

FLORIDA PUBLIC SERVICE COMMISSION  
Capital Circle Office Center • 2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

MEMORANDUM

MARCH 12, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING, *AK* BOWMAN *AKB*)  
DIVISION OF COMMUNICATIONS (SIRIANNI) *AKS*

RE: DOCKET NO. 980155-TP - PETITION OF SUPRA  
TELECOMMUNICATIONS & INFORMATION SYSTEMS FOR GENERIC  
PROCEEDING TO ARBITRATE RATES, TERMS, AND CONDITIONS OF  
INTERCONNECTION WITH BELL SOUTH TELECOMMUNICATIONS, INC.,  
OR, IN THE ALTERNATIVE, PETITION FOR ARBITRATION OF  
INTERCONNECTION AGREEMENT.

AGENDA: MARCH 24, 1998 - REGULAR AGENDA - DECISION PRIOR TO  
HEARING - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\980155.RCM

CASE BACKGROUND

On January 30, 1998, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Petition for a Generic Proceeding to Arbitrate Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc., or In the Alternative, Petition for Arbitration of Interconnection Agreement. By its Petition, Supra seeks either a generic proceeding to arbitrate rates, terms and conditions of interconnection with BellSouth for all participating Florida-certificated alternative local exchange companies (ALECs) or an arbitration proceeding limited to issues between Supra and BellSouth Telecommunications, Inc. (BellSouth) under the Telecommunications Act of 1996 (Act). On February 23, 1998, BellSouth filed a Motion to Dismiss Supra's Petition. Supra's response to the Motion was due March 9, 1998. On March 11, 1998, Supra filed its Response to BellSouth's Motion. According to Rule 25-22.037(2)(b), Florida Administrative Code, Supra's Response was two days late. Supra did not, however, file a motion or include a request that the Commission accept its late-filed

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Response.

This is staff's recommendation on the Motion to Dismiss

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant BellSouth's Motion to Dismiss?

**STAFF RECOMMENDATION:** Yes. There is no authority under the Act allowing the Commission to conduct a generic arbitration. Also, Supra is currently bound by a Commission approved agreement addressing resale, unbundling, and interconnection. Nothing in the Act provides for a request for arbitration while the matters at issue are governed by an approved agreement. Furthermore, staff believes that the allegations against BellSouth raised in Supra's Petition would be best addressed in a complaint proceeding. Staff notes that Supra has filed a separate Complaint against BellSouth, Docket No. 980119-TP. Even if all of Supra's allegations are taken as true and viewed in the light most favorable to the petitioner, Supra has failed to state a cause of action upon which the Commission can grant relief. Staff recommends, therefore, that BellSouth's Motion to Dismiss be granted.

**STAFF ANALYSIS:** Pursuant to Rule 1.420(b), Florida Rules of Civil Procedure, a party may move to dismiss another party's request for relief on the ground that, on the facts and the law, the party seeking relief has not shown a right to relief.

Supra's Petition should be viewed in the light most favorable to Supra, in order to determine whether Supra's request is cognizable under the provisions of Section 252 of the Act. As stated by the Court in Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." In determining the sufficiency of the petition, the Commission should confine its consideration to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Furthermore, the Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

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### **Petition**

In its Petition, Supra asks that the Commission open a generic docket to establish the rates, terms and conditions of interconnection between BellSouth and all Florida-certificated ALECs that choose to intervene in the proceeding. Supra asserts that the Commission has traditionally used generic proceedings to address issues that have industry-wide effects. Supra argues that the rates, terms and conditions of interconnection with BellSouth are of "broad significance" throughout the telecommunications industry.

Supra also argues that BellSouth has indicated that the rates, terms and conditions set in the AT&T, MCI and MFS agreements will form BellSouth's basic, unalterable position for all future negotiations. Supra asserts that BellSouth has stated that it will not negotiate with any carrier, including Supra, beyond offering new entrants a choice of either the AT&T, the MCI, the MFS, or BellSouth's "standard" interconnection agreement. Supra argues that by this action and others, BellSouth has established a track record of failure to negotiate in good faith with new entrants. Thus, Supra seeks a generic proceeding to handle arbitration issues with BellSouth across the board.

In addition, Supra argues that the Act allows the Commission to consolidate proceedings to facilitate the arbitration process. Supra also argues that the Commission has violated principles of due process by not allowing all carriers to participate in the ongoing arbitration proceeding between BellSouth and AT&T, MCI and MFS, Docket Nos. 960757-TP, 960833-TP, and 960846-TP, because BellSouth has stated that the results of those arbitrations will form BellSouth's basic position in arbitrations and negotiations with all other carriers. Supra further argues that the Commission also violated due process principles by not allowing other carriers to participate in the original arbitration proceedings in Dockets Nos. 960833-TP, 960757-TP, and 960916-TP because the Commission's decisions in the consolidated arbitration proceedings constitute "statements of broad policy and general applicability. . . ." Supra asks, therefore, that the Commission defer any final decision in Dockets Nos. 960833-TP, 960757-TP, and 960846-TP, until the Commission has conducted a generic proceeding open to all carriers to arbitrate BellSouth's rates, terms and conditions of interconnection, resale, and unbundled network elements.

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In the alternative, Supra asks that the Commission conduct an arbitration proceeding to determine the rates, terms and conditions of interconnection between Supra and BellSouth. Supra notes that it already has an approved interconnection agreement with BellSouth, but argues that it was forced to enter into that agreement by BellSouth personnel who indicated that Supra had no other choice. Supra states that its current interconnection agreement is the AT&T/BellSouth agreement. Supra adds that it requested negotiations with BellSouth in September 1997, but was unable to wait the full 135 days required in order to request arbitration because Supra had already invested a substantial sum in preparation for providing local exchange service.

Supra asserts that it has experienced numerous problems in its dealings with BellSouth. Supra notes that the billing problems it has had with BellSouth have been particularly egregious and have resulted in Supra losing approximately \$1 million. Supra further asserts that BellSouth has also tried to interpret various provisions in the parties' agreement in the manner most detrimental to Supra's operations. Supra adds that BellSouth has refused to negotiate to resolve these problems.

In view of the numerous problems it has had with BellSouth, including BellSouth's refusal to negotiate to resolve those problems, and because BellSouth has failed to implement properly the provisions of the approved agreement between BellSouth and Supra, Supra asks that the Commission conduct an arbitration proceeding to resolve the issues between the parties.

### **BellSouth**

In its Motion to Dismiss, BellSouth asks that the Commission dismiss Supra's Petition because there is no authority for Supra to request a generic proceeding, and Supra cannot ask for arbitration when it already has an approved agreement with BellSouth. See Order No. PSC-98-0206-FOF-TP, issued in Docket No. 971555-TP, on February 3, 1998.

Regarding Supra's request for a generic proceeding, BellSouth first argues that the petition should be dismissed because the Act does not authorize generic arbitration proceedings. Citing Section 47 USC §§ 252(b)(1) and (2), BellSouth argues that the Act contemplates arbitration between individual parties, and does not provide for "mass proceedings" between incumbent LECs and all

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potential ALECs. BellSouth adds that Supra has cited no authority for its request.

BellSouth does agree that the issues under that Act have effects on the whole telecommunications industry. BellSouth asserts that the Act, however, contemplates only arbitrations between individual parties when negotiations between those parties have failed to produce a complete agreement. BellSouth adds that while the Florida Commission may have used generic proceedings in the past, such proceedings are not contemplated by the Act. Citing Order No. PSC-98-0008-PCO-TP, issued in Docket Nos. 960833-TP, 960757-TP, and 960846-TP, on January 2, 1998, BellSouth states that the Commission has already determined that the only parties in arbitrations should be the requesting carriers and the ILEC; the Act does not contemplate other parties that will not be bound by the final agreement resulting from the arbitration process.

BellSouth also asserts that Supra's allegations that BellSouth has negotiated in bad faith are "ludicrous," and unsupported. In addition, BellSouth states that it agrees that the Act allows arbitration proceedings to be consolidated for efficiency, but BellSouth adds that Supra is not in an arbitration proceeding; therefore, there is nothing to combine.

Furthermore, BellSouth disputes Supra's assertions that the Commission's decision not to allow other parties to participate in the AT&T, MCI and MFS arbitration proceedings violated the due process rights of all other potential ALECs. BellSouth notes that in Order No. PSC-98-0008-PCO-TP, the prehearing officer noted that the interconnection agreements resulting from these arbitration proceedings will be binding only on the parties participating in the proceedings. See Order No. PSC-98-0008-PCO-TP at p. 3. BellSouth notes that the prehearing officer's decision was upheld by the full Commission on reconsideration. BellSouth asks, therefore, that the Commission dismiss Supra's petition.

Regarding Supra's request for an arbitration proceeding to resolve issues between Supra and BellSouth, BellSouth argues that the Act does not contemplate an arbitration between parties that already have an approved agreement. BellSouth argues that Supra should not be allowed to dispense with a Commission-approved agreement when there is no authority in the Act for it to do so.

BellSouth also asserts that it did not "bully" Supra into

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taking the AT&T/BellSouth agreement. BellSouth asserts that it suggested to Supra that it review the agreement and have counsel review the agreement. BellSouth asserts that Supra did not take its advice and subsequently signed the agreement. Because Supra signed the agreement, BellSouth argues that Supra cannot complain that it does not like the agreement and should be allowed to arbitrate another one. BellSouth states that the Supra/BellSouth agreement covers every aspect of the interconnection relationship between Supra and BellSouth. The agreement lasts for two years. BellSouth argues, therefore, that there are no issues to arbitrate. Furthermore, BellSouth asserts that Supra has not met the necessary time lines for requesting arbitration under the Act.

Finally, BellSouth denies all of Supra's allegations that it has not negotiated with Supra in good faith and that it has failed to properly implement the terms of the agreement. BellSouth states that it has attempted to help Supra and to provide Supra with training that would help the company better compete. BellSouth adds, however, that it is under no obligation to ensure that Supra is financially successful. For these reasons, BellSouth asks that the Commission dismiss Supra's entire Petition.

**Supra (Late-filed Response - included for consideration at the Commission's discretion.)**

As stated in the Case Background, Supra's Response to BellSouth's Motion was filed two days late. Supra did not request that the Commission consider its late-filed response, nor did it include an explanation for the lateness of its filing. For this reason, staff does not believe that the Commission should consider Supra's Response in making its determination on BellSouth's Motion. If, however, the Commission chooses to consider Supra's Response, staff's analysis is set forth below.

In its Response, Supra argues that it has, in fact, properly stated a cause of action. Citing Elliott v. Hernando County, 281 So. 2d 395 (Fla. 2nd DCA 1973). Supra argues that its allegations must be taken as true. Thus, Supra argues that the Commission should disregard BellSouth's procedural claims and proceed on Supra's petition.

Supra also argues that there has been no court determination that the state commissions do not have the authority to consider violations of the duty to negotiate in good faith. Supra adds that

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the Act clearly states that the state commissions have the authority to refuse to implement an interconnection agreement that is not in the public interest. Supra argues, therefore, that if the Commission determines that BellSouth unfairly coerced Supra into signing an interconnection agreement, or that the agreement itself is not in the public interest, then the Commission may set aside the existing agreement and arbitrate another one.

In addition, Supra argues that no court has determined that a state commission cannot hold a generic proceeding. Supra notes that California uses generic proceedings to address certain aspects of arbitration proceedings. Supra asserts that, in this case, a generic proceeding could serve as "corrective action" against BellSouth because it would allow small ALECs to combine their resources in order to more effectively work towards obtaining a satisfactory agreement with an "uncooperative incumbent local exchange carrier." Supra adds that it would benefit the small ALECs significantly if they are allowed to combine their resources in a generic proceeding.

Based on the above, Supra states that the Commission should allow it to proceed on its Petition and deny BellSouth's Motion to Dismiss.

**STAFF ANALYSIS:**

After reviewing the Act and Supra's Petition, staff does not believe there are any provisions in the Act authorizing a state commission to grant the specific relief requested by Supra. Thus, Supra has failed to allege a cause of action upon which relief can be granted by this Commission. Staff recommends, therefore, that BellSouth's Motion to Dismiss be granted.

To the extent that Supra has asked for a generic arbitration proceeding open to all Florida-certificated ALECs, staff believes that the Act is clear. The Commission has already determined that Section 252 contemplates that only the party requesting interconnection and the incumbent local exchange company should be parties to the arbitration proceeding. Section 252(b)(1) of the Act states that the "carrier or any other party to the negotiation" may request arbitration, while Section 252(b)(3) says "a non-petitioning party to a negotiation may respond to the other party's petition" within 25 days. In addition, Section 252(b)(4) requires the state commission to limit its consideration to the issues

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raised by the petition and the response. The Commission has adhered to this interpretation of Section 252 in Order No. PSC-96-0933-PCO-TP, which established procedure in Docket No. 960833-TP, and Order Nos. PSC-98-0007-PCO-TP, PSC-98-0008-PCO-TP, PSC-98-0227-FOF-TP, and PSC-98-0226-FOF-TP, also issued in Docket No. 960833-TP, as well as in Order No. PSC-98-0119-PCO-TP, issued in Docket No. 960847-TP.

While Section 252(g) does allow for consolidation of arbitration proceedings for administrative efficiency, that provision contemplates that there is an actual arbitration proceeding to consolidate. It does not contemplate initiation of a generic proceeding by one ALEC that would be open to all ALECs that care to participate. Section 252(g) states that a state commission may consolidate proceedings "[w]here not inconsistent with the requirements of this Act . . . ." Staff believes that opening a generic proceeding would clearly go beyond consolidating arbitration dockets between specified parties; thus, it would be inconsistent with the requirements of the Act. In view of the Act's requirements, staff recommends that Supra's request for a generic arbitration proceeding fails to state a cause of action upon which the Commission can grant relief.

As for Supra's request for an arbitration proceeding between Supra and BellSouth, staff can find nothing in the Act authorizing the Commission to conduct an arbitration on matters covered by a Commission-approved agreement. Staff can also find nothing in the Act authorizing a state commission to alter terms within an approved negotiated agreement or to nullify an approved negotiated agreement. Staff notes that Supra did not file a motion for reconsideration of the Commission's order approving Supra's agreement with BellSouth.

Furthermore, Supra's petition does not comply with Section 252(b)(2)(a) because Supra did not submit any documentation concerning unresolved issues, the position of each of the parties, and any other issues discussed and resolved by the parties. Staff notes that because neither party indicated the exact date in September 1997 that BellSouth received Supra's request for negotiations, staff cannot determine whether Supra's petition meets the filing requirements of Section 252(b)(1) as asserted by BellSouth.

As for the specific allegations against BellSouth contained

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within Supra's petition, staff believes that the specific allegations raised by Supra are best addressed within the context of a complaint proceeding, rather than an arbitration proceeding. Staff notes that on January 23, 1998, Supra filed a Complaint against BellSouth for alleged violations of the Act and Petition for resolution of certain disputes between BellSouth and Supra regarding interpretation of the Interconnection, Resale, and Collocation Agreements between Supra and BellSouth. Supra also requested relief on an emergency basis. See Docket No. 980119-TP.

Based on the foregoing, staff recommends that Supra's petition fails to state a cause of action upon which the Commission can grant relief. Staff recommends, therefore, that BellSouth's Motion to Dismiss be granted.

**ISSUE 2:** Should this docket be closed?

**STAFF RECOMMENDATION:** Yes. If the Commission approves staff's recommendation in Issue 1, no other matter will remain for the Commission to address. This docket should, therefore, be closed.

**STAFF ANALYSIS:** If the Commission approves staff's recommendation in Issue 1, no other matter will remain for the Commission to address. This docket should, therefore, be closed.