

State of 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-

RECEIVED-FPSC
MAR 3 AM 9:40
FPSC-RECORDS AND REPORTING

DATE: MARCH 23, 2000

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

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *BK*
 DIVISION OF TELECOMMUNICATIONS (FAVORS) *CRF*
 DIVISION OF AUDITING & FINANCIAL ANALYSIS (VINSON) *CAW*
 DIVISION OF POLICY ANALYSIS & INTERGOVERNMENTAL LIAISON (CLARK-WATTS) *cow* *198*

RE: DOCKET NO. 980119-TP - COMPLAINT OF SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. FOR VIOLATION OF THE TELECOMMUNICATIONS ACT OF 1996; PETITION FOR RESOLUTION OF DISPUTES AS TO IMPLEMENTATION AND INTERPRETATION OF INTERCONNECTION, RESALE AND COLLOCATION AGREEMENTS; AND PETITION FOR EMERGENCY RELIEF.

AGENDA: 04/04/00 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980119RC.RCM

CASE BACKGROUND

On January 23, 1998, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged violations of the Telecommunications Act of 1996 (Act) and Petition for resolution of certain disputes between BellSouth and Supra regarding interpretation of the Interconnection, Resale, and Collocation Agreements between Supra and BellSouth (Petition). On February 16, 1998, BellSouth filed its Answer and Response to Supra's Petition. On April 30, 1998, the Commission held a hearing in which it received testimony concerning Supra's complaint.

DOCUMENT NUMBER-DATE

03642 MAR 23 8

FPSC-RECORDS/REPORTING

DOCKET NO. 980119-TP
DATE: MARCH 23, 2000

No. PSC-98-1001-FOF-TP, issued July 22, 1998, the Commission rendered its final determination regarding the complaint.

On August 6, 1998, BellSouth filed a Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TP. That same day, Supra filed a Motion for Reconsideration and Clarification, as well as a Motion to Take Official Notice of the Record in Docket No. 960786-TL. On August 17, 1998, BellSouth filed its Response to Supra's Motion for Reconsideration and Clarification of Order No. PSC-98-1001-FOF-TL. BellSouth also filed its Opposition to Supra's Motion to Take Official Recognition of the Record in Docket No. 960786-TL. On August 18, 1998, Supra filed its Response to BellSouth's Motion for Reconsideration and Clarification, as well as a Request for Oral Argument. On August 21, 1998, BellSouth filed its Opposition to Supra's Request for Oral Argument.

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 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 Dismiss 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. By Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, the Commission denied the motions for reconsideration and to supplement the record, and clarified its post-hearing Order.

Thereafter, on November 24, 1998, BellSouth filed a Complaint in the federal district court for the Northern District of Florida appealing the Commission's decision, Case No. 4:98CV4041-WS. The Complaint asked that the above Commission Orders be declared invalid and that enforcement of them be enjoined "to the extent that they require BellSouth to provide Supra with on-line editing capabilities." Complaint, p. 8.

On January 1, 1999, Supra filed with this Commission a Notice that BellSouth had not complied the Commission's final Order. On April 26, 1999, BellSouth filed a Notice of Compliance with the Commission's final Order, and asked that the Commission approve BellSouth's compliance.

On June 16, 1999, BellSouth filed a Motion to Hold Proceedings in Abeyance Pending Action in Related Administrative Proceedings seeking to abate its federal appeal to enable the Commission to determine if BellSouth had complied with the Commission's Orders issued in this Docket. Supra opposed the motion.

On September 3, 1999, the Northern District heard argument on the Motion. Judge Hinkle specifically asked whether three months would be sufficient for the status of BellSouth's compliance to be determined by the Commission. He was advised that three months was sufficient by the Commission attorneys participating.

The Court issued an order on September 6, 1999, abating the federal case until December 1, 1999. Though a discovery schedule was followed to meet that deadline, Supra provided certain discovery responses late, which made the December 1, 1999 deadline impossible to meet. The Commission sought to extend the deadline until February 1, 2000. On December 21, 1999, the Court granted that extension. It should, however, be noted that Supra vigorously opposed any abatement of the federal case on the grounds that is a delaying tactic on the part of BellSouth.¹

On November 22, 1999, the parties and staff met to discuss the discovery responses, and to clarify which, if any, matters in the Commission's Order had been complied with or otherwise resolved. Staff also attempted to mediate a resolution between the parties. During those discussions, BellSouth was asked to provide further information. BellSouth provided the information on December 10, 1999.

Based upon Notice filed by BellSouth, Supra's response, the discovery provided by the parties, and information gained as a result of staff's November 22, 1999, with the parties, the Commission issued Order No. PSC-00-0288-PCO-TP, on February 11, 2000. Therein, the Commission determined that BellSouth had complied with all portions of the Commission's final decision in this case, Order No. PSC-98-1001-FOF-TP, issued July 22, 1998, as clarified by Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, except for the specific requirements that BellSouth should provide Supra with on-line edit checking capability by December 31, 1998. The Commission did, however, acknowledge that BellSouth had made

¹ The Court did subsequently grant a brief extension for BellSouth to file its brief on the merits, and on February 25, 2000, BellSouth filed its Initial Brief on the Merits.

significant developments in its OSS since the time that we rendered our final decision, including TAG, Robo-TAG, and LENS '99.

On February 25, 2000, Supra filed a Motion for Reconsideration of the Commission's decision, as well as a Request for Oral Argument. On March 8, 2000, BellSouth filed its Response, which included a request that the Commission reconsider its decision not to proceed to hearing on the limited issue of on-line edit checking capability. Supra did not file a response to this apparent request/cross-motion for reconsideration. This is staff's recommendation on Supra's Motion for Reconsideration, and BellSouth's apparent cross-motion contained in its Response.

DISCUSSION OF ISSUES

ISSUE 1: Should Supra's Motion for Oral Argument be granted?

RECOMMENDATION: No. The matters upon which Supra seeks reconsideration are clearly set forth in the pleadings and the record. Staff does not believe that oral argument would aid the Commission in evaluating Supra's Motion for Reconsideration. Staff recommends that the Motion for Oral Argument be denied. (B. KEATING)

STAFF ANALYSIS: Rule 25-22.058, Florida Administrative Code, requires a movant to show ". . . with particularity why Oral Argument would aid the Commission in comprehending and evaluating the issues before it."

Supra believes that oral argument is necessary because the factual and legal issues presented are technical and complicated. Supra believes that a proper determination requires a full understanding that can only be reached after hearing oral argument. Supra adds that oral argument will allow for a fair consideration of its Motion for Reconsideration.

BellSouth indicates that it does not oppose Supra's request for oral argument if the Commission believes it will assist the Commission in rendering a decision on this matter.

In this particular case, staff believes that the matters addressed in Supra's Motion for Reconsideration are ably presented by the pleadings. Staff does not believe, therefore, that further oral argument would aid the Commission in evaluating the Motion for Reconsideration. Thus, staff recommends that the Request for Oral Argument be denied.

ISSUE 2: Should the Commission grant Supra's Motion for Reconsideration and BellSouth's apparent cross-motion for reconsideration?

RECOMMENDATION: No. Supra and BellSouth have failed to identify a point of fact overlooked by the Commission or a mistake made by the Commission in rendering its decision. Therefore, Supra's Motion for Reconsideration should be denied, as well as BellSouth's cross-motion for reconsideration, contained in its Response, requesting that the matter be set for hearing on the issue of on-line edit checking capability. (B. KEATING)

STAFF ANALYSIS: The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the 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 161 (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. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

COMMISSION'S ORDERS IN DOCKET NO. 980119-TP

In its post-hearing decision in this case, Order No. PSC-98-1001-FOF-TP, the Commission determined that BellSouth should be required to implement the following:

1. BellSouth shall provide Supra with CABS formatted bills, rather than CLUB formatted bills.
2. BellSouth shall identify to Supra which USOC codes are discounted and which are not. Also, to the extent that BellSouth's electronic interfaces provide information or automatically populate fields with USOC codes, BellSouth shall provide this same capability to Supra through the ordering interfaces available to Supra.

3. BellSouth shall provide Supra with the ability to reserve the same number of telephone numbers through LENS as BellSouth can through RNS. BellSouth shall also modify LENS to automatically assign a telephone number to an end user when the customer's address is validated.
4. BellSouth shall either provide Supra with all of BellSouth's central office addresses so that Supra is able to reserve telephone numbers for Remote Call Forwarding service to its end users, or BellSouth shall work with Supra to find another mutually agreeable solution.
5. BellSouth shall modify the ALEC ordering systems so that the systems provide the same online edit checking capability to Supra that BellSouth's retail ordering systems provide.
6. BellSouth shall retrain its employees on the proper procedures for handling ALEC repairs and Inside Wire Maintenance problems.
7. If contacted by Supra customers regarding any complaints against Supra, BellSouth shall direct the customer to Supra.
8. BellSouth shall provide any outstanding documentation requested by Supra. This requirement included the provision of PLATS, which is the cable layout and engineering records of BellSouth.

Order at pgs. 47-48.

The Commission further determined that Supra should pay its bills, and also not misrepresent itself as BellSouth to customers. Id.

Subsequently, by Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, (Reconsideration Order), the Commission clarified that BellSouth would only be required to provide PLATS to Supra on a per request basis, and could do so subject to a protective agreement between the parties, if necessary. Reconsideration Order PSC-98-1467-FOF-TP at pgs. 15-16. The Commission further clarified that

In accordance with Order No. PSC-98-1001-FOF-TL, BellSouth shall provide

Supra with the same interaction and online edit checking capability through its interfaces that occurs when BellSouth's retail ordering interfaces interact with BellSouth's FUEL and Solar databases to check orders. Order No. PSC-98-1001-FOF-TL at pages 22 and 47. BellSouth shall be required to do so by December 31, 1998. If, however, BellSouth is able to sufficiently demonstrate that it is not possible to provide online edit checking by that date, BellSouth may file a Motion for Extension of Time for our consideration.

Reconsideration Order at p. 21.

The Commission also clarified that BellSouth did not need to provide the exact same interfaces that it uses at Supra's premises. Reconsideration Order at p. 15.

By Order No. PSC-00-0288-PCO-TP, issued February 11, 2000, the Commission rendered its decision on BellSouth's Notice of Compliance with the Commission's final orders in this proceeding. Therein, the Commission determined that

. . . BellSouth has complied with all portions of our final decision in this case, Order No. PSC-98-1001-FOF-TP, issued July 22, 1998, as clarified by Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, except for the specific requirements that BellSouth should provide Supra with on-line edit checking capability by December 31, 1998. We do, however, acknowledge that BellSouth has made significant developments in its OSS since the time that we rendered our final decision, including TAG, Robo-TAG, and LENS '99. Thus, while it appears that BellSouth is not literally in compliance, technology has been developed that may provide on-line edit checking. Nevertheless, it would not be appropriate for us to revisit our decision in this case to consider these newly developed

alternatives in response to BellSouth's Notice of Compliance.

Order at p. 12.

ARGUMENTS

SUPRA

In its Motion, Supra argues that the Commission erred in its decision by determining that BellSouth had complied with the Commission's final decisions in this Docket without allowing either party to present evidence on the issues. Supra maintains that it presented un rebutted evidence through sworn statements that BellSouth had not complied with the Commission's Order; therefore, it was improper for the Commission to determine otherwise without a hearing on the subject.

Supra further argues that the Commission erred with regard to its determination that BellSouth had complied with the Commission's decision on provision of USOCs. Supra contends that in the original hearing, it emphasized that it required updated USOCs from BellSouth in order to properly bill customers. The Commission directed BellSouth to provide the USOCs so that Supra could properly bill its customers. Supra maintains that BellSouth is not providing the updated USOCs; therefore, Supra cannot properly bill its customers. As such, BellSouth is not in compliance with the Commission's Orders.

Supra adds that the staff's conclusion that a new complaint must be filed with the Commission "every month or two" to obtain updates is unnecessary and pointless.

For these reasons, Supra asks that the Commission reconsider its decision in Order No. PSC-00-0288-PCO-TP, grant a hearing regarding this matter, or simply refuse to consider BellSouth's Notice of Compliance.

BELLSOUTH

In its Response, BellSouth argues that Supra's Motion for Reconsideration clearly fails to meet the standard for reconsideration of a Commission decision. BellSouth maintains that Supra has not identified a fact overlooked by the Commission or a mistake of law made by the Commission in rendering its decision. BellSouth adds that Supra's Motion for Reconsideration simply reargues points raised by Supra in consideration of BellSouth's Notice of Compliance. BellSouth contends that these points have

already been fully considered and addressed in Order No. PSC-00-0288-PCO-TP; therefore, Supra has failed to provide a basis for reconsideration. Therefore, BellSouth believes that Supra's Motion should be denied.

BellSouth argues, however, that it agrees with Supra that a hearing would be appropriate to give the parties further guidance on the issue of on-line edit checking and whether TAG satisfies the Commission's requirements. BellSouth explains that it filed the Notice of Compliance in the hope that it would provide a practical means to resolve the issue. If the Commission agreed that BellSouth had complied with the Commission's decisions in this Docket and determined that TAG complies with the on-line edit checking requirement, BellSouth states that it would have dismissed its complaint at the federal court.

BellSouth notes that the Commission indicated in its Order on the Notice of Compliance that it believes that TAG may meet the on-line edit checking requirement, but would not make a final determination on that point because it believed it would be inappropriate in view of the ongoing federal proceeding. BellSouth adds that it believes a hearing would be appropriate to resolve this issue.

BellSouth further argues that the ongoing federal proceeding is actually a strong basis for the Commission to conduct an evidentiary proceeding on the Notice of Compliance. BellSouth contends that such a proceeding may negate the need for further proceedings at the federal level.

For these reasons, BellSouth asks that the Commission reconsider its decision in Order No. PSC-00-0288-PCO-TP regarding on-line edit checking and set this matter for hearing to determine whether TAG meets the Commission's on-line edit checking requirements.

ANALYSIS

Staff agrees with BellSouth that Supra has failed to identify a point of fact overlooked or a mistake of law made by the Commission in rendering its decision in this matter. Supra has simply reargued matters it raised in its Response to BellSouth's Notice of Compliance and that the Commission addressed in Order No. PSC-00-0288-PCO-TP.

As for Supra's assertion that the staff's conclusion that a new complaint must be filed with the Commission "every month or

two" to obtain updates is unnecessary and pointless, staff has been unable to determine to what Supra is referring.

With regard to USOCs, staff emphasizes that in its Final Order, the Commission stated that it believed that BellSouth had provided Supra with "several sources that contain USOC codes," including regular updates on BellSouth's Interconnection Services Web Page. Order PSC-98-1001-FOF-TP at p. 15. The Commission added, however, that BellSouth should still identify which USOCs are discounted and which ones are not. The Commission added that

. . . to the extent that BellSouth's electronic interfaces provide information or automatically populate fields with USOC codes, this capability shall be provided through the ordering interfaces available to Supra, in accordance with the parity provision in the parties' agreement.

Order at p. 15.

Staff emphasizes that the Commission only required BellSouth to provide USOC codes and identify for Supra which USOCs were discounted and which ones were not. The Commission considered this aspect and stated that it appears BellSouth has complied with this requirement. Order No. PSC-00-0288-PCO-TP at p. 8.

The Commission also indicated that BellSouth should provide Supra with the capability to automatically populate fields with USOC codes, to the extent that BellSouth has this capability. Order PSC-98-1001-FOF-TP at p. 15. While the Commission did state that BellSouth should automatically populate fields with USOCs, to the extent that BellSouth has this capability, the Commission did not make a specific finding that BellSouth does actually have this capability. The Commission also did not indicate that BellSouth had to provide USOC updates specifically to Supra. In fact, the Commission clearly indicated in its post-hearing order that BellSouth had provided Supra with adequate sources for USOCs, including the Web Page, discussed by BellSouth witness Stacy, to which BellSouth posts USOC updates. Order PSC-98-1001-FOF-TP at p. 15. As such, it is clear the Commission has not failed to overlook any point of fact or made a mistake of law in rendering its decision on this point.

Regarding both Supra and BellSouth's indication that the Commission should have handled BellSouth's Notice of Compliance through an evidentiary proceeding, staff emphasizes that Order No.

PSC-00-0288-PCO-TP was issued as a procedural order. The Commission explained the reason for this in its Order:

At the outset, we emphasize that we are unaware of any other Notice of Compliance ever filed with or ruled upon by this Commission. There is nothing in Chapter 120, Florida Statutes, or our rules governing such a filing. Upon consideration, we believe that it would be inappropriate to reopen the record of this docket to revisit the issues addressed by us in this case, because we believe that to do so would be contrary to the doctrine of administrative finality. We do, however, believe that we can review the Notice and Response filed by the parties and rule upon BellSouth's Notice as a procedural matter. It is our understanding that the essential purpose of such a decision is to assist the federal District Court in making its determination in this case.

Order No. PSC-00-0288-PCO-TP at p. 3. The Commission also clearly explained that it did not believe it appropriate to reopen the record to receive further evidence regarding these issues in view of the pending federal proceeding and the implications of the doctrine of administrative finality, which stands for the proposition that:

. . . orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.

Peoples Gas Sys. V. Mason, 187 So. 2d 335, 338-339 (Fla. 1966). Nevertheless, the Commission noted that an argument could be made that the development of TAG, LENS, and Robo-TAG amounts to changed circumstances, thereby, providing a basis for rehearing by the

DOCKET NO. 980119-TP
DATE: MARCH 23, 2000

Commission in this case, citing McCaw Communications of Florida, Inc., Appellant, vs. Susan F. Clark, 679 So. 2d 1177 (Fla. 1996). Order at p. 11. The Commission added that "We do not, however, believe that this is appropriate in this instance, in view of the matter pending before the federal District Court." Order at p. 11.

The Commission clearly explained that it believed it would be inappropriate to conduct an evidentiary hearing in this case with a proceeding pending at the federal court. The Commission did not, however, preclude the possibility that should the federal proceeding be dismissed, the Commission might find that an evidentiary proceeding is warranted based on changed circumstances. On this point, neither of the parties has identified a fact overlooked or a mistake of law made by the Commission in rendering its decision. Therefore, staff recommends that Supra's Motion for Reconsideration be denied, as well as BellSouth's apparent cross-motion for reconsideration, contained in its Response, requesting that the matter be set for hearing on the issue of on-line edit checking capability.

ISSUE 3: Should this Docket be closed?

RECOMMENDATION: No. Whether or not the Commission approves staff's recommendation in Issues 1 and 2, no further determinations will remain to be made by the Commission. However, this Docket should remain open pending the outcome of the federal proceeding. (B. KEATING)

STAFF ANALYSIS: No. Whether or not the Commission approves staff's recommendation in Issues 1 and 2, no further determinations will remain to be made by the Commission. However, this Docket should remain open pending the outcome of the federal proceeding.