State of Florida

Public Service Commission

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

DATE: June 8, 2006

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

FROM: Division of Competitive Markets & Enforcement (Harvey, Lee)
Office of the General Counsel (Fudge)

RE: Docket No. 041269-TP – Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

AGENDA: 06/20/06 – Regular Agenda – Post-Hearing – Motion for Reconsideration – Oral Argument at the Commission's Discretion

COMMISSIONERS ASSIGNED: Edgar, Deason, Arriaga

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\041269.RCM.DOC

Case Background

On November 1, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition asking the Commission to determine what changes are required in existing, approved interconnection agreements between BellSouth and CLECs in Florida as a result of changes in law from recent FCC and federal appellate court decisions.

A final administrative hearing was conducted on November 2-4, 2005 before a panel of three Commissioners.

On February 27, 2006, after the Commission's initial vote in this Docket, Supra Telecommunications and Information Systems, Inc. (Supra), Florida Digital Network, Inc. d/b/a FDN Communications, Inc. (FDN), Nuvox Communications, Inc./NewSouth Communications Corp. (Nuvox/NewSouth), Xspedius Communications, LLC (Xspedius), and DIECA Communications, Inc. d/b/a Covad Communications Co. (Covad) (collectively "Joint Petitioners") filed a Joint Petition for Rehearing and Request for Expedited Treatment (Joint Petition). The Joint Petitioners argue that the Commission committed a procedural error in only assigning a panel of three Commissioners to hear this matter. By Order No. PSC-06-0307-FOF-TP the Joint Petition for Rehearing was voluntarily dismissed.

On March 15, 2006, Supra filed its Motion for Reconsideration. In its Motion, Supra suggests the Commission erred in concluding that it is without jurisdiction to require the inclusion of §271 network elements in §252 interconnection agreements, and, consequently, that the Commission does not have authority to set rates for such elements. Additionally, Supra argues that the Commission erred by not providing for consideration of this issue by the full Commission in accordance with Sections 350.01(5) and (6), Florida Statutes.

BellSouth filed its Response in Opposition to Supra's Motion for Reconsideration on March 22, 2006.

Discussion of Issues

Issue 1: Should Supra's Request for Oral Argument be granted?

Recommendation: No. The Request for Oral Argument should be denied. **(Fudge)**

Staff Analysis: Supra filed its Request for Oral Argument pursuant to Rule 25-22.058, Florida Administrative Code. Supra states that oral argument will be extremely beneficial to the Commission because the procedural anomaly is unusual and complex. Supra further states that the jurisdiction arguments are significant to the Commission's role in promoting the continuation of competition.

BellSouth opposes Supra's Request for Oral Argument. BellSouth argues that the issues raised by Supra are neither unusual nor complex, and Commission staff and the Commission panel are fully capable of addressing these issues without the need for a protracted discussion.

Staff believes that the decision to either grant or deny oral argument pursuant to Rule 25-22.060(f), Florida Administrative Code, is solely within the discretion of the Commission. Moreover, staff believes that oral argument will not aid the Commission in comprehending and evaluating the arguments as set forth in the Motion for Reconsideration, because the issue in question has been fully addressed by all parties during the course of this proceeding. Further, staff does not believe oral argument will aid the Commission in addressing Supra's argument regarding the assignment of the Commission panel. Consequently, staff recommends that Supra's Request for Oral Argument should be denied.

Issue 2: Should Supra's Motion for Reconsideration of Issue 7(a) be granted?

Recommendation: No. Supra has not demonstrated that the Commission overlooked a point of fact or law in rendering Order No. PSC-06-0172-FOF-TP. Furthermore, the Commission did not make a procedural error in assigning a panel of three Commissioners. **(Fudge)**

Staff Analysis:

I. Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order on Arbitration. 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.

II. Parties' Arguments

In its Motion, Supra asserts that the Commission misapplied federal law and failed to consider state authority.

Misapplication of Federal Law

Supra argues that the Commission incorrectly equated the requirement of including §271 elements in §251 agreements with the enforcement of §271 requirements. Supra asserts that the question before the Commission was the logical and legally required inclusion of the terms evidencing compliance with §271 in a §252 agreement. Supra contends that in order to comply with §271, BellSouth must provide access to unbundled network elements on the competitive checklist set forth within the statute at just and reasonable rates. Supra contends that regardless of whether network elements are provided to a CLEC as UNEs pursuant to §251 or whether they are leased pursuant to §271, to the extent the network elements are provided in satisfaction of BellSouth's obligation to provide interconnection and access to unbundled network elements under the Act, the relevant obligations should be included in a §252 interconnection agreement.

Supra asserts further that pursuant to §252(e)(1), "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval by the State commission." Supra points out that §252(e)(1) contains no indication that Congress intended to limit this requirement to §251 elements.

Supra argues that the Commission erred when it considered ¶664 of the *TRO*, wherein the FCC stated it could consider the propriety of §271 rates in the context of either an application for

interLATA authority or in a §271(d)(6) enforcement proceeding. Supra contends that the Commission overlooked two important points. First, ¶663 of the *TRO* provides that pricing of §271 elements will be ". . . reviewed utilizing the basic just, reasonable and non-discriminatory rate standard of §§ 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes. . ." Supra contends that the use of the word "reviewed" indicates that the FCC does not intend to actually set §271 rates in the first instance. Second, Supra cites the Georgia Commission in its Order Initiating Hearing to Set a Just and Reasonable Rate Under Section 271, which found that the FCC clearly recognized the application of the "just, reasonable, and non-discriminatory standard" at both the federal and state level must be read as an acknowledgement that states have a role in establishing rates consistent with this standard. Supra argues that the fact the FCC sets the pricing standards does not relinquish or otherwise diminish the state commissions' responsibility to apply these standards in the rate setting process.

Supra asserts it is critical that the Commission give weight to the fact that the FCC has never stated that state commissions are precluded, preempted, or otherwise relieved of their obligation to apply federal pricing standards and to establish rates for intrastate services. Supra further contends that the FCC has never stated that state commissions are precluded or exempt from requiring the inclusion of §271 network elements in interconnection agreements, or from setting rates for §271 network elements. In support of its contention, Supra cites the Georgia, Kentucky, and Tennessee state commissions which each acknowledged state commissions' authority to establish §271 rates under the just and reasonable pricing standard and to include these rates in a §252 interconnection agreement is resolute and explicit under the federal and state statutory authority.

In its Response, BellSouth contends that Supra has failed to show that the Commission erred in not following the decisions of Georgia, Kentucky, and Tennessee. BellSouth further argues that the Commission is not bound by decisions from other state commissions and reconsideration is neither warranted nor appropriate because different jurisdictions have reached different outcomes. BellSouth contends that state commissions have no authority to regulate §271 elements, and points out that the Commission's decision is in accordance with the decisions of Alabama, South Carolina, North Carolina, and Louisiana.

BellSouth argues that Supra's implication that the FCC has not addressed this issue is incorrect and fails to justify reconsideration. BellSouth asserts that the FCC has addressed §271 in both its *UNE Remand Order* and the *TRO*. BellSouth points out that in the *UNE Remand Order* the FCC was clear that "the prices, terms, and conditions set forth under §§ 251 and 252 do not presumptively apply to network elements on the competitive checklist of §271." BellSouth cites further to the *TRO* wherein the FCC found that "§271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of §271." BellSouth argues the FCC made no mention of a state commission's role in this process.

Failure to Consider State Authority

Supra asserts that the Commission derives its authority from the specific direction of the Florida Legislature. Citing §§ 364.16 and 364.162, Florida Statutes, Supra asserts that the

Florida Legislature contemplates that the Commission will act to set rates and conditions for facilities and services to be included in interconnection agreements. Furthermore, Supra argues that nothing in §271 plainly precludes the Commission from setting rates for elements that continue to be unbundled pursuant to this section of federal law.

Supra contends that if the Commission acts pursuant to its state authority, such action will not conflict with federal law nor is it likely to be subject to preemption. Supra argues the courts have recognized that a state law may impose a stricter standard than a federal law, as long as it does not conflict with the federal provisions.[1] Supra asserts further that the U.S. Supreme Court has previously held that State Commissions have jurisdiction to entertain claims pursuant to their own state law authority and could fulfill their federal obligations simply by acting on the state law claims and resolving them in accordance with the federal standards.[2]

Supra disagrees with the Commission's reference to ¶193 of the *TRO* as a basis for reaching the conclusion that "the FCC did not envision state regulation of §271 elements or their inclusion in interconnection agreements."[3] Supra argues that this conclusion entirely overlooks the fact that ¶193 of the *TRO* was addressing the FCC's unbundling requirements and the states' role in implementing §§251 and 252 of the Act. Supra asserts that the fact that there is no reference to §271 in this paragraph renders the Commission's conclusion an inaccurate over-extension of the FCC's statement. Supra argues further that the Commission's analysis is demonstrative of a fundamental misapprehension of what the CLECs requested in this proceeding. Supra asserts that the CLECs do not seek additional unbundling but rather that the terms and conditions applicable to the network elements BellSouth is required to offer pursuant to §271 be included in interconnection agreements and that the Commission acknowledge its state authority to set rates for these network elements.

In its Response, BellSouth asserts that Supra's argument that the Commission neglected to consider independent state authority is wholly lacking in support. BellSouth cites the prehearing order in which the Joint CLECs' position addressing this issue stated "Joint CLECs also believe the Commission has authority to include network elements in ICAs pursuant to state law authority, but are not requesting the Commission exercise such authority in this proceeding." Consequently, BellSouth concludes that Supra's argument of error concerning state law cannot withstand scrutiny. BellSouth contends that Supra's suggestion that the Commission has erred is inexcusable given that Supra's position stated that state statutory provisions were not at issue. BellSouth argues that Supra had ample time to raise any state law arguments and now that its federal statutory claims were rejected it should not get another "bite at the apple."

BellSouth asserts further that even if the Commission were to consider Supra's tardy state law arguments, reconsideration is not appropriate. BellSouth argues any attempt to include §271 obligations in a §252 interconnection agreement under a state law theory would be inconsistent with federal law. BellSouth points out that the Supreme Court has held that Congress unquestionably took regulation of local telecommunications competition away from the states on

[1] Atherton v. Federal Deposit Insurance Corp., 519 U.S. 213 (1997).
[2] FERC v. Mississippi, 456 U.S. 742 (1982).
[3] Order No. PSC-06-0172-FOF-TP, at p.53.

all matters addressed by the Telecommunications Act of 1996.[4] BellSouth contends 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 §271 elements. BellSouth asserts that §271 "does not gratuitously reimpose the very same requirements that" §251 "has eliminated."[5]

Error in Consideration of Procedural Requirements

Supra contends that the Commission should reconsider this issue in light of its misapplication of Section 350.01(5), Florida Statutes, which resulted in failure to have a full panel consider the issue. Supra argues that when a Commissioner inquired into the legality of allowing the full Commission to consider Issue 7, the Commission misconstrued Section 350.01(5), Florida Statutes, when it continued its consideration as a three-member panel. Supra contends that Section 350.01(5), Florida Statutes, requires that substitute commissioners should have been assigned to replace the commissioners that were unavailable after their assignment to this proceeding.

Furthermore, Supra argues that the Commission failed to consider deferring its decision on Issue 7 and assigning two new Commissioners for the limited purpose of considering this issue. Supra contends the new Commissioners would have been required to read the record as it pertains to this issue and to participate in the final disposition of this issue. Supra argues that because the provision and pricing of §271 elements is an ongoing requirement, the Commission should reject the argument that it is impractical at this point to assign the full Commission because the *TRRO* transition date has passed. Supra further argues that assigning two new Commissioners will correct the Commission's error in failing to assign substitutes for those Commissioners who left the Commission.

In its Response, BellSouth contends that neither it nor any other party invoked the provisions of Section 350.01(5) and (6), Florida Statutes. Consequently, BellSouth argues that the Commission had discretion to manage Commissioner assignments as it deemed necessary to maintain timely agency decision making. BellSouth asserts that starting with the October 4, 2005, Agenda Conference, when the Commission was initially scheduled to address its Motion for Summary Judgment, the parties were on notice that this docket had been assigned to a panel rather than the full Commission. BellSouth asserts further that the parties were again put on notice that this docket had been assigned to a panel at the October 18, 2005, Agenda Conference when the Commission addressed Supra's Emergency Motion.

Furthermore, BellSouth asserts that Supra failed to raise any objection to the assignment of Commissioners at either the prehearing conference held on October 19, 2005, or the hearing which began on November 2, 2005.

BellSouth contends that the Commission has the legal authority and discretion to fairly distribute its workload and to expedite the Commission's calendar through Commissioner

[4] AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 378 n.6 (1999)
[5] *TRO* at ¶ 659.

assignments and because no party had invoked the "full commission" subsection of Section 350.01(6), Florida Statutes.

III. Staff Analysis

Staff recommends that, for the reasons set forth below, Supra's Motion for Reconsideration fails to meet the standard of review for a motion for reconsideration. Supra's Motion fails to allege or identify any point of fact or law that the Commission overlooked or failed to consider in rendering its Order. See Stewart Bonded Warehouse Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. w. King, 146 So. 2d 889 (Fla. 1962). Rather, Supra's Motion merely reargues matters that have already been considered and raises arguments it explicitly stated were not at issue during the pendency of this proceeding.

Federal Law

Staff believes Supra's assertions regarding the Commission's consideration of federal law clearly fail to raise any point of law that the Commission failed to consider in rendering its Order. Rather, Supra only argues that it disagrees with the Commission's interpretation of the pertinent federal law. Such arguments may be appropriate for an appeal of the Commission's decision but are certainly not sufficient to satisfy the strict standard for reconsideration.

Additionally, staff agrees with BellSouth that the Commission is not bound by decisions from other state commissions. Furthermore, although the state commissions cited by Supra may have made contrary findings to the Commission, BellSouth has cited other state commissions which have rendered decisions that are consistent with the Commission's findings.

State Law

As noted in BellSouth's Response, the Joint CLECs' prehearing statement stated they were not requesting the Commission exercise state authority in this proceeding. The Joint CLECs included CompSouth of which Supra is a member. Staff notes that on March 10, 2005, Supra was granted intervention in this proceeding. Staff notes further that although Supra chose not to file a separate prehearing statement or final brief in this proceeding, Supra did participate in the discovery process and on March 4, 2005, filed a Petition and Request for Emergency Relief. At no time was Supra precluded from raising state law arguments prior to the Commission's decision. Nor was Supra precluded from filing a prehearing statement or final brief in which it may have raised any state law arguments. Instead Supra chose to allow CompSouth to file a prehearing statement on its behalf which failed to raise any state law arguments and, as noted above, explicitly stated that state law was not at issue in this proceeding. Staff believes upon the filing of the Joint CLECs' prehearing statement, Supra was on notice of the Joint CLECs' (including CompSouth) position regarding state law in this proceeding. If Supra disagreed with the Joint CLEC's position on Issue 7a, it could have filed a post-hearing brief raising any and all relevant state law arguments; Supra chose not to do so.

Accordingly, staff believes that the Commission fully addressed all legal and factual arguments regarding Issue 7(a) set forth by the parties in this proceeding. No party including Supra was precluded from filing a posthearing brief raising any and all relevant legal arguments.

The arguments raised by Supra in its Motion were never set forth during the pendency of this proceeding and, therefore, do not satisfy the standard for reconsideration.[6]

Assignment of Commission Panel

As asserted by BellSouth, all parties to this proceeding had notice as early as October 4, 2005, that a panel had been assigned to this docket. Once again Supra has chosen to raise its arguments at the conclusion of the proceeding rather than during its pendency. Staff believes Supra had ample time and opportunity[7] to raise any and all objections to the assignment of the Commission panel. Furthermore, as noted by BellSouth, pursuant to Section 350.01(6), Florida Statutes, Supra could have requested that the full Commission be assigned to this proceeding. Supra chose not to do so. It is imperative for the efficiency of the administrative process that parties raise procedural objections during the pendency of a proceeding and not after it has concluded. Conseqeuntly, Supra's failure to raise this procedural issue during the pendency of this proceeding constitutes a waiver of the issue. See e.g. Oceania Joint Venture v. Ocean View of Miami, Ltd., 707 So.2d 917, 918 (Fla. 3d DCA 1998)(finding that appellant's failure to timely challenge the order of dismissal on the basis that it was rendered by one judge instead of a three judge panel resulted in a waiver of the issue).

Staff notes that even if the full Commission had been assigned to this proceeding on the day of the hearing (November 2, 2005), two of the Commissioners were no longer sitting Commissioners when the Commission rendered its final decision. Section 350.01(5), Florida Statutes, requires that only those Commissioners assigned to a proceeding requiring hearings are entitled to participate in the final decision. Consequently, in order to render a decision in a timely and efficient manner and prior to the March 11, 2006, transition date set forth by the FCC in the *TRRO*, the Commission appropriately assigned a panel to this proceeding.

In conclusion, staff believes Supra's Motion for Reconsideration fails to allege or identify any point of fact or law that the Commission overlooked or failed to consider in rendering its Order. Accordingly, staff recommends the Commission deny Supra's Motion for Reconsideration.

[6] Staff notes that it does not disagree with Supra that Sections 364.16 and 364.162, Florida Statutes grant the Commission authority to set forth rates, terms, and conditions necessary to provide access to and interconnection between ILECs and CLECs. However, staff notes that the FCC found in the *TRO* that states are precluded from enacting or maintaining a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in the [*TRO*]. *TRO* at ¶192.

[7] Staff believes Supra could have raised any objections or concerns regarding the assignment of the Commission panel at the Prehearing Conference or at the Hearing. Additionally, Supra was not precluded from filing a Motion with the Commission addressing the assignment of the Commission panel at any time during the pendency of this proceeding.

Issue 3: Should this docket be closed?

Recommendation: No, this docket shall remain open pending Commission approval of the final agreements and amendments in accordance with §252 of the Telecommunications Act of 1996. **(Fudge)**

Staff Analysis: This docket shall remain open pending Commission approval of the final agreements and amendments in accordance with §252 of the Telecommunications Act of 1996.