BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by Supra Telecommunications and Information Systems, Inc. for arbitration with BellSouth Telecommunications, Inc.	DOCKET NO. 040301-TP ORDER NO. PSC-04-0942-FOF-TP ISSUED: September 23, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.'S MOTION FOR AN INTERIM RATE AND DENYING ITS MOTION FOR RECONSIDERATION

BY THE COMMISSION:

I. Case Background

On April 5, 2004, Supra Telecommunications & Information Systems, Inc. (Supra) filed a petition for arbitration with BellSouth Telecommunications, Inc. (BellSouth). On June 23, 2004, Supra filed a Motion For Leave to file its First Amended Petition for Arbitration with BellSouth. The Motion was granted and on July 21, 2004, BellSouth filed its Answer and Response to Supra's Amended Petition For Arbitration, as well as a Motion to Dismiss.

In its Amended Petition, Supra requests expedited relief for the purpose of resolving a rate(s) for an individual hot cut and asks that an interim rate be established during the pendency of the case.

On July 23, 2004, an issue identification conference was held at which both parties agreed to our staff's proposed issues. On July 30, 2004, Supra filed its Response to BellSouth's Motion to Dismiss.[1] On that same day, BellSouth filed a Motion to Hold Discovery in Abeyance pending resolution of the Motion to Dismiss. The Motion to Hold Discovery in Abeyance was denied.[2]

On August 4, 2004, Order No. PSC-04-0752-PCO-TP was issued denying Supra's request for expedited treatment and reforming the proceeding as a complaint rather than an

[1] A power failure in South Miami made it impossible for Supra to file its Response to the Motion to Dismiss on July 28, 2004. Therefore, Supra requested and was granted two extra days to respond to BellSouth's Motion to Dismiss.
[2] See Order No. PSC-04-0810-PCO-TP, issued on August 19, 2004.

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arbitration. On August 11, 2004, Supra filed a Motion for Reconsideration of that Order and on August 17, 2004, BellSouth filed its Opposition.

This Order addresses: (1) Supra's Request for an Interim Rate; and (2) Supra's Motion for Reconsideration of Order No. PSC-04-0752-PCO-TP, issued on August 4, 2004.

II. Parties Position Regarding Need for Interim Rate:

Supra's Position

Supra states in its Amended Petition that the issue at hand "has an immediate impact on Supra's ability to use its own facilities to serve its end-users, thereby creating cost-savings and a degree of certainty in light of regulatory uncertainty . . ." (First Amended Petition, p. 13) In addition, Supra argues that "[w]ithout an interim rate, Supra will be forced to continue the already 18-month delay in implementing its business plan to transition to a facilities-based provider." Id. Specifically, Supra requests that a $15.00 interim rate for UNE-P to UNE-L conversions be established where there is no truck roll involved to effectuate a hot cut. Supra justifies the interim rate as being "the most BellSouth could possibly recover for converting already in-existence UNE-P lines served via copper or UDLC."[3] Last, Supra states "Should this Commission grant Supra's Alternative Motion to Set an Interim Rate, Supra will file an affidavit, using BellSouth's own costs studies as its basis, which details how the $15.00 figure is reached."[4]

BellSouth's Position

BellSouth argues that Supra is not entitled to any interim relief. BellSouth argues that an interim rate is not appropriate because Supra has not alleged any specific facts to warrant an interim rate. BellSouth relies on the fact that during the last few months of 2003 Supra migrated over 13,000 lines from UNE-P to UNE-L without ever claiming the need for emergency relief. In total, Supra has migrated over 18,000 of its customers' lines to UNE-L arrangements. Therefore, BellSouth asks this Commission to deny Supra's request for an interim rate.

III. Decision:

We hereby deny Supra's request for an interim rate because there does not appear to be a need or an adequate basis for an interim rate. Supra has neither demonstrated the need for an interim rate nor provided empirical evidence to support an interim rate of $5.28 (as stated in its First Amended Petition) or a rate of $15 (as stated in its August 11, 2004, pleading).

In its First Amended Petition, Supra provides a portion of Verizon Pennsylvania Inc.'s tariff that lists rates for effectuating hot cuts. This stand-alone document is devoid of any

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See Supra's Alternative Motion to Set an Interim Rate, August 10, 2004, page 12.
Id.

analysis or calculation, and Supra does not put forth any methodology using those rates. Further, there may be differences in labor costs and material costs, but Supra fails to address this issue. As for an interim rate of $15, we find that an affidavit would need to be filed before setting an interim rate, not after.

In addition, the undisputed fact that Supra has migrated over 18,000 customer lines to UNE-L arrangements, indicates there is no urgent need for an interim rate, particularly in view of the fact that this matter is currently set for hearing December 1, 2004. We therefore deny Supra's request to establish an interim rate.

IV. Motion For Reconsideration

Supra's Position

Supra's Motion for Reconsideration of the Order denying its request for expedited hearing is based on four arguments: (1) The Prehearing Officer has ignored Sections 364.161 and 364.162, Florida Statutes; (2) Supra has been denied Due Process; (3) BellSouth's own arguments show that this proceeding is ripe for an expedited hearing; and (4) Expedited treatment is warranted in light of existing law and new circumstances.

Supra argues that the Prehearing Officer has ignored Sections 364.161 and 364.162, Florida Statutes. Supra also contends that by converting its Amended Petition into a complaint with an indefinite time for resolution, this Commission has wholly negated the intent and purpose of the aforementioned statutes. Supra contends that this proceeding is not a complex, highly factual and time-consuming process, but merely a matter of contract interpretation.

Next, Supra argues that it has been denied due process because neither BellSouth nor this Commission has filed a motion pursuant to Rule 28-106.204, Florida Administrative Code, requesting that the matter be reformed as a complaint.

Third, Supra argues that BellSouth's own arguments show that this matter is ripe for an expedited hearing. Supra cites BellSouth's Motion to Dismiss supporting the notion that these issues have already been litigated, and therefore Supra would expect BellSouth's evidence to be the exact same cost study and testimony it previously filed with this Commission.

Last, Supra argues that expedited treatment is warranted in light of existing law and new circumstances due to a recent decision vacating certain UNE-P related provisions in the Federal Communications Commission (FCC) Triennial Review Order (TRO). Supra states that it needs to transfer its customers to its own facilities, so as to provide the least cost impact on its customer base before UNE-P prices increase.

BellSouth's Position

At the outset, BellSouth argues that all of Supra's arguments have been considered and rejected by the Prehearing Officer, or the arguments are new and not in Supra's initial request.

First, BellSouth argues that the Prehearing Officer considered and properly rejected Supra's argument regarding Sections 364.161 and 364.162, Florida Statutes. BellSouth argues that these statutes apply to arbitrations in the event negotiations fail. In addition, BellSouth argues that Supra's attempt to portray this proceeding as an arbitration under state law, as opposed to a dispute regarding an Interconnection Agreement approved by Federal law, is transparent. BellSouth therefore argues that the Prehearing Officer was correct in determining that this is not an arbitration.

Second, BellSouth argues that the Prehearing Officer did not violate Supra's due process rights simply because this Commission exercised its discretion to treat the matter as a Complaint. Supra had requested that the proceeding be treated as an arbitration.

Next, BellSouth argues that it has in no way acquiesced to expedited treatment of this Complaint proceeding and that this argument should not serve as the basis for reconsideration because Supra's argument was not in its initial pleading.

Last, BellSouth argues that the existing law and new circumstances do not warrant expedited treatment because this argument was specifically referenced and rejected in the underlying Order. BellSouth contends that Supra has not put forth a reasonable argument as to how this Commission failed to consider this argument.

It should be noted that BellSouth presumes that Supra's argument that this Commission set an interim rate for hot cuts is part of Supra's request for reconsideration and not a separate motion for some type of relief. BellSouth argues that the Prehearing Officer properly addressed Supra's request.

V. Decision:

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 this 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 162 (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., 294 So. 2d at 317. Last, it is well-established that it is inappropriate to raise new arguments in a motion for reconsideration. In re: Established Nondiscriminatory Rates, Terms and Conditions, Docket 950984-TP, Order No. PSC-96-1024-FOF-TP; August 7, 1996. This standard is equally applicable to Orders issued by the Prehearing Officer.

As stated above, Supra's Motion for Reconsideration is based on four arguments: (1) The Prehearing Officer has ignored Sections 364.161 and 364.162, Florida Statutes; (2) Supra has been denied Due Process; (3) BellSouth's own arguments show that this is ripe for an expedited hearing; and (4) Expedited treatment is warranted in light of existing law and new circumstances. For the reasons set forth below, we deny Supra's Motion for Reconsideration.

First, we hold that the Prehearing Officer has not ignored the timeframes set forth in Sections 364.161 and 364.162, Florida Statutes. The Prehearing Officer correctly determined that the allegations set forth in Supra's First Amended Petition[5] are more akin to a complaint and not an arbitration because the allegations stem from existing language in the parties' interconnection agreement. The Prehearing Officer clearly stated his reasoning on page three of the Order. As a Complaint, the arbitration time-frames are inapplicable.

Second, we find that Supra's argument that it has been denied due process is incorrect and without merit. Supra argues that the Prehearing Officer must file a motion to process the proceeding as a complaint. This argument fails to meet the standard of review because Supra fails to recognize the Prehearing Officer's authority pursuant to Rule 28-106.211, Florida Administrative Code. This rule specifically authorizes the Prehearing Officer to issue orders to promote a just determination of all aspects of the case.

In light of the fact that Supra brought this issue into question by seeking expedited treatment and application of the arbitration time frames, the Prehearing Officer merely exercised his discretion as to the proper procedural handling of this case. The Prehearing Officer was not required to file a motion in order to exercise his discretion under Rule 28-106.211, Florida Administrative Code.

Third, we find Supra's argument that BellSouth's Motion to Dismiss is an admission in favor of an expedited hearing is a new argument and therefore not appropriate in the context of a Motion for Reconsideration. Regardless, the argument does not identify a mistake in the Prehearing Officer's decision. As stated above, it is well-established that it is inappropriate to raise new arguments in a motion for reconsideration. In re: Established Nondiscriminatory Rates, Terms and Conditions, Docket 950984-TP, Order No. PSC-96-1024-FOF-TP; August 7,

[5] Specifically, Supra alleges that the current hot cut rate is unjustified and was not properly addressed in Docket No. 990649-TP.

1996. Therefore, we find that this argument cannot be considered in the instant motion because it was not raised in Supra's request for expedited treatment.

Last, Supra's argument that expedited treatment is warranted in light of existing law and changed circumstances was specifically contemplated and rejected by the Prehearing Officer. See Order No. PSC-04-0752-PCO-TP, issued August 4, 2004, at 1. In addition, Supra has not identified a mistake of fact or law in the Order. Supra merely rehashes its request for expedited treatment which fails to meet the standard of review for a motion for reconsideration.

For the reasons put forth above, we hereby deny Supra's Motion for Reconsideration because Supra's arguments have been properly considered and rejected by the Prehearing Officer, or the arguments are new and not in Supra's initial request.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Supra Telecommunications & Information Systems, Inc.'s Motion for an Interim Rate is hereby denied. It is further

ORDERED that Supra Telecommunications & Information Systems, Inc.'s Motion for Reconsideration of Order No. PSC-04-0752-PCO-TP is denied because it fails to identify a point of fact or law that the Prehearing Officer failed to consider in rendering his Order. It is further

ORDERED that the docket should remain open to determine the merits of Supra Telecommunications & Information Systems, Inc.'s First Amended Petition.

By ORDER of the Florida Public Service Commission this 23rd day of September, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

JLS

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 the Commission Clerk and Administrative Services, 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 the Commission Clerk and Administrative Services 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.