

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: March 24, 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, Duffey, Harvey, Dowds)

RE: 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. service area.

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

AGENDA: 04/05/05 – Regular Agenda – Supra’s Motion for Reconsideration and Request for Oral Argument – Participation is at the discretion of the Commission, in accordance with Rule 25-22.060(1)(f), F.A.C.

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 for December 2, 2004.

On September 1, 2004, Supra filed a Motion For Partial Summary Final Order on Contractual Issues. BellSouth filed its Response on September 8, 2004. The matter was resolved at the October 5, 2004 Agenda conference whereby the Commission denied Supra's Motion for Partial Summary Final Order finding that "It is apparent that the current agreement lists rates that are associated with the necessary steps to effect a hot cut." See, Order No. PSC-04-0997-FOF-TP, issued October 12, 2004, at page 9.

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. BellSouth's Motion was granted in part, as to the request for continuance, by Order No. PSC-04-1180-PCO-TP, issued on November 30, 2004.

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 making the same contractual arguments put forth at the October 5, 2004, Agenda conference. On February 8, 2005, Order No. PSC-05-0157-PCO-TP, was issued. The Order granted BellSouth's Emergency Motion for Continuance and Consolidation of Docket Nos. 040301-TP and 041338-TP, denied Supra's Motion for Partial Summary Final Order, and denied Supra's Motion for Reconsideration of Order No. PSC-04-1180-PCO-TP.

On February 9, 2005, Supra filed its Motion for Reconsideration of Order No. PSC-05-0157-PCO-TP, and its Request for Oral Argument. BellSouth filed its Response on February 16, 2005.

This recommendation pertains to Supra's Motion for Reconsideration of Order PSC-05-0157-PCO-TP, and Request 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.

Discussion of Issues

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

Recommendation: No. Staff recommends denying Supra's Motion for Oral Argument because staff believes Supra's arguments are adequately contained in its motion, thereby making oral argument unnecessary. (Susac, Banks)

Staff Analysis: Staff recommends denying Supra's Request for Oral Argument, because staff believes Supra's arguments are adequately contained in its motion thereby making oral argument unnecessary. However, staff notes that this is a matter prior to hearing, and Rule 25-22.0021(1), F.A.C., contemplates giving parties an opportunity to address matters before the Commission when the matter is taken up prior to hearing. However, Rule 25-22.060(1)(f), F.A.C., is clear that argument on a Motion for Reconsideration is solely at the discretion of the Commission. Thus, staff believes that at this point in the proceeding, participation is at the discretion of the Commission, but recommends denying Supra's Request, because Supra's arguments are adequately contained in its underlying Motion for Reconsideration.

Issue 2: Should the Commission grant Supra Telecommunications and Information Systems Inc.'s Motion for Reconsideration of Order No. PSC-05-0157-PCO-TP, issued February 8, 2005?

Recommendation: No. Staff recommends denying Supra's Motion for Reconsideration of Order No. PSC-05-0157-PCO-TP, issued February 8, 2005 (hereinafter Motion), because the Commission did not make an error of fact or law in resolving the matter. (Susac, Vinson, Duffey, Harvey, Dowds)

Staff Analysis:

Supra

Supra requests that the Commission reconsider Order No. PSC-05-0157-PCO-TP, issued February 8, 2005, and grant Supra's Motion for Partial Summary Final Order with respect to Issues 3 and 4. Supra argues that the Commission made errors of fact and law regarding the

issue of whether the parties' agreement contained rates applicable to a UNE-P to UNE-L conversion. Supra claims that the parties' Interconnection Agreement (ICA) does not specifically set forth a rate for UNE-P to UNE-L conversions. Supra also states that this Commission has found that the parties' ICA does not contain a rate for UNE-P to UNE-L conversions. Supra also argues that BellSouth has not contended that the contractual language in the parties' ICA is ambiguous or even pointed to a section in the ICA that specifically sets forth a rate for UNE-P to UNE-L. Therefore, Supra contends that the plain and unambiguous language of the parties' ICA dictates the next step, which is for Supra to receive UNE-P to UNE-L conversions for free.

In summary, Supra argues that the ICA does not specifically state a hot cut rate as required by Section 22.1 of the parties' ICA and that the plain language of the ICA requires BellSouth to bear its own costs to transition services (UNE-P) to Supra (UNE-L).

BellSouth

On February 16, 2005, BellSouth filed its Opposition to Supra's Motion arguing that the Motion is procedurally deficient because it requests reconsideration of an Order addressing a prior request for reconsideration. BellSouth effectively adopts its January 11, 2005, pleading in opposition which states that Supra's Motion is based on a previous argument that was rejected by the Commission. Further, BellSouth claims that the Motion for Reconsideration has been rendered moot by intervening events. First, the consolidation of Docket Nos. 040301-TP and 041338-TP has created a proceeding whereby the parties to the dockets will agree on a rate structure, but that Supra is seeking a determination as a matter of law as to the structure of a rate without the input of the other named CLECs. Second, Supra has agreed to pay the rates in its contract on a going-forward basis with a true-up, if necessary. This agreement renders the Motion moot, unless Supra is now backing out of the aforementioned agreement. Last, BellSouth argues that the Motion should be denied because Supra fails to identify anything that contradicts the Commission's finding 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." (BellSouth's Opposition, p. 3)

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.

Analysis

Staff recommends denying Supra's Motion because the Commission did not commit an error of fact or law in Order No. PSC-05-0157-PCO-TP, issued February 8, 2005. It is staff's belief that Supra's analysis is flawed due to misinterpreting the issues set forth in the underlying Order and the Order Establishing Procedure.¹

As stated above, Supra claims that the parties' Interconnection Agreement (ICA) does not specifically contain a rate for a UNE-P to UNE-L conversion, and therefore the company should receive hot cuts for free. However, the issue is not whether the parties' ICA "contains" a rate for UNE-P to UNE-L conversion, but rather, "Should a new nonrecurring rate be created that applies for a hot-cut from UNE-P to UNE-L" The Commission has already considered Supra's argument and found that there is an issue of fact as to whether there are rates in the parties' ICA that "apply" to a UNE-P to UNE-L conversion. Supra's argument was put forth at the October 5, 2005, Agenda Conference for Issues 1 and 2, and was rejected by the Commission.²

In its Motion for Reconsideration, Supra puts forth the exact same argument for Issues 3 and 4.³ Staff does not believe this is a proper basis for a Motion for Reconsideration, and therefore staff recommends denying the Motion. Supra's question regarding the parties ICA has been preserved for hearing and will be addressed at that time.

Therefore, in the spirit of consistency, and applying the applicable standard of review stated above, staff recommends denying Supra's Motion for Reconsideration of Order No. PSC-05-0157-PCO-TP, issued February 8, 2005, because the Commission did not make an error of fact or law in resolving the matter.

¹ See, Order Establishing Procedure, Order No. PSC-04-0809-PCO-TP, issued August 19, 2004.

² "In short, we find that although the agreement does not explicitly list a rate for a UNE-P to UNE-L "hot cut," the agreement may contain rates associated with the necessary steps to effectuate such a "hot cut." In other words, an issue of fact exists as to whether this rate covers a UNE-P to UNE-L conversion. Therefore, we deny Supra's Motion for Partial Final Summary Order because there is an issue of fact as to whether the current rates in place include the necessary steps to effectuate a hot cut from a UNE-P arrangement to a UNE-L arrangement." Order No. PSC-04-0997-PCO-TP, issued October 12, 2004, page 9.

³ Id., "Should a new nonrecurring rate be created that applies for a hot-cut from UNE-P to UNE-L"

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Issue 3: Should these dockets be closed?

Recommendation: No. Staff believes these dockets should remain open pending the resolution of the issues set for hearing. (Susac, Banks)

Staff Analysis: Staff believes these dockets should remain open pending the resolution of the issues set for hearing.