

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

M E M O R A N D U M

September 24, 1998

RECORDS AND
REPORTING

SEP 24 PM 12:13

RECEIVED 11:50

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *AK MCB*
DIVISION OF COMMUNICATIONS (STAVANJA, FAVORS) *CF RNT*

RE: DOCKET NO. 980800-TP - PETITION FOR EMERGENCY RELIEF BY
SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS AGAINST
BELLSOUTH TELECOMMUNICATIONS, INC., CONCERNING
COLLOCATION AND INTERCONNECTION AGREEMENTS.

AGENDA: OCTOBER 6, 1998 - REGULAR AGENDA - MOTIONS TO STRIKE -
ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\980800MS.RCM

CASE BACKGROUND

On June 30, 1998, Supra Telecommunications & Information Systems (Supra) filed a Petition for Emergency Relief against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, Supra asks that the Commission require BellSouth to permit Supra to physically collocate its switch equipment in BellSouth's Golden Glades and West Palm Beach Gardens Central Offices. On July 20, 1998, BellSouth filed its Answer and Response to Supra's Petition. This matter has been set for an administrative hearing on October 21, 1998.

On September 2, 1998, Supra filed a Motion to Dismiss BellSouth's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP and Motion to Strike BellSouth's Answer in Docket No. 980800-TP for Misconduct. Supra also requested oral argument on its motion. On September 9, 1998, BellSouth filed its Opposition to Supra's Motion to Dismiss and Motion to Strike and its own Motion to Strike and Motion for Oral Argument. BellSouth

DOCUMENT NUMBER-DATE

10589 SEP 24 88

FPSC-RECORDS/REPORTING

DOCKET NO. 980800-TP

DATE: September 24, 1998

also included a Motion for Sanctions in its filing. On September 21, 1998, Supra filed its Response to BellSouth's Motion to Strike Supra's Motion to Strike and Motion for Sanctions. Supra also included a request to accept its Response Out of Time. On September 23, 1998, BellSouth filed its Opposition to Supra's request to accept its Response to BellSouth's Motion to Strike.

Supra's Motion to Dismiss and Motion to Strike and BellSouth's Opposition and Motion to Strike are only addressed in this recommendation to the extent that they apply to Docket No. 980800-TP. To the extent that they apply to Docket No. 980119-TP, they are addressed by a separate recommendation. Staff notes that Dockets Nos. 980119-TP and 980800-TP are assigned to different Commission panels.

This is staff's recommendation on these motions.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Supra's Request for Oral Argument on its September 2, 1998, Motion to Strike BellSouth's Answer in response to Supra's complaint in this Docket and BellSouth's Motion for Oral Argument on its Motion to Strike Supra's Motion?

RECOMMENDATION: Yes. The companies filed their requests for oral argument in accordance with Rule 25-22.058, Florida Administrative Code. Due to the nature of Supra's and BellSouth's Motions to Strike, staff believes that limited oral argument would assist the Commission in its decision. Staff recommends that oral argument be limited to 5 minutes per side.

STAFF ANALYSIS: Supra and BellSouth filed their requests in accordance with Rule 25-22.058, Florida Administrative Code. Due to the nature of Supra's and BellSouth's Motions to Strike, staff believes that limited oral argument would assist the Commission in its decision. Staff recommends that oral argument be limited to 5 minutes per side.

DOCKET NO. 980800-TP
DATE: September 24, 1998

ISSUE 2: Should the Commission grant Supra's Motion to File its Response to BellSouth's Motion to Strike Supra's Motion to Strike Out of Time?

RECOMMENDATION: No. Supra has not indicated an adequate basis for its untimely response.

STAFF ANALYSIS:

SUPRA

Supra states that BellSouth's Motion was served by hand delivery on September 10, 1998. Therefore, Supra's Response was due September 17, 1998. Supra's Response was four days late. Supra states that it was unable to timely file its response due to activities and deadlines in this docket and Docket No. 980119-TP. Supra asks, therefore, that the Commission accept its late-filed Response.

BELLSOUTH

In its response, BellSouth argues that Supra has not stated good cause for filing its response out of time. BellSouth states that a busy schedule does not excuse an untimely filing. BellSouth notes that Supra could have sought an extension of time to file its response before the filing deadline, but did not. BellSouth asks, therefore, that the Commission deny Supra the right to file its response out of time.

STAFF'S ANALYSIS

Staff is aware that there have been numerous activities in this docket and Docket No. 980119-TP. Staff believes, however, that the filing deadlines set forth in Rule 25-22.037, Florida Administrative Code, were established to ensure that pleadings are filed in a timely manner and that no party is unduly burdened or inappropriately benefitted by the timing of pleadings and motions. These rules are equally applicable to the parties in this case. Staff recommends that Supra's request be denied.

DOCKET NO. 980800-TP
DATE: September 24, 1998

ISSUE 3: How should the Commission dispose of Supra's Motion to Strike BellSouth's Answer for Misconduct and BellSouth's Motion to Strike Supra's Motion to Strike?

RECOMMENDATION: Staff recommends that the Commission should grant BellSouth's Motion to Strike Supra's Motion to Strike for Misconduct.

STAFF ANALYSIS:

SUPRA

Supra asks that the Commission strike BellSouth's Answer to Supra's complaint because of misconduct in this proceeding. Supra alleges that BellSouth engaged in misconduct by offering a staff person that had been involved in this Docket a position with BellSouth. Supra states that this staff person, MaryRose Sirianni, was lead on this docket, as well as Docket No. 980119-TP. Because she was offered a position with BellSouth, and has now accepted that position, Supra complains that she can no longer participate in resolving this case. Supra asserts that Ms. Sirianni participated in a walk-through of the central offices at issue in this Docket, which took several hours to complete. Supra asserts that as a result of BellSouth's employment of Ms. Sirianni, Commission staff will no longer be able to complete the handling of the issues in this case. Supra argues that in view of the importance of this case, BellSouth's actions in offering Ms. Sirianni a position are clearly improper.

Supra complains that BellSouth has the resources to hire anyone. Supra adds that it ". . . is not an accident that this staff person was offered a position by BellSouth at this point in time." September 2, 1998, Motion at p. 4. Supra charges that BellSouth offered Ms. Sirianni a position in order to avoid Ms. Sirianni's further involvement in this docket and in Docket No. 980119-TP. Supra argues that Ms. Sirianni has demonstrated her knowledge, experience, and ". . . willingness to challenge BellSouth. . .," therefore, BellSouth would prefer to have her removed from these cases so that less experienced staff members will be required to complete these cases. September 2, 1998, Motion at p. 5. Supra states that no other Commission staff member is able to handle these cases as capably as Ms. Sirianni. Thus, Supra argues it is a violation of due process for BellSouth to offer Ms. Sirianni a position with BellSouth.

DOCKET NO. 980800-TP

DATE: September 24, 1998

Supra further asserts that this is "misconduct of the highest order. . .," which has deprived Supra of its right to a fair hearing. Supra argues that this is analogous to jury tampering. Supra argues that, according to Rule 1.540, Florida Rules of Civil Procedure, BellSouth's actions are sufficient basis for the Commission to strike BellSouth's Answer to Supra's complaint. Rule 1.540, Florida Rules of Procedure, states, in part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, decree, order, or proceeding for the following reasons:

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Supra states that BellSouth's action is ". . . premeditated, targeted, and abusive of the process." September 2, 1998, Motion to Dismiss at p. 14. Supra asks, therefore, that BellSouth's Answer to Supra's Complaint be stricken.

BELLSOUTH

In its Opposition and Motion to Strike, BellSouth asserts that Supra's allegations are without merit. BellSouth states that its offer of employment to Ms. Sirianni is permissible under Section 112.313(9)(a)(6)(c), Florida Statutes. In accordance with that Section, the restrictions on employment set forth in Section 112.313, Florida Statutes, do not apply to a person employed by the agency prior to December 31, 1994. BellSouth has also attached the affidavit of Nancy Sims to its Opposition and Motion to Strike. The affidavit states that BellSouth did not offer Ms. Sirianni a position in order to avoid her participation in these dockets or to influence the outcome of the dockets. BellSouth states that it had no "sinister" motive in hiring Ms. Sirianni. BellSouth also asserts that the Commission staff is capable of handling these dockets without Ms. Sirianni's participation and assistance. BellSouth adds that Supra has offered no evidence to substantiate its claims that BellSouth's misconduct was premeditated.

DOCKET NO. 980800-TP
DATE: September 24, 1998

BellSouth states that Supra knew that BellSouth's conduct was lawful.¹ BellSouth argues, therefore, that Supra's Motion should be denied as a sham pleading pursuant to Rule 1.150, Florida Rules of Civil Procedure.² BellSouth adds that Supra's Motion contains 0 "scandalous" matters, that should also be stricken in accordance with Rule 1.140, Florida Rules of Civil Procedure. BellSouth states that scandalous matters are accusations against another party that are unnecessary and accusatory. BellSouth argues that such things include allegations that reflect upon one's moral character or that detract from the dignity of the court.³

BellSouth also asks that sanctions be imposed upon Supra for filing this Motion. BellSouth argues that administrative proceedings are no place for improper or frivolous pleadings, as set forth in Section 120.57(1)(b)(5), Florida Statutes. BellSouth argues that Supra's Motion to Dismiss qualifies as an improper and frivolous pleading. BellSouth argues that the only purpose for Supra's Motion is to "throw mud," delay the case, and to harass BellSouth. September 9, 1998, Opposition and Motion to Strike at p. 5. According to BellSouth, there is no legal basis for Supra's Motion. Thus, BellSouth asks that the Commission impose reasonable sanctions on Supra, including the imposition of attorneys' fees and costs.⁴

¹ Citing Supra's Motion at ¶ 22, where Supra notes that the employment restrictions in Section 112.313, Florida Statutes, do not apply to Ms. Sirianni, in accordance with Section 112.313(9)(a)(6)(c), Florida Statutes.

² Citing Menke v. Southland Specialities Corp., 637 So. 2d 285 (Fla. 2nd DCA 1994).

³ Citing Burke v. Mesta Machinery Co., 5 F.R.D. 134 (Pa. 1946) and Martin V. Hunt, 28 F.R.D. 35 (D.C. Mass. 1961). BellSouth also cites Ropes v. Stewart, 45 So. 31 (Fla. 1907), wherein the Court granted a motion to strike scandalous allegations that the defendant had used perjury and evil influence on the judge and jury.

⁴ Citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, wherein the Commission stated that it has the authority to impose sanctions pursuant to Section 120.57(1)(b), Florida Statutes.

DOCKET NO. 980800-TP

DATE: September 24, 1998

SUPRA-----Supra's response to BellSouth's Motion to Strike has been included in the analysis for consideration by the Commission, if the Commission denies staff's recommendation in Issue 2.

Supra argues that BellSouth's actions are clearly abusive of the process. Supra states that Ms. Sirianni was clearly active in Dockets No. 980119-TP and 980800-TP, and was the primary, senior staff member on those cases. Supra argues the Ms. Sims' affidavit is completely inadequate considering the facts of this situation.

Supra also argues that Section 112.313(9), Florida Statutes, does not give BellSouth the authority to tamper with the process by hiring key staff members. Supra adds that it does not wish to criticize other Commission staff members, nor does it believe that Ms. Sirianni has done anything wrong. Supra argues, however, that staff members are not "fungible," and that hiring Ms. Sirianni has clearly violated Supra's right to due process. Supra's Response at pages 4 and 5.

STAFF'S ANALYSIS

Staff believes that Supra's Motion to Strike BellSouth's Answer should be considered a sham pleading.

Ms. Sims has stated in her affidavit that BellSouth offered Ms. Sirianni a position based upon her experience, instead of a desire to influence the outcome of this Docket. Staff also notes that Ms. Sirianni was not the only staff member that participated in the walk-through at the central offices at issue in this case. In addition, Ms. Sirianni was never assigned as a staff member to this case. The staff members reflected in the header of this recommendation have been the same since the inception of this Docket. There has also been a second walk-through of these offices in recent weeks involving additional staff members. Furthermore, the hiring of Ms. Sirianni by BellSouth did not necessitate a change in the scheduled handling of this case. While Ms. Sirianni's knowledge and experience were valuable assets to the Commission, the staff members responsible for this case are capable of handling this case in a proper and timely manner.

Based on the facts as known by staff and as set forth in Ms. Sims' uncontroverted affidavit, staff believes that Supra's Motion is factually false and may be considered a sham pleading in accordance with Rule 1.150, Florida Rules of Civil Procedure.

DOCKET NO. 980800-TP
DATE: September 24, 1998

Staff also believes that Supra's Motion may be considered a frivolous pleading in accordance with Section 120.57 (1)(b)(5), Florida Statutes, because there is no legal basis or justification for the motion. In past cases, the Commission has stated that "In determining whether a motion is improper pursuant to Section 120.57(1)(b)(5), Florida Statutes, we must solely focus on whether there was some legal justification for its filing." Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21. Supra has stated in its own Motion that the agency employment restrictions set forth in Section 112.313, Florida Statutes, are not applicable to Ms. Sirianni. Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding dismissal for fraud or misconduct. Supra does not allege fraud, but, instead, alleges that BellSouth has engaged in misconduct. Misconduct is defined by Black's Law Dictionary as

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior, willful in character, improper or wrong behavior. . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law which BellSouth broke when it offered Ms. Sirianni a position, nor has Supra provided any factual or legal support for its assertions that BellSouth hired Ms. Sirianni in an attempt to improperly influence the outcome of these two dockets. Staff also does not believe that Rule 1.540, Florida Rules of Civil Procedure, is applicable in this instance. Supra is asking the Commission to strike BellSouth's Answer to Supra's complaint. Supra is not seeking relief from a judgment, decree or order. Staff does not believe there is any legal basis for Supra's Motion. Thus, staff believes Supra's Motion to Strike may be considered a frivolous motion. Staff further addresses this point in the staff analysis of the following issue.

For these reasons, staff recommends that BellSouth's Motion to Strike Supra's Motion be granted.

DOCKET NO. 980800-TP
DATE: September 24, 1998

ISSUE 4: Should the Commission grant BellSouth's request for sanctions, including attorneys' fees and costs?

RECOMMENDATION: Yes. Staff recommends that BellSouth's request be granted. As set forth in Issue 3, Supra's Motion to Strike should be stricken. Staff also recommends that Supra be required to pay BellSouth's attorneys' fees and costs associated with responding to Supra's Motion to Strike BellSouth's Answer.

STAFF ANALYSIS:

BELLSOUTH

BellSouth asks that sanctions be imposed upon Supra for filing this Motion. BellSouth argues that administrative proceedings are no place for improper or frivolous pleadings, as set forth in Section 120.57(1)(b)(5), Florida Statutes. BellSouth argues that Supra's Motion qualifies as an improper and frivolous pleading. BellSouth argues that the only purpose for Supra's Motion is to "throw mud," delay the case, and harass BellSouth. September 9, 1998, Opposition and Motion to Strike at p. 5. According to BellSouth, there is no legal basis for Supra's Motion. Thus, BellSouth asks that the Commission impose reasonable sanctions on Supra, including the imposition of attorneys' fees and costs.⁵

SUPRA-----Supra's response has been included in the analysis for consideration by the Commission, if the Commission denies staff's recommendation in Issue 2.

Supra argues that it has presented a valid legal basis for its Motion. Supra states that it has based its motion on its inability to obtain due process in this proceeding and in Docket No. 980119-TP, because BellSouth has hired Ms. Sirianni. Supra argues that it can no longer obtain a fair and impartial result, because of BellSouth's actions. Supra asks, therefore, that BellSouth's request for sanctions be denied.

⁵Citing Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, wherein the Commission stated that it has the authority to impose sanctions pursuant to Section 120.57(1)(b), Florida Statutes.

DOCKET NO. 980800-TP
DATE: September 24, 1998

STAFF'S ANALYSIS

As set forth in the previous issue, staff believes that Supra's Motion to Dismiss may be considered a frivolous pleading in accordance with Section 120.57 (1)(b)(5), Florida Statutes. There is no legal basis or justification for Supra's motion.

In Order No. PSC-96-1320-FOF-WS, the Commission relied on Mercedes Lighting and Elec. Supply, Inc. v. State, Dep't of General Services, 567 So. 2d 272, 278 (Fla. 1st DCA 1990) in rendering its decision on a request for attorney's fees and costs. The Commission noted that in Mercedes Lighting, the court stated:

"The rule [against frivolous or improper pleadings contained in Rule 11, Federal Rules of Civil Procedure] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." The court further noted, that "a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition."

Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. The Commission also noted the court's holding that improper purpose in a pleading "may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." Id. at 278, Order No. PSC-96-1320-FOF-WS at 19. The Commission added that ". . . it is important to consider what was reasonable at the time the pleading was filed." Order No. PSC-96-1320-FOF-WS at p. 20. The Commission also stated that there must be some legal justification for the filing in question. Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21.

Supra has stated in its Motion to Strike that the agency employment restrictions set forth in Section 112.313, Florida Statutes, are not applicable to Ms. Sirianni. As indicated in Issue 3, Supra's only other asserted legal basis for its Motion is Rule 1.540, Florida Rules of Civil Procedure, regarding relief from a decree or order based upon fraud or misconduct. Misconduct is, however, defined as

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behavior,

DOCKET NO. 980800-TP
DATE: September 24, 1998

willful in character, improper or wrong
behavior. . .

Black's Law Dictionary, 6th Ed. (1990). Supra has not identified any rule or law that BellSouth violated when it offered Ms. Sirianni employment. Staff does not believe there is any legal basis for Supra's Motion. Even if one considers that the proceedings in Docket No. 980800-TP have been quite contentious between the parties and that the end results of this case may be quite significant for both parties, staff does not believe that this pleading can be considered reasonable under the circumstances. Staff believes Supra's Motion to Strike should be considered a frivolous motion.

While staff believes that Supra's Motion to Strike is frivolous, staff acknowledges that sanctions should only be imposed when truly warranted, in order to avoid ". . .chill[ing] an attorney's enthusiasm or creativity in pursuing factual or legal theories." Nevertheless, in this specific circumstance, staff believes that limited sanctions are warranted. Staff recommends, therefore, that Supra be required to pay BellSouth's attorneys' fees and costs associated with responding to and defending against Supra's Motion to Strike.

ISSUE 5: Should this Docket be closed?

RECOMMENDATION: No. Whether or not the Commission approves staff's recommendations in Issues 1-4, this Docket should remain open pending the outcome of the hearing in this Docket.

STAFF ANALYSIS: No. Whether or not the Commission approves staff's recommendations in Issues 1-4, this Docket should remain open pending the outcome of the hearing in this Docket.