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-04-0997-PCO-TP ISSUED: October 12, 2004

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS AND SUPRA TELECOMMUNICATIONS & INFORMATION, INC.'S MOTION FOR PARTIAL SUMMARY FINAL ORDER

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. At the September 21, 2004 Agenda conference, this Commission denied the request for an interim rate.

On July 23, 2004, an issue identification conference was held at which both parties agreed to our staff's wording of the 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]

[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.

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 arbitration. Supra filed a Motion for Reconsideration of that Order and at the September 21, 2004 Agenda conference, this Commission denied that Motion.

On September 1, 2004, Supra filed a Motion for Partial Summary Final Order claiming two of the four issues are purely contractual. BellSouth responded on September 8, 2004.

This Order addresses BellSouth's Motion to Dismiss and Supra's Motion for Partial Summary Final Order.

II. Motion to Dismiss

BellSouth

BellSouth argues that Supra's Amended Petition is nothing but a relitigation of Order No. PSC-01-1181-FOF-TP, issued on May 25, 2001 (Cost Order), in Docket No. 990649A-TP (Cost Docket). BellSouth argues: (1) Supra's Amended Petition seeks to undo the Cost Order and establish separate rates for dispatch and non-dispatch; (2) this Commission approved and established nonrecurring rates for SL1 and SL2 loops in its Cost Docket; (3) the hot cut rate for an SL1 and SL2 loop is comprised of the nonrecurring rates for the loop, a cross-connect and service order processing.

First, BellSouth claims that in the Cost Order, we established the cost methodology by which non-recurring UNE rates would be set in Florida (i.e., typically, a melded rate). BellSouth claims that Supra is attempting to use a two-party complaint process to reverse a Commission decision in an industry-wide generic docket over three years ago. BellSouth argues that Supra's claim that it wants a new rate for UNE-P to UNE-L conversions is nothing more than a request for two nonrecurring rates for SL1 loops: one for 100% dispatch and one for 100% non-dispatch.

Specifically, BellSouth directs our attention to page 335 of the Cost Order where BellSouth used probabilities to assign dispatch and non-dispatch provisioning for SL1 loops. The Order reads, "one of the changes to the SL1 loop nonrecurring cost study was an increase in the field dispatch rate from 20 percent to 38 percent . . ." BellSouth states that later in the Cost Order this Commission compared the 100 percent dispatch rate used for xDSL loops with the 38 percent dispatch rate for an SL1 loop. Id. at 348. Further, BellSouth argues that while this Commission reduced work times associated with loop provisioning, this Commission did not alter either the 100 percent dispatch probability for xDSL loops or the 38 percent dispatch probability for SL1 loops (Id. at 349-350). Therefore, BellSouth claims that we have already approved a methodology that melds dispatch and non-dispatch activities into one rate.

Next, BellSouth argues that the hot cut charges for an SL1 or SL2 loop are comprised of the nonrecurring rates for the loop, a cross-connect, and service order processing. BellSouth cites to MCI's position in the Cost Order to illustrate this issue. In the Cost Docket, MCI describes the nonrecurring costs associated with effectuating a hot cut.[3] The process of moving an SL1 and SL2 loop from a BellSouth switch to a CLEC switch is comprised of the work activities necessary to provision the UNE loops. BellSouth argues that the costs associated with the work activities consist of the nonrecurring cost of the loop, a cross-connect charge and a service order processing charge.

Further, BellSouth argues that this Commission and the parties to the Cost Docket agreed that the calculation of nonrecurring costs included the assignment of probabilities. As argued above, BellSouth directs the reader's attention to MCI's position in the Cost Docket.

Last, BellSouth argues that the following facts cannot be disputed: (1) we established non-recurring rates for SL1 and SL2 loops; (2) this Commission-approved methodology for calculating those rates used a weighting of dispatch/non-dispatch probabilities; and (3) all CLECs had an opportunity to participate in the Cost Docket, and all CLECs in Florida are bound by the results of that docket. Thus, BellSouth argues Supra has failed to state a cause of action upon which relief can be granted.

BellSouth recommends that if we were to entertain the Amended Petition that it do so by way of a generic docket.[4]

Supra

Supra argues that we must confine its review to the four corners of Supra's First Amended Petition, must take all material factual allegations made by Supra as true, and is prohibited from considering any extraneous matters. Martin v. Principal Mutual Life Ins. Co., 557 So.2d 128 (Fla. 3rd DCA 1990); Lewis State Bank v. Travelers Ins. Co., 356 So.2d 1344 (Fla. 1st DCA 1978); Connoly v. Sebeco, 89 So.2d 482 (Fla. 1956). Supra first argues that BellSouth's Motion is based on extrinsic information that is not contained in Supra's First Amended Petition that includes facts relating to another Commission proceeding, and therefore should be denied. Further, Supra argues that BellSouth's Motion is really a Motion For Summary Final Order masquerading as a Motion to Dismiss, and that it is well-settled "[a] motion to dismiss is not a substitute for a summary judgment." Response at p. 4, citing Combs v. City of Naples, 834 So.2d 194, 198 (Fla. 2nd DCA 2002).

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[3] "The non-recurring cost of a particular action, then, is simply the sum of the costs of each of the necessary work activities, calculated as the product of (1) the required time, (2) the labor rate, and (3) the probability of occurrence of each work activity." Id. at 291.

[4] BellSouth indicates in its pleading that it reserves the right to comment on the appropriateness of such action should such a petition be filed.

Second, Supra argues that BellSouth previously submitted a cost study for the installation of a new SL1 or SL2 loop, and a separate study for a retail/resale to UNE-P conversion. Of the $49.57 SL1 NRC, Supra claims just $0.102 is properly charged when converting from a working retail to resale service to UNE-P. (Response, p. 5) However, Supra argues that no study of the costs of a UNE-P to UNE-L conversion was undertaken in the Cost Docket.

Supra also claims that BellSouth's cost study does not address the realities of moving IDLC-served customers to a CLEC owned switch. Supra also claims that BellSouth's argument that the current rate represents the conversion process from UNE-P to UNE-L is contrary to its position in Federal Bankruptcy Court.[5] Further, Supra argues that BellSouth's cost study does not address six of the eight most efficient methods of converting a UNE-P customer served via IDLC to a UNE-L. In sum, Supra argues that there is no record of the costs of a UNE-P to UNE-L conversion.

Last, Supra argues that BellSouth has compounded its error by improperly charging an $8.22 cross-connect NRC. Supra claims that a cross-connect already exists in the underlying cost study put forth in Docket No. 990649-TP, and therefore there should not be a separate charge.

For these reasons, Supra contends it has stated a cause of action upon which relief can be granted; therefore, BellSouth's motion should be denied.

Analysis

Standard of Review

Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. " Id. See also Flye v. Jeffords, 106 So. 2d 229 (1st DCA 1958)(consideration should be confined to the allegations in the petition and the motion). The

[5] "BellSouth agrees that the terms of the Agreement do not explicitly reference a conversion process from the Port/Loop Combination Service (i.e., UNE-P) Supra currently uses to the separate 2-Wire Analog Voice Grade Loop Service (i.e., UNE-L) Supra now seeks to use." Emergency Motion of BellSouth Telecommunications, Inc. For Interim Relief Regarding Obligations to Perform UNE-P to UNE-L Conversions, at p.5, In re Supra Telecommunications & Information Systems, Inc.

moving party must specify the grounds for the motion to dismiss, and we must construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (2nd DCA 1960).

Discussion

In the case at hand, Supra has put forth an issue – what is the non-recurring rate for a UNE-P to UNE-L hot cut - that more than likely does not fall squarely within prior Commission Orders, and therefore is not barred by the doctrine of administrative finality.[6] Specifically, Supra alleges that neither Docket No. 990649A-TP or 001797-TP addressed a conversion process from UNE-P to UNE-L. Supra alleges that the current rate represents a conversion from "active BellSouth retail end users" to UNE-L and that this process is different from a UNE-P to UNE-L conversion. Therefore, Supra's First Amended Petition is not barred by the doctrine of administrative finality, because it states an issue not litigated in Docket No. 990649A-TP or 001797-TP. However, we note that in accordance with to the doctrine of administrative finality, we do not address Supra's argument that the prior Commission Orders are incorrect.

Taking all material allegations contained in Supra's First Amended Petition as true, Supra has stated a cause of action upon which relief can be granted by this Commission. Under Florida law, this Commission must confine its review to the four corners of Supra's First Amended Petition and take all material factual allegations made by Supra as true, and this Commission is prohibited from considering any extraneous matters. Martin v. Principal Mutual Life Ins. Co., 557 So.2d 128 (Fla. 3rd DCA 1990); Lewis State Bank v. Travelers Ins. Co., 356 So.2d 1344 (Fla. 1st DCA 1978); Connoly v. Sebeco, 89 So.2d 482 (Fla. 1956). However, pursuant to the doctrine of administrative finality, we find that it would be impermissible to allow Supra to reargue the issues resolved in Docket No. 990649A-TP and 001797-TP.

First, Supra alleges that BellSouth's cost study contains a cost for installation of a new SL1 or SL2 loop when one already exists, and a separate study for a retail/resale to UNE-P conversion. Second, Supra alleges that of the $49.57 SL1 NRC, just $0.102 is properly charged when converting from a working retail or resale service to UNE-P. Third, Supra states in its Amended Petition that Section 3.8 of the parties' interconnection agreement applies to hot cuts, but only to converting "active BellSouth retail end users" to UNE-L. Supra argues that these

[6] Under the doctrine of administrative finality, the Commission's prior, unappealed ruling, even if erroneous, operates to bar subsequent claim despite change in law potentially affecting scope over the controversy. Florida Power Corporation v. Garcia, 780 So.2d 34, 35 (Fla. 2001) "The doctrine of finality provides that there must be a terminal point in every proceeding both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." Id. However, administrative finality was not meant to preclude the Commission from revisiting a prior order when the record reflected a plethora of changed circumstances that justified Commission's decision. McCaw Communications of Florida, Inc. v. Clark, 679 So.2d 1177 (Fla. 1996).

rates for the retail-to-UNE-L conversion process cannot and should not apply to a UNE-P to UNE-L conversion. These arguments, if correct, could lead to a different rate for a UNE-P to UNE-L hot cut. Therefore, taking these allegations as facially correct, Supra states a cause of action for which relief can be granted.

Last, we hold that this proceeding shall remain a complaint proceeding limited to these two parties.

III. Motion For Partial Summary Final Order

Supra

Supra claims that BellSouth is trying to incorporate the UNE-P to UNE-L conversion process into its general SL1 and SL2 UNE loop non-recurring cost study. Supra argues that the existing agreement either provides for rates, terms or conditions for a hot cut, or it does not. Supra therefore argues that this is purely a contractual issue.

Supra claims that the following facts are either admitted to or undisputed by BellSouth: (1) the current agreement does not contain or even reference a rate for UNE-P to UNE-L conversions; (2) the unbundled rates in the current agreement are tied to our Order in Docket No. 990649-TP, which also does not contain or reference a rate for UNE-P to UNE-L conversion; (3) BellSouth's director in charge of all BellSouth's cost studies (Daonne Caldwell) testified that she neither prepared a cost study for a retail to UNE-L conversion or a UNE-P to UNE-L conversion; (4) Ms. Caldwell testified that we never referenced a retail to UNE-L conversion or hot cut, or a working UNE-P to UNE-L conversion in any Order in any docket; (5) BellSouth's cost studies are for the construction of new SL1 and SL2 loops to locations, and do not distinguish between retail to UNE-L conversions or UNE-P to UNE-L conversions; (6) that BellSouth has not submitted any cost studies for its proposed eight different alternatives, with varying degrees of costs and efficiencies, for handling UNE-P to UNE-L conversions when the loops are being served by IDLC.

BellSouth

BellSouth argues that Supra's argument is misdirected because the debate over whether the Interconnection Agreement (ICA) contains a UNE-P to UNE-L conversion process is not the same issue that is before us in this docket. The issue before this Commission is whether the ICA has non-recurring rates that apply to a UNE-P to UNE-L conversion. BellSouth argues that the interconnection agreement has rates that include the necessary steps for a UNE-P to UNE-L conversion,[7] and therefore gives rise to a material fact exists.

BellSouth also argues that this Commission-approved, non-recurring rates upon which BellSouth relies are equally applicable to all hot cuts. BellSouth argues that the work times and activities for a hot cut process (except for coordination activities) are identical regardless of whether the conversion is from retail to UNE-L, resale to UNE-L, or from UNE-P to UNE-L.

Last, BellSouth argues that Supra's Motion for Partial Summary Final Order is an improper collateral attack on a prior Commission Order and granting Supra's Motion would render this Commission's rules meaningless. BellSouth states that any challenge to the rates should have been raised as an issue in the docket in which the rates were established.

Analysis

Standard of Review

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.[8] The burden is on the movant to demonstrate that the opposing party cannot prevail.[9] "A summary judgment should

[7] $1.52 for an electronic OSS charge; $49.57 2-wire analog voice grade loop – Service level 1; and $8.22 for physical collocation – 2- wire cross-connect.

[8] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).

[9] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996)

not be granted unless the facts are so crystallized that nothing remains but questions of law."[10] "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[11] If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[12] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[13]

Moreover, we have recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[14] this Commission found that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
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> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be

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[10] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

[11] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[12] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[13] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

[14] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

> exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

Discussion

Supra claims that the current agreement does not contain a rate for a UNE-P to UNE-L hot cut (hot cut). It is therefore Supra's burden to demonstrate that BellSouth cannot prevail on this issue,[15] and not the slightest doubt exists as to whether the agreement contains a rate for a UNE-P to UNE-L hot cut.

In short, we find that although the agreement does not explicitly list a rate for a UNE-P to UNE-L "hot cut," the agreement may contain rates associated with the necessary steps to effectuate such a "hot cut." In other words, an issue of fact exists as to whether this rate covers a UNE-P to UNE-L conversion. Therefore, we deny Supra's Motion for Partial Final Summary Order because there is an issue of fact as to whether the current rates in place include the necessary steps to effectuate a hot cut from a UNE-P arrangement to a UNE-L arrangement.

In the case at hand, Supra asks this Commission to determine whether the parties' existing interconnection agreement has a non-recurring rate for a hot cut where the lines are served by copper/UDLC and where lines are not served by copper/UDLC. If the agreement does not address these rates, then the next question is what should be the appropriate non-recurring charge, if any, for the lines served by copper/UDLC and the lines served by non-copper/UDLC.

It is apparent that the current agreement lists rates that are associated with the necessary steps to effectuate a hot cut. This rate also takes into account dispatching a truck and not dispatching a truck; however, it is unclear whether these rates encompass a UNE-P to UNE-L conversion. It is also very apparent that these rates stem from Docket No. 990649-TP and 001797-TP. For example, on page 394 of Order No. PSC-01-1181-FOF-TP, issued on May 25, 2001, Docket No. 990649A-TP, this Commission addresses the issue of dispatching a truck for IDLC and non-IDLC when a CLEC orders a SL1 loop. However, we find that there arguably is an issue of fact as to whether this rate covers a UNE-P to UNE-L conversion.

In conclusion, we deny Supra's Motion For Summary Final Order because there is an issue of fact whether the current rate listed in the parties' agreement covers a "hot cut" for a UNE-P to UNE-L conversion. There is an issue of fact as to whether the work times and activities for a hot cut process are identical regardless of whether the conversion is from retail to

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[15] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

UNE-L, resale to UNE-L or from UNE-P to UNE-L. Therefore, we hold that Supra's Motion be denied.

This docket will remain open to determine the merit(s) of Supra's First Amended Petition.

Based on the foregoing, it is

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

ORDERED that Supra Telecommunications & Information Systems, Inc.'s Motion For Partial Summary Final Order is denied. It is further

ORDERED that this docket shall remain a complaint proceeding limited to BellSouth Telecommunications, Inc. and Supra Telecommunications & Information Systems, Inc.

By ORDER of the Florida Public Service Commission this 12th day of October, 2004.

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

(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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.