BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.	DOCKET NO. 001305-TI ORDER NO. PSC-01-1180-FOF-TI ISSUED: May 23, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER DENYING MOTION TO DISMISS AND CONTINUING ARBITRATION

BY THE COMMISSION:

On September 1, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition for Arbitration pursuant to the Telecommunications Act of 1996 (Act). On October 16, 2000, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Response to the Petition. On January 8, 2001, our staff held an issue identification meeting in an attempt to establish agreement on the wording of the issues in this docket. The parties agreed on several issues, referred others to the prehearing officer, and agreed to submit proposed language on others.

On January 26, 2001, Supra filed a Motion to Dismiss BellSouth's petition, citing as grounds for the dismissal, the lack of subject matter jurisdiction, and BellSouth's violation of Section 251(c)(1) of the Act. On February 6, 2001, BellSouth filed its Response in Opposition to Supra's Motion to Dismiss, arguing that subject matter jurisdiction exists, and that all other claims are time barred. We are vested with jurisdiction in this matter pursuant to Section 252(b)(1) of the Telecommunications Act of 1996.

MOTION TO DISMISS

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

Supra's Motion

Supra asserts that we lack subject matter jurisdiction over this action for two reasons: (1) BellSouth failed to comply with the procedural requirements of the parties' current, Commission approved Interconnection Agreement, and (2) it prematurely filed its Petition, in violation of 47 U.S.C. 252(b). Supra's current interconnection agreement with BellSouth, the BellSouth/AT&T of the Southern States arbitrated agreement, provides in Section 2.3 of the General Terms and Conditions:

> Prior to filing a Petition pursuant to this Section 2.3, the Parties agree to utilize the informal dispute resolution process provided in Section 3 of Attachment 1.

Section 3 of Attachment 1 provides:

> The Parties to this Agreement shall submit any and all disputes between BellSouth and [Supra] for resolution to an Inter-Company Review Board, consisting of one representative from [Supra] at the Director-or-above level and one representative of BellSouth at the Vice-President-or-above level (or at such lower level as each Party may designate)

Supra argues that BellSouth failed to request that the matter be submitted to an Inter-Company Review Board prior to filing the present Petition. In fact, says Supra, BellSouth raises the very

same point against Supra in response to Supra's filing of a complaint for commercial arbitration pursuant to attachment 1 of the current agreement.

Supra also argues that BellSouth has prematurely filed its petition, in violation of 47 U.S.C. § 252(b)(1), which provides, in pertinent part:

> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

Supra states that BellSouth did not receive a request for negotiation from Supra until June 9, 2000, and so BellSouth's filing of an arbitration petition on September 1, 2000, was premature. As such, claims Supra, this Commission lacks jurisdiction in this matter, because 135 days have not passed since BellSouth received Supra's a request for negotiation pursuant to Section 252; therefore, the present petition should be dismissed.

BellSouth's Response

BellSouth's response contends that Supra's motion fails to provide any basis upon which this Commission could find that it lacks subject matter jurisdiction over the arbitration of the interconnection agreement between the parties, and that all other grounds are untimely. BellSouth maintains that subject matter jurisdiction is vested in a particular tribunal by organic law. It cites the Florida Supreme Court in Cunningham v. Standard Guaranty Insurance Co., 630 So. 2d 179, 181(Fla. 1994) as defining jurisdiction to be "the power of the . . . [tribunal] . . . to deal with a class of cases to which a particular case belongs." BellSouth states that this Commission is empowered by Section 252(b)(1) of the Act to arbitrate any and all unresolved issues regarding Supra's interconnection with BellSouth. It asserts that Supra's Motion fails because it does not go to this Commission's jurisdiction over the subject matter.

BellSouth also argues that even if Supra's motion did state some basis that went to the subject matter jurisdiction of this Commission, Supra is simply wrong in its assertions. BellSouth notes that it sent Supra a request for negotiation by letter dated March 29, 2000, and that by filing the Petition for Arbitration on September 1, 2000, it was clearly within the 135-160 day time frame for filing as contemplated by Section 252(b)(1) of the Act. BellSouth characterizes Supra's argument regarding the Inter-Company Review Board (Review Board) meeting as an extreme example of form over substance. This, says BellSouth, is because negotiations were held, and they were attended by the same persons who would have constituted an Inter-Company Review Board. Further, Supra failed to bring up the requirement of the Review Board during the negotiations or the pendency of this Petition, and so has waived any contractual right to a Review Board Meeting, according to BellSouth.

In addition, BellSouth disagrees with Supra's argument that only an Alternative Local Exchange Company (ALEC), like Supra, can request negotiation under the Act, noting that Section 2.3 of the interconnection agreement states that in the process of negotiating a new agreement, if "the parties are unable to satisfactorily negotiate new terms, conditions and prices, either party may petition the Commission to establish an appropriate follow-on agreement pursuant to 47 U.S.C. § 252."

Motion to Dismiss

Section 2.2 of the parties' agreement states:

> No later than one hundred and eighty (180) days prior to the expiration of this Agreement, the Parties agree to commence negotiations with regard to the terms, conditions, and prices of a follow-on agreement for the provision of Services and Elements to be effective on or before the expiration date of this agreement (Follow-on Agreement).

While it does not appear that the parties commenced negotiations more than 180 days prior to the June 9, 2000,

expiration date of the agreement, it is clear that for negotiations to commence, one party had to contact the other. BellSouth did contact Supra on March 9, 2000, and its correspondence with Supra on that date was unequivocally a request to negotiate a new agreement, rather than to extend the terms of the existing agreement. BellSouth's letter to Supra also started the clock running on the time to file a petition for arbitration. Further, Section 2.3 of the parties' agreement states that:

> (i)f within one hundred and thirty-five days (135) of commencing the negotiation referenced to Section 2.2 above, the Parties are unable to satisfactorily negotiate new terms, conditions and prices, either Party may petition the Commission to establish an appropriate Follow-on Agreement pursuant to 47 U.S.C. § 252.

This language within the Agreement essentially mirrors the provision of Section 252(b)(1) of the Act.

Further, the obligation in Section 2.3 of the agreement, calling for the parties to utilize the Inter-Company Review Board (Review Board) to settle disputed issues, is squarely on the shoulder of both parties. Along with the letter of March 9, 2000, BellSouth included an electronic copy of its new agreement. Disputed issues in that agreement should have been brought to the Review Board by both parties. The fact that they did not meet as the Review Board, nevertheless, does not toll the requirements under Section 252 of the Act, to file for arbitration between the 135th and 160th day after negotiations have commenced. Therefore, BellSouth timely filed its petition for arbitration.

We emphasize that, pursuant to Rule 28-106.204(2), Florida Administrative Code, "(u)nless otherwise provided by law, motions to dismiss the petition shall be filed no later than 20 days after service of the petition on the parties." Rule 1.140, Fla.R.Civ.Pro., provides in part that "any ground showing that the Court lacks jurisdiction of the subject matter may be made at any time." BellSouth served the Petition for Arbitration on September 1, 2000. Supra filed the Motion to Dismiss on January 26, 2001.

Therefore, on any grounds save the lack of subject matter jurisdiction, Supra's motion is time barred.

"Jurisdiction over the subject matter refers to a court's power to hear and determine a controversy. . . . Generally, it is tested by the good faith allegations, initially pled, and is not dependent upon the ultimate disposition of the lawsuit." Calhoun v. New Hampshire Ins. Co., 354 So.2d 882, 883 (Fla. 1978). "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs." Lusker v. Guardianship of Lusker, 434 So.2d 951, 953 (Fla. 2d DCA 1983).

In any cause of action, a court must not only have jurisdiction over the parties but must also be vested with subject matter jurisdiction in order to grant relief. See Keena v. Keena, 245 So.2d 665 (Fla. 1st DCA 1971). Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. See Board of Trustees of Internal Improvement Trust Fund of State v. Mobil Oil Corp., 455 So.2d 412 (Fla. 2d DCA 1984), quashed in part on other grounds by Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339 (Fla. 1986).

Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996, we must arbitrate any open issues brought before this Commission in the petition for arbitration or response. Our jurisdiction to hear an arbitration vests after the parties have followed the requirements of the Act calling for the filing of a petition 135-160 days after the reception of a request for negotiation. Therefore, we have subject matter jurisdiction over arbitrations brought before us in this manner. Based on the above, we find it appropriate to deny Supra's motion to dismiss.

CONTINUANCE

State commissions retain primary authority to enforce the substantive terms of agreements they have approved, pursuant to Sections 251 and 252 of the Act. Iowa Utils. Bd. v. Federal Communications Commission, 120 F. 3d 753, 804 (8th Cir. 1997)(Iowa Utils. Bd.). It is clear that prior to and during the course of negotiations, both Supra and BellSouth failed to fully comply with

the terms of the agreement we approved. The parties did not commence negotiations within the time specified by the agreement, though it appears that BellSouth did cure that defect in a far more timely fashion than did Supra. Neither party has complied with the requirement of Section 2.3 of the agreement calling for the parties, prior to filing a petition pursuant to this section, to utilize the informal dispute resolution process submitting any and all disputed matters to an Inter-Company Review Board comprised of persons as specified in the agreement. We do not believe that this requirement of the agreement is simply form over substance as alluded to by BellSouth. BellSouth's blanket statement that the negotiations which were held would have been attended by the same representatives who would have attended an Inter-Company Review Board meeting, presupposes Supra's decision as to whom it would have sent to said meeting. Further, a meeting clearly designated as an Inter-Company Review Board meeting would entertain all issues in dispute, giving the greatest opportunity to reach agreement on the issues, or in the alternative, clearly delineate what issues would proceed to arbitration.

While the failure to convene the Review Board does not challenge our subject matter jurisdiction, we believe the terms of the agreement should be enforced to the extent possible. As such, the requirement to convene the Inter-Company Review Board shall be fulfilled before we proceed with this arbitration. Where the terms of the agreement extend to both parties, it is the responsibility of each party to fulfill the terms of the agreement as approved by us. We hereby order the parties to comply with the term of their agreement, by convening an Inter-Company Review Board meeting within 14 days of the issuance of this order. Within 10 days of either party's termination of that meeting, the parties shall notify us as to the outcome of the meeting, including but not limited to what issues were resolved and what issues remain to be arbitrated. We will then establish a schedule for the completion of this proceeding. If the parties fail to convene within the specified time, or if the parties engage in practices in violation of Section 252(b)(5) of the Act, the parties are forewarned that they run the considerable risk of us opening a docket to show cause them as to why the offending party or parties should not be fined for failure to follow our orders - this Order and our Order approving the parties' underlying agreement.

We note that we do not believe that continuing this proceeding is in conflict with the requirement in Section 252(4)(C) that an arbitration be completed within nine months, because, as previously stated, the Eighth Circuit Court, in Iowa Utils. Bd., 120 F.3d at 804, has clearly stated that state commissions retain jurisdiction over approved agreements for purposes of enforcement. Furthermore, upon completion of the mediation process as required herein, the arbitration process, if still necessary, shall be restarted as if it was the 135th day in the process as set forth in Section 252 of the Act. We note that should the parties have any concerns about this interpretation of the proper time frames, Section 252(c)(5) of the Act provides that they can seek relief from the FCC.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Supra Telecommunications and Information Systems, Inc.'s Motion to Dismiss is denied. It is further

ORDERED that this arbitration is continued until such time as the parties have complied with the terms of their agreement calling for the convening of an Inter-Company Review Board meeting to discuss any and all disputed issues, as set forth in the body of this Order. It is further

ORDERED that the parties shall convene the Inter-Company Review Board meeting within 14 days of the issuance of this Order. It is further

ORDERED that within 10 days of the completion of the meeting, the parties shall notify this Commission as to any outstanding issues, after which time we will schedule all necessary matters for the completion of this proceeding. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 23rd Day of May, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: _____
Kay Flynn, Chief
Bureau of Records

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the

First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.