-TP, issued on August 4, 2004 ("Supra's allegations arise from language in an existing Agreement.[2] Thus, as a procedural matter, this docket shall be processed as a complaint and not an arbitration for interconnection."). See also, Order No. PSC-04-0942-FOF-TP, issued September 23, 2004, page. 5.

Last, staff recommends that Supra's request for an interim rate is outside the scope of its First Amended Petition. Supra's First Amended Petition relates to an individual rate for a UNE-P to UNE-L conversion, not a rate for a batch hot cut. If Supra now wants a rate for a batch hot cut, then this is an argument more appropriately made in Docket No. 041338-TP, which is currently a separate proceeding.

In conclusion, staff recommends consolidating Dockets Nos. 040301-TP and 041338-TP due to the fact that both dockets request the Commission to consider the rates, terms and conditions for a UNE-P to UNE-L conversion, and administrative efficiencies would be gained by a single proceeding. Further, the consolidation of the dockets will also give the entire CLEC community an opportunity to put forth evidence regarding the UNE-P to UNE-L conversion.

Issue 2: Should Supra Telecommunications and Information Systems, Inc.'s Motion for Partial Summary Final Order on Issues three and four be granted?

Recommendation: No. A genuine issue of material fact remains as to whether new non-recurring rates should be created that apply for a hot-cut from UNE-P to UNE-L where the lines are served by copper or UDLC, and where they are not served by copper or UDLC.

Staff Analysis:

Supra

Pursuant to Sections 3.1, 3.8 and 3.8.1 of the parties Interconnection Agreement (ICA), and testimony by BellSouth witness Kenneth Ainsworth, Supra argues that the Commission does not need to establish nonrecurring rates for UNE-P to UNE-L conversions. Supra claims that the parties ICA requires BellSouth to perform UNE-P to UNE-L conversions at BellSouth's own costs unless a specific rate is identified in the parties' ICA. The fact that BellSouth may incur some expense in performing its contractual obligations does not, and cannot, change the plain and unambiguous language in the parties' ICA. Therefore, Supra contends that the Commission need not make a determination on Issues three and four.

Supra also argues that BellSouth is trying to incorporate the UNE-P to UNE-L conversion process into its general, all purpose SL1 and SL2 UNE loop cost study. Supra claims that it is undisputed that the cost study allocates costs associated with the construction of new UNE loop service. Supra further claims that BellSouth is trying to redefine and is

misinterpreting this cost study to somehow include the cost for the construction of new service, and also for the costs of effectuating UNE-P to UNE-L conversions.

Next, Supra claims that there is simply no need to ever send a technician to the end-users' premise when the line is already in service, as in a UNE-P scenario. Supra supports this claim by citing to the deposition of BellSouth employee Mr. James McCracken. Supra argues that Mr. McCracken testified under oath that looking at all of BellSouth's assignments, a dispatch was required for new installs and not for reusing the facilities that are already in place, as in a UNE-P to UNE-L scenario.

BellSouth

First, BellSouth argues that Supra's Motion does not meet the legal standard for a summary final order. BellSouth argues that there is no correlation between Supra's instant Motion and Issues three and four. BellSouth claims that Supra's argument is misplaced because it is predicated upon the parties Interconnection Agreement (ICA) which is not related to Issues three and four. BellSouth argues that Issues three and four address whether a new non-recurring rate should be created for a UNE-L conversion, and that Issues one and two are related to the parties' ICA. Further, BellSouth argues that paragraphs six through thirteen of Supra's undisputed facts are identical allegations to its previously denied Motion For Partial Summary Final Order on contractual issue.

BellSouth argues that paragraphs one through five of Supra's Motion are faulty contract construction. For instance, BellSouth contends that Supra's quotes from section 3.1 of the ICA apply to terminating the entire ICA or a specific ICA attachment, which in not the case in this docket. Because Supra is not terminating the ICA or an attachment thereof, BellSouth argues that this argument is inapplicable to UNE-L conversions. BellSouth also contends that the remaining allegations listed as undisputed facts are interpretations of quotes taken out of context and/or incorrect interpretations of inapplicable provisions from the General Terms and Conditions section of the parties' ICA.

BellSouth also asserts that Supra never attempts to ascribe any relevance or context regarding the quote in paragraph fourteen, and therefore the Commission should reject this as an undisputed fact. Further, BellSouth argues that the quote in paragraph fifteen is taken out of context from a prior Commission Order, and when taken in context, it is a ruling that a genuine issue of fact exists as to whether the ICA has rates applicable for a UNE-P to UNE-L conversion.

Last, BellSouth argues that the Commission should reject Supra's argument that under Section 22.1 of the ICA, BellSouth must provide hot cuts for free. BellSouth bases its reasoning on a decision made in bankruptcy court, where Supra made the same argument and was ultimately required to pay the same rates as BellSouth puts forth for a UNE-P to UNE-L conversion.

Standard of Review

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.[3] The burden is on the movant to demonstrate that the opposing party cannot prevail.[4] "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."[5] "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[6] If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[7] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[8]

Moreover, staff notes that this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[9] the Commission found that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more

[3] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).

[4] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

[5] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

[6] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[7] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[8] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

[9] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that

> [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

Discussion

It is staff's recommendation to deny Supra's Motion For Partial Summary Final Order on Issues three and four. Supra claims that the current agreement does not contain a rate for a UNE-P to UNE-L conversion and therefore it should receive such conversions for free. It is therefore Supra's burden to demonstrate that BellSouth cannot prevail on this issue,[10] and that not the slightest doubt exists as to whether the agreement contains a rate for a UNE-P to UNE-L hot cut.

It is staff's recommendation that Supra fails to meet this burden. Although the agreement does not explicitly list a rate for a UNE-P to UNE-L "hot cut," the agreement may contain appropriate rates associated with the necessary steps to effectuate such a "hot cut." In other words, it is staff's belief that an issue of fact exists as to whether an appropriate rate for a UNE-P to UNE-L conversion is contained in the parties' ICA. Therefore, staff recommends denying Supra's Motion for Partial Final Summary Order.

In the case at hand, Supra asks the Commission to determine whether the parties' existing ICA has a non-recurring rate for a hot cut where the lines are served by copper/UDLC and where lines are not served by copper/UDLC. If the agreement does not address these rates, then the next question is what should be the appropriate non-recurring charge, if any, for the lines served by copper/UDLC and the lines served by non-copper/UDLC.

It is staff's belief that the current agreement contains rates that are associated with steps to effectuate a UNE-P to UNE-L hot cut, and that BellSouth's current rate also takes into account dispatching a truck and not dispatching a truck. It is also staff's belief that these rates stem from Docket Nos. 990649-TP and 001797-TP. For example, on page 394 of Order No. PSC-01-1181-FOF-TP, issued on May 25, 2001, in Docket No. 990649A-TP, the Commission addresses the issue of dispatching a truck for IDLC and non-IDLC when a CLEC orders a SL1 loop.

[10] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

However, it is unclear whether this rate encompasses only the necessary steps to effectuate a UNE-P to UNE-L conversion. Staff therefore believes that there is an issue of fact as to whether the rate is an appropriate rate for a UNE-P to UNE-L conversion.

Even if staff were to agree with Supra that the Agreement did not contain a rate for a UNE-P to UNE-L conversion, such argument would fail according to the Doctrine of Quantum Meruit. The Doctrine of Quantum Meruit is an "equitable doctrine and based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched." Swiftships Inc. v. Burdin, La.App. 338 So.2d 1193, 1195. Under these circumstances, the law implies a promise to pay a reasonable amount for the labor and materials furnished, even absent a specific contract for the service. Id. Applying the doctrine to the case at hand, BellSouth would be entitled to a commercially reasonable rate for a UNE-P to UNE-L conversion in order to avoid unjust enrichment.

In conclusion, staff recommends denying Supra's Motion For Summary Final Order because there is an issue of fact as to whether the parties' ICA contains such a rate for a UNE-P to UNE-L conversion. In addition, staff recommends that there is an issue of fact as to whether a new rate for a UNE-P to UNE-L conversion should be required because the appropriate rate may already lie in the parties' ICA. Further, staff recommends that there is an issue of fact as to whether the work times and activities for a hot cut are identical regardless of whether the conversion is from retail to UNE-L, resale to UNE-L, or from UNE-P to UNE-L. Last, staff recommends that even if there were no rate listed in the parties' ICA, the Doctrine of Quantum Meruit demands a reasonable rate to avoid unjust enrichment. Therefore, staff recommends for all the reasons stated above that Supra's Motion be denied.

Issue 3: Should Supra Telecommunications and Information Systems, Inc.'s Motion for Reconsideration be granted?

Recommendation: No. Supra's Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP, issued November 30, 2004, should be denied because it fails to identify a point of fact or law that the Prehearing Officer failed to consider in rendering his Order. Supra's arguments have been considered and rejected by the Prehearing Officer. In addition, the arguments have been rendered moot by passage of time. **(Susac)**

Staff Analysis:

Supra

Supra argues that it will be severely prejudiced by the delay that would result if BellSouth's Emergency Motion for Continuance is granted. Supra argues that this is especially true in light of anticipated increased prices they will be charged for UNE-P, and that the current UNE-P to UNE-L conversion rate makes it economically infeasible for Supra to serve a significant number of customers through its own switch. Supra points out that the Commission has previously acknowledged the need for setting a new rate on an expedited basis and cites dialogue from the September 21, 2004, Agenda in support. Supra argues that every CLEC in the state of Florida had an opportunity to petition to intervene in this docket but chose not to intervene. Further, Supra argues that it would be severely prejudiced should it wait longer to proceed to trial and would need to re-prepare and re-incur the costs it has already expended. Supra requested oral argument on this motion for December 1, 2004. Last, Supra requests that if the Commission grants BellSouth's Motion, the Commission should then set an interim rate for a UNE-P to UNE-L conversion subject to true-up.

BellSouth

BellSouth states that Supra has failed to meet any of the legal requisites for granting reconsideration. First, BellSouth states that the Prehearing Officer had ample time to consider the underlying motion and response. Second, BellSouth argues that oral argument is not required by law or the facts in this case. Third, BellSouth contends that Supra fails to identify any fact or law that overlooked by the Pre-hearing Officer. Further, BellSouth argues that nothing in the underlying Order suggests that the Commission will not ultimately have a ratemaking proceeding to consider the appropriate rate for a UNE-P to UNE-L conversion. BellSouth states that granting the continuance merely gives the Commission more time to decide whether the issue should be considered on a state-wide basis in a generic proceeding as requested by the coalition of CLECs. Last, BellSouth argues that the passing of the hearing dates has been rendered the motion for reconsideration moot.

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d

162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., 294 So. 2d at 317. Last, it is well-established that it is inappropriate to raise new arguments in a motion for reconsideration. In re: Established Nondiscriminatory Rates, Terms and Conditions, Docket 950984-TP, Order No. PSC-96-1024-FOF-TP; August 7, 1996. This standard is equally applicable to Orders issued by the Prehearing Officer.

Discussion

Staff recommends denying Supra's Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP, issued November 30, 2004. The Motion should be denied because it fails to identify a point of fact or law that the Prehearing Officer failed to consider in rendering his Order. Supra's arguments have been considered and rejected by the Prehearing Officer. In addition, the arguments have been rendered moot by passage of time.

Issue 4: Should these Dockets be closed?

Recommendation: If Issue one is approved then these dockets should be consolidated for hearing purposes. However, if issue one is not approved then both dockets should remain open and proceed to hearing. (Susac, Banks)

Staff Analysis: If Issue one is approved then these dockets should be consolidated for hearing purposes. However, if issue one is not approved then both dockets should remain open and proceed to hearing.