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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc., for Resolution of Billing Disputes	)	Docket No. 001097-TP Dated: November 17, 2000

MOTION FOR RECONSIDERATION OR CLARIFICATION OF ORDER ON SUPRA'S MOTION TO DISMISS

NOW COMES Supra Telecommunications & Information Systems, Inc. ("Supra"), by and through its undersigned counsel, pursuant to Public Service Commission Rule 25-22.0376, moves for reconsideration of the Commission's Order on Supra's Motion to Dismiss, and in support hereof states as follows:

I. BRIEF INTRODUCTION

On November 7, 2000, after hearing oral argument from Supra and BellSouth Telecommunications, Inc. ("BellSouth"), the Commission followed its Staff Recommendations, dated October 26, 2000, and granted in part and denied in part Supra's Motion to Dismiss. The two bases for Supra's Motion for Reconsideration are as follows: (1) the Commission overlooked the complications which arise by allowing BellSouth to raise Supra's defenses/affirmative causes of action, including a determination of burden of proof and the order of the presentation of evidence, and (2) the Commission did not properly apply or consider the Federal Arbitration Act in determining the cut-off date for those claims which it did not dismiss.

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II. FACTUAL BACKGROUND

1. This motion necessarily addresses two separate agreements between the parties: A June 26, 1997 agreement ("1997 Agreement") and the AT&T-BellSouth Interconnection Agreement adopted by Supra on October 5, 1999 ("1999 Agreement").

2. BellSouth's Complaint raises only one affirmative cause of action: that since January 1, 2000, Supra has failed to pay its bills, including undisputed funds. See paragraph 8 of the Complaint. BellSouth admits that this matter is governed by the arbitration clause contained in the AT&T – BellSouth Interconnection Agreement, adopted by Supra on October 5, 1999, and the Commission properly dismissed this claim on that basis.

3. BellSouth, in its attempt to avoid the application of the parties' arbitration clause, cleverly raised Supra's defenses, stating in paragraph 10 of its Complaint:

> The **majority of the issues which Supra raises in its attempts to justify its refusal to pay**, arose prior to October 5, 1999. Accordingly, such claims arise under the 1997 agreement and must be determined by the Florida Public Service Commission according to the dispute resolution provisions of that agreement. (Emphasis added.)

4. BellSouth then sets forth Supra's justifications for its refusal to pay:

   a. Improperly charged End User Common Line Charges (EUCLs) from June 1, 1997 through December 1999. See paragraph 12 of the Complaint.
   b. Improperly billed charges for processing changes in service from September 1997 through December 1999. See paragraph 15 of the Complaint.
   c. Improperly billed secondary service charges (although no dates have been listed, Supra surmises that the time period would be identical to those subparagraph 4(b) above. See paragraph 17 of the Complaint.

5. Supra moved to dismiss BellSouth's Complaint in its entirety, as BellSouth's only cause of action was subject to a mandatory arbitration clause.

6. The Commission, following the October 26, 2000 Staff Recommendations, dismissed BellSouth's only cause of action, and denied Supra's motion to dismiss Supra's defenses.

7. It should also be noted that BellSouth, in its attempts to have its claim heard by the Commission, misleadingly stated in paragraph 11 of its Complaint that it had followed the escalation procedure of Exh. 2, Attachment 6, Section 14 of the 1999 Agreement. Although this statement may have been true, BellSouth conveniently failed to mention that it was also necessary for it follow the escalation procedure of Attachment 1 of the 1999 Agreement. Only on November 16, 2000, over three months after filing its present Complaint, did BellSouth finally comply with this procedure. See true copy of November 16, 2000 letter attached hereto as **Exhibit A.**

III. 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 we failed to consider in rendering an 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); *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981).

IV. ARGUMENT

This Commission overlooked or failed to consider the following facts in rendering its Order:

(1) Perhaps dispositive of the issues herein, Section XVI, paragraph F of the parties' 1997 Agreement provides:

> 2. Reseller accepts a deemed offer of an Other Resale Agreement or other terms, then BellSouth or Reseller, as applicable, shall make a corrective payment to the other party to correct for the difference between the rates set forth herein and the rates in such revised agreement or Other Terms for substantially similar services for the period from the effective date of such revised agreement or Other Terms until the date that the parties execute such revised agreement or Reseller accepts such Other Terms, plus simple interest . . .

Therefore, the billing rates, or absence of billing rates, set forth in the 1999 Agreement are the ones that govern Supra's affirmative defenses, as plead by BellSouth, and therefore such are governed by the arbitration provision of the 1999 Agreement.

(2) Despite BellSouth's contention in paragraph 10 of its Complaint, Supra never raised any affirmative defenses or claims in this matter, as Supra has not filed any documents other than a Motion to Dismiss. This fact pattern is similar to a party seeking to remove a case from state court to federal court under the theory of removal jurisdiction. Herein, BellSouth seeks to have claims before the Commission instead of before arbitrators. In the case of removal jurisdiction, pursuant to what is known as the well-pleaded complaint rule, a court must look solely to the four corners of a complaint to determine whether or not a claim arises under federal law. *King Provision Corp. v. Burger King Corp.*, 750 F. Supp. 501, (M.D. Fla. 1990), citing *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989). Most important to our case, a federal defense will not support removal jurisdiction, **even if the defense is anticipated in**

the complaint's allegations. *Id.* In the present case, BellSouth is anticipating the counterclaims/defenses of set-off in an attempt to place jurisdiction before the FPSC. As Supra has not raised these counterclaims or defenses, the FPSC does not have such jurisdiction.

(3) By allowing BellSouth to raise Supra's affirmative defenses, the Commission has created a problem regarding which party has the burden of proof. Supra submits that BellSouth, as the Claimant, now has the burden of proving it has correctly billed Supra.

(4) Similarly, the Commission has created a problem in that the remaining claims are the affirmative claims of Supra, not BellSouth. Therefore, Supra should be able to present its evidence first.

(5) BellSouth now intends to bring its only affirmative claim in the proper venue, i.e. before private arbitrators. See **Exhibit A.** Yet this Commission has retained jurisdiction over Supra's affirmative defenses. Supra is now forced to raise its affirmative defenses before the arbitrators, while the Commission hears the same issues.

(6) By allowing BellSouth to plead Supra's affirmative claims in this forum, Supra is unable, if successful, to receive from this forum the remedy it would seek, namely: money damages. See *Florida Power & Light Co. v. Glazer*, 671 So.2d 211 (Fla. 3d DCA 1996).

Furthermore, the Commission overlooked or failed to follow the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, and the case law interpreting it, in reaching its

decision. Specifically, the Commission lacks jurisdiction to hear any issue beyond October 5, 1999. See *Dean Witter Reynolds, Inc. v. Byrd*, 105 S. Ct. 1238 (1985). The *Dean Witter* court, in interpreting whether, in cases in which there are some issues which are covered by an arbitration provision and some issues which are not so covered, held:

> The Arbitration Act provides that written agreements to arbitrate controversies arising out of an existing contract "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. §§ 3, 4. Thus, insofar as the language of the Act guides our disposition of this case, we would conclude that agreements to arbitrate must be enforced, absent a ground for revocation of the contractual agreement.
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> * *
>
> The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is "piecemeal" litigation, at least absent a countervailing policy manifested in another federal statute.

BellSouth, in its Complaint, states that Supra's affirmative defenses include bills issued after October 5, 1999. Therefore, the Commission erred, at a minimum, in not dismissing at least the portions of the affirmative defenses that go beyond October 5, 1999.

V. CONCLUSION

Because this Commission overlooked or failed to consider the aforementioned points of fact and law, the Commission should reconsider and grant Supra's Motion to Dismiss in its entirety. Should this Commission deny Supra's Motion for Reconsideration, Supra requests that this Commission clarify its Order regarding whether there is a cut-off date of October 5, 1999 for all claims.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been served via facsimile and/or U.S. Mail upon Nancy White, Esq. and Michael Goggin, Esq., BellSouth, 150 West Flagler Street, Suite 1910, Miami, Florida 33130; R. Douglas Lackey and J. Philip Carver, BellSouth, Suite 4300, 675 W. Peachtree St., NE, Atlanta, GA 30375; and Staff Counsel, Florida Public Service Commission, Division of Legal Services, 2450 Shumard Oak Boulevard, Tallahassee, Florida; this 17th day of November, 2000.

SUPRA TELCOMMUNICATIONS & INFORMATION SYSTEMS, INC.
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November 16, 2000

VIA FACSIMILE AND
FEDERAL EXPRESS
Mr. Kay Ramos
Brian Chaiken, Esq.
Supra Telecom
2620 S.W. 27th Avenue
Miami, FL 33133

Re: Inter-Company Review Board Meeting

Dear Mr. Ramos and Mr. Chaiken:

This is to request a formal Inter-Company Review Board Meeting to attempt to settle the billing dispute between BellSouth and Supra. As the parties have discussed on numerous occasions, Supra has not paid any of its bills from BellSouth since January 1, 2000. It is BellSouth's position that Supra owes BellSouth approximately $1,388,229.03 for services rendered. The billing disputes have been escalated in accordance with the escalation procedures set forth in Attachment 6 of the interconnection agreement. However, the parties were unable to resolve the disputes.

BellSouth originally filed its claim with the Florida Public Service Commission, as the parties have numerous billing disputes, many of which arose under the parties' prior interconnection agreement. As you know, the Commission separated the claims arising under the prior agreement from those arising under the current agreement should be heard in commercial arbitration in pursuant to Attachment 1 of the interconnection agreement.

In preparation for commercial arbitration, and in a final effort to resolve the billing disputes arising under the current agreement, BellSouth requests a meeting of the Inter-Company Review Board to discuss this issue.

I would like to schedule a meeting of the Board for Monday, November 20, 2000, if you are available. If you are not available I would like to discuss other dates we could meet. I will call to discuss your calendar.

Sincerely,

Parkey D. Jordan /kbn

Parkey D. Jordan

PDJ/kbn

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