ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

CONFIDENTIAL
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9.17.05

In re: Petition for Arbitration of the Interconnection)
Agreement Between BellSouth Telecommunications,) Docket No. 001305-TP
Inc. and Supra Telecommunications & Information)
System, Inc., Pursuant to Section 252(b) of the) Filed: May 9, 2002
Telecommunications Act of 1996.)

BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION TO STRIKE AND REPLY TO BELLSOUTH'S <u>OPPOSITION TO SUPRA'S MOTION TO DISQUALIFY AND RECUSE</u>

BellSouth Telecommunications, Inc. ("BellSouth") opposes Supra Telecommunications & Information Systems, Inc.'s ("Supra") Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion to Disqualify and Recuse ("Motion to Strike"). For the reasons discussed below, the Florida Public Service Commission ("Commission") should deny Supra's Motion to Strike and reject its impermissible reply memorandum.

INTRODUCTION

Supra is making a mockery of the regulatory process and the telecommunications business. It is operating what amounts to a confidence game in which BellSouth is the mark and the Commission, the Staff, the consumers, and the commercial arbitration panel each occupy involuntary supporting roles. The game is simple: obtain wholesale telecommunications services for free and use the administrative process to keep the free services flowing for as long as possible. The Motion to which we respond is part of that game.

Through its aggressive and improper actions, Supra is seeking to wrestle control of these proceedings away from the Commission. It is obvious that this

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appeal

proceeding will not reach a conclusion until Supra's abusive tactics are curbed. To date, the Commission has afforded Supra every opportunity to present its case, yet Supra has presented nothing but a campaign of baseless accusations, impermissible filings, and general disregard for the administrative process and the Commission itself. The Commission must put a stop to this circus. Failing to do so will encourage other companies to treat the Commission and the regulatory process in a similar manner.

LAW AND ARGUMENT

On April 17, 2002, Supra filed a Motion to Disqualify and Recuse Commission Staff and Commission Panel From All Further Consideration Of This Docket And To Refer This Docket To The Division of Administrative Hearings For All Further Proceedings ("Motion to Recuse") in Docket No. 001305-TP. BellSouth timely filed its Opposition to that motion on April 24, 2002. BellSouth incorporates by reference all of the arguments and information contained in its Opposition as though reproduced fully herein. For the reasons set forth in that Opposition, the Commission should deny Supra's Motion to Recuse. It is a groundless submission calculated solely to attempt to delay the effective date of the parties' new agreement.

On May 1, 2002, Supra filed its Motion to Strike. In it, Supra (1) asks the Commission to strike certain portions of BellSouth's Opposition and (2) submits additional arguments in support of its Motion to Recuse. The Commission should deny the request to strike because it is totally groundless and procedurally improper. Moreover, the Commission should reject any additional arguments

advanced by Supra in support of the Motion to Recuse as an impermissible reply memorandum.

I. BellSouth's Opposition Should Not Be Stricken.

Supra requests that the Commission strike portions of BellSouth's Opposition pursuant to Rule 1.140(f) of the Florida Rules of Civil Procedure. The Commission should deny Supra's Motion because Supra cannot meet the standard to strike allegations under Rule 1.140(f) or any other rule or authority.[1] "'A motion to strike matter as redundant, immaterial or scandalous should only be granted if the material is wholly irrelevant, can have no bearing on the equities and no influence on the decision.'" McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A., 704 So. 2d 214, 216 (Fla. 2nd DCA 1998) (quoting Pentecostal Holiness Church, Inc. v. Mauney, 270 So. 2d 762, 769 (Fla. App. 4th DCA 1972). In McWhirter, Reeves, the court refused to strike certain allegations in the plaintiff's complaint pursuant to Rule 1.140(f) because it found the that the "allegations [in the complaint] were relevant and definitely had a bearing on the equities." Id.

Supra asks the Commission to strike BellSouth's statement that Supra is attempting to avoid paying BellSouth for legitimate services received. To support that request, Supra improperly refers to certain confidential arbitration matters. BellSouth has filed a Notice of Intent with regard to those statements. But, to allow the Commission to fully consider the issue, BellSouth submits the following facts:

[1] As stated in BellSouth's Opposition to Supra's First Motion to Strike and Reply Memorandum, filed on May 1, 2002, the Commission should deny Supra's Motion to Strike for the additional

1. Immediately upon opting into the BellSouth-AT&T agreement in October, 1999, Supra stopped paying BellSouth for the wholesale services it was receiving.

2. Supra refused to pay any amounts, including undisputed amounts, until the parties had completed a time-consuming arbitration process on each claim asserted by BellSouth. In other words, Supra refused to pay any amount until ordered to do so.

3. Supra's payments to BellSouth to date have covered the period from October, 1999 through May, 2001.

4. Supra has made no further payments to BellSouth.

5. The fundamental issue that the parties have litigated before the commercial arbitrators is whether Supra should be billed as a UNE-P provider or as a reseller.

6. BellSouth has rendered restated bills totaling $16.7 million to Supra as a UNE-P provider for the period June to December, 2001. These restated bills only seek recovery of a portion of what Supra owes, but Supra still refuses to pay any amount to BellSouth. Instead, Supra has raised numerous objections to the bills before the commercial arbitrators and simultaneously used every procedural maneuver to delay the proceedings before the Commission.

7. Since January, 2002, Supra has continued to refuse to pay any amounts for the wholesale services it receives.

8. Significantly, as part of the most recent commercial arbitration, BellSouth converted more than 200,000 of Supra's end users from resale to UNE-P.

9. To date in 2002, BellSouth has billed Supra approximately $17 million for UNE-P services and Supra has paid **nothing**. Supra will continue to receive free wholesale services until this Commission takes final action in this docket. In the meantime, Supra will continue to use BellSouth's money to wage legal battles and public relations campaigns to prevent this Commission from moving forward.

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reason that Rule 1.140(f) only applies to complaints, answers, cross claims, counter claims and third party claims and not to oppositions to motions.

As the Commission can see, there is no basis for striking BellSouth's statements as they are relevant, bear directly on the equities, and are accurate. Indeed, rather than striking those statements, the Commission should take them as a call to action and take the appropriate steps to end Supra's outrageous behavior.

To support its motion to strike, Supra makes the false statement that BellSouth's actions have "caused the bankruptcy of more than one CLEC." Nowhere does Supra provide any substance to support that irresponsible accusation. It is obvious that Supra is simply willing to do or say anything in order to keep the free wholesale services flowing. And, returning to its familiar refrain, Supra claims that the real issue is whether the Commission should be given jurisdiction over the parties' disputes. According to Supra, this Commission "has repeatedly demonstrated a predisposition in favor of BellSouth and a bias against Supra." Motion to Strike at p. 5. There is no basis for that statement. These lies simply cannot be condoned. Supra is attempting to marginalize this Commission by repeating unfounded claims of bias with the expectation that the Commission will then be reluctant to exercise its statutory authority.

In the remainder of its motion to strike, Supra asks the Commission to strike particular phrases from BellSouth's Opposition. There is no basis for such a request. BellSouth has merely laid out the true facts for the Commission to consider and characterized them appropriately.

II. The Commission Should Reject the Motion to Strike To The Extent It Is A Reply Memorandum.

Beginning at page 6 of its Motion to Strike, Supra sets forth additional arguments in support of its Motion to Recuse. The Commission must reject those arguments. It is well settled that reply memoranda are not recognized by Commission rules or the rules of the Administrative Procedure Act and thus cannot be considered by the Commission. Indeed, Supra is no stranger to this rule as Supra raised this very argument against BellSouth in Docket No. 980119-TP.

In that case, BellSouth filed a reply to Supra's Opposition to BellSouth's Motion for Reconsideration, at which point Supra filed a Motion to Strike BellSouth's Reply. Supra argued that the Commission should strike BellSouth's Reply because the Commission rules do not contemplate the filing of reply memorandums. Specifically, Supra argued:

> Rule 25-22.060(3), Florida Administrative Code governs motions for reconsideration of final orders. Likewise, Rule 25-22.0376(1), Florida Administrative Code, governs motions for reconsideration of non-final orders. Both rules only permit a motion for reconsideration and a response. Neither rule allows or authorizes the Reply Brief filed by BellSouth. Moreover, no reply is allowed or authorized by Rule 28-106.204, Florida Administrative Code. Accordingly, BellSouth's Reply Brief, is *unauthorized and improper* and thus should be stricken.

See Supra's Motion to Strike at 4, Docket No. 980119-TP, filed Jul. 11, 2000.

The Commission agreed with Supra, stating:

> We agree with Supra that neither the Uniform Rules nor or rules contemplate a reply to a response to a Motion. Therefore the Motion to Strike is granted.

In re: Complaint of Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc., Docket No. 980119-TP, Order No. PSC-00-1777-PCO-TP.

The Commission reached an identical conclusion in In re: ITC-DeltaCom, Docket No. 990750-TP, Order No. PSC-00-2233-FOF-TP, finding that "the Uniform Rules and Commission rules do not provide for a Reply to a Response to a Motion for Reconsideration." See also, In re: Petition by Florida Digital Network, Inc. for Arbitration, Docket No. 010098-TP, Order No. PSC-01-1168-PCO-TP (refusing to address arguments raised by FDN in reply memorandum because reply memorandums are "not contemplated by Commission rules.")

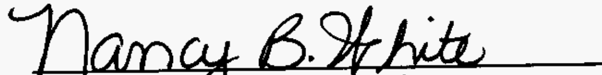
In its Motion to Strike, Supra deliberately omits citation to this well-established principle regarding the impermissibility of reply memoranda in Commission proceedings – a principle it helped to create. Supra's Supplemental Motion is a bad faith filing submitted only to harass the Commission and BellSouth. Thus, Supra's Motion to Strike should be rejected to the extent it is an impermissible reply memorandum.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission refuse to consider and deny Supra's Motion to Strike and reject the additional arguments raised therein in support of the Motion to Recuse.

Respectfully submitted this 9th day of May 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.



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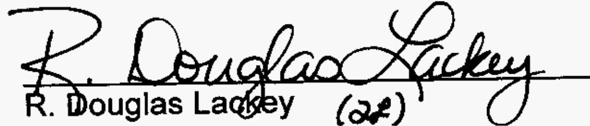

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