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April 16, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (B. KEATING, BOWMAN) *SK B B MCB*  
DIVISION OF COMMUNICATIONS (SIRIANNI, MUSSELWHITE) *SSM 102*

RE: DOCKET NO. 980119-TP - COMPLAINT OF SUPRA  
TELECOMMUNICATIONS & INFORMATION SYSTEMS AGAINST  
BELLSOUTH TELECOMMUNICATIONS, INC. FOR VIOLATION OF THE  
TELECOMMUNICATIONS ACT OF 1996; PETITION FOR RESOLUTION  
OF DISPUTES AS TO IMPLEMENTATION AND INTERPRETATION OF  
INTERCONNECTION, RESALE AND COLLOCATION AGREEMENTS; AND  
PETITION FOR EMERGENCY RELIEF.

AGENDA: APRIL 28, 1998 - REGULAR AGENDA - DECISION PRIOR TO  
HEARING - MOTION FOR RECONSIDERATION OF PREHEARING  
OFFICER'S ORDER - ORAL ARGUMENT NOT REQUESTED

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\980119ro.RCM - ALTHOUGH THE  
PARTIES DID NOT REQUEST ORAL ARGUMENT, THIS IS A DECISION  
PRIOR TO HEARING AND ORAL ARGUMENT MAY BE GRANTED AT THE  
COMMISSION'S DISCRETION. STAFF BELIEVES, HOWEVER, THAT  
THE PLEADINGS ARE SUFFICIENT FOR A FULLY INFORMED  
EVALUATION OF THE ISSUES AND THAT ORAL ARGUMENT WILL NOT  
AID THE COMMISSION IN ITS DECISION.

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CASE BACKGROUND

On January 23, 1998, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) for alleged violations of the Telecommunications Act of 1996 (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 (Petition). Supra also requested relief on an emergency basis. On February 16, 1998, BellSouth filed its Answer and Response to Supra's Petition. This matter has been set for hearing on April 30, 1998.

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On February 26, 1998, Commission staff conducted an issues identification meeting. At that meeting, a dispute arose regarding the inclusion of certain issues suggested by Supra. On March 6, 1998, the parties submitted legal memoranda on the issues in dispute, and on March 11, 1998, the parties presented oral argument on the disputed issues. By Order No. PSC-98-0416-PCO-TL, issued March 24, 1998, the prehearing officer excluded certain issues proposed by Supra regarding whether BellSouth had failed to negotiate in good faith in violation of the Act, had entered into agreements containing unfair terms in violation of the Act, and had failed to give Supra access to all unbundled elements in violation of the Act. The prehearing officer also excluded issues regarding whether BellSouth is required to resell its billing services and dark fiber to Supra.

On April 3, 1998, Supra filed a Motion for Reconsideration of Order No. PSC-98-0416-PCO-TL. Therein, Supra seeks reconsideration of the prehearing officer's decision to exclude these issues. On April 9, 1998, BellSouth filed its Response to Supra's Motion for Reconsideration.

### **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant the Motion for Reconsideration filed by Supra Telecommunications and Information Systems, Inc.?

**RECOMMENDATION:** No. Supra has failed to identify any point of fact that the prehearing officer overlooked, or any mistake made by the prehearing officer in applying the law in rendering Order No. PSC-0416-PCO-TL. Therefore, Supra's Motion for Reconsideration should be denied.

**STAFF ANALYSIS:** The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the prehearing officer failed to consider in rendering his 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 161 (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);

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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. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

### Supra

In its Motion, Supra argues that it has alleged that it requested negotiation with BellSouth in September 1997. Supra asserts that among the issues it sought to negotiate was the resale of BellSouth's billing service and the resale of BellSouth's dark fiber. Supra asserts that BellSouth refused to negotiate those issues; thus, there is no agreement between BellSouth and Supra regarding those issues.

Supra also asserts that at the time of the filing of this Complaint, it was approximately 120 days from the date that it first entered into negotiations with BellSouth. Supra asserts that although its Complaint was not filed within the 135-160 day window set forth in Section 252(b)(1) of the Act for a petition for arbitration, its Complaint was filed in the vicinity of that window. Supra argues, therefore, that the Commission should fashion issues addressing dark fiber and the resale of billing services and address those issues within this docket. In addition, Supra argues that it is within the Commission's jurisdiction to also include in this Docket issues that would address BellSouth's failure to negotiate these issues in good faith.

### BellSouth

In its Response, BellSouth argues that Supra should not be allowed to include issues for arbitration for resolution in this Docket, which has been established to address Supra's complaint regarding implementation of the agreement between BellSouth and Supra. BellSouth states that the prehearing officer specifically found that these issues are not properly within the scope of this docket, although the prehearing officer did not address whether Supra could file a separate petition for arbitration of these issues.

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BellSouth further argues that Supra is trying to make this complaint proceeding into an arbitration proceeding. BellSouth notes that Supra has already admitted that it has not met the time restraints of Section 252(b)(1) of the Act. BellSouth adds that Supra has offered no new arguments, nor has it shown any reason the prehearing officer's order should be reversed. BellSouth states, therefore, that Supra's Motion for Reconsideration should be denied.

#### Staff Analysis

Staff believes that the arguments raised by Supra in its Motion for Reconsideration are the same arguments raised by Supra in its Memorandum of Law in Support of Specific Issues and at oral argument. These arguments were fully addressed by the prehearing officer at pages 3 and 4 of Order No. PSC-0416-PCO-TL.

With regard to the issues on whether BellSouth has failed to negotiate in good faith or had included unfair provisions in its agreement with Supra, the prehearing officer noted that these issues address matters relating to the relationship between BellSouth and Supra **prior** to the Commission's approval of the BellSouth/Supra agreement. The prehearing officer then stated that these issues were outside the scope of a proceeding to enforce the approved agreement. Furthermore, the prehearing officer found that it was not necessary to resolve these particular issues in order to grant the ultimate relief requested by Supra in its Complaint. Order No. PSC-98-0416-PCO-TL at page 4.

As for the issues on the resale of billing services and dark fiber, the prehearing officer found that these issues did not relate to provisions in the current BellSouth/Supra agreement. The prehearing officer determined, therefore, that these issues were not properly addressed within a complaint proceeding.

As indicated by the prehearing officer, this case concerns a complaint regarding implementation of a Commission-approved agreement. The prehearing officer noted that the Eighth Circuit Court has stated that with regard to state commission-approved agreements, the state commission's authority is limited to enforcement of the provisions in the agreement. The prehearing officer further stated that "We cannot revisit the circumstances that led to the signing and subsequent Commission approval of the agreement." Order No. PSC-98-0416-PCO-TP at pages 3 and 4. Supra

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has not shown, or even argued, that the prehearing officer misapplied the law with regard to enforcement of Commission-approved agreements.

Instead, Supra argues that it should now be allowed to arbitrate additional matters that it was unable to resolve in its negotiations with BellSouth. As noted by the prehearing officer, however, this is a case involving enforcement of the Commission-approved BellSouth/Supra agreement. Staff believes that it is clear that the Act does not contemplate arbitrating issues within a complaint proceeding. In addition, staff notes that Supra has admitted that it has not requested arbitration of these issues within the time requirements set forth in Section 252(b)(1) of the Act.

Furthermore, staff notes that the prehearing officer made no determination as to the validity of Supra's excluded issues. Order No. PSC-98-0416-PCO-TP at 4. The prehearing officer simply determined that these issues are not appropriate for determination in this complaint proceeding. Staff agrees with the prehearing officer that these issues, particularly the issues regarding dark fiber and the resale of billing services, would be more appropriately resolved within the context of a properly filed request for arbitration. Id.

Staff notes that on January 30, 1998, Supra did submit a Petition for Generic Proceeding to Arbitrate Rates, Terms and Conditions of Interconnection with BellSouth, or, in the alternative, Petition for Arbitration of Interconnection Agreement. On March 31, 1998, however, the Commission issued Order No. PSC-98-0466-FOF-TP, granting BellSouth's Motion to Dismiss Supra's Petition.

In Order No. PSC-98-0466-FOF-TP, the Commission determined that the Act does not contemplate a generic arbitration proceeding. The Commission also found that Supra had not demonstrated that its Petition had been filed within the time restraints set forth in Section 252(b)(1) of the Act. In addition, the Commission found that the Act does not contemplate arbitration of issues between parties that are contained within an effective, approved agreement between the same parties. Supra sought arbitration of all issues with BellSouth. Furthermore, the Commission found that some of the concerns raised by Supra in its Petition would be better addressed within this complaint proceeding in Docket No. 980119-TP. Order

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No. PSC-98-0446-FOF-TP at 6-8. Staff believes that many of the concerns raised by Supra in Docket No. 980155-TP will, in fact, be addressed in this complaint proceeding, as indicated by the list of approved issues attached to this recommendation as Attachment A. Issues that do not relate to the BellSouth/Supra agreement are, however, not properly addressed in this proceeding.

Again, staff emphasizes that there do appear to be issues between BellSouth and Supra that could be resolved in an arbitration proceeding properly submitted in accordance with Section 252 of the Act. Neither Supra's Complaint nor its January 30, 1998, Petition can, however, be considered proper requests for arbitration under the Act. Furthermore, staff notes that if Supra's assertion is correct that its Complaint was filed on the 120th day, then Supra's Petition for Generic Proceeding to Arbitrate Rates, Terms and Conditions of Interconnection with BellSouth, or, in the alternative, Petition for Arbitration of Interconnection Agreement was submitted on the 127th day. Relying on that count, the period during which Supra could have sought to arbitrate any issues that were not resolved in its negotiations initiated in September 1997, was between February 7, 1998, and March 4, 1998.

Based on the foregoing, staff recommends that the Commission deny Supra's Motion for Reconsideration of Order No. PSC-98-0416-PCO-TP. Supra has not identified a point of fact that the prehearing officer overlooked or a mistake in the prehearing officer's application of the law.

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

**RECOMMENDATION:** No. This Docket should remain open pending the outcome of the hearing, which is set for April 30, 1998.

**STAFF ANALYSIS:** This Docket should remain open pending the outcome of the hearing, which is set for April 30, 1998.

**Attachment A**

APPROVED ISSUES

- . Has BST failed to properly implement the following provisions of its Interconnection, Collocation and Resale agreements with Supra such that Supra is unable to provide local exchange service on parity with that which BellSouth provides:
  - a. billing requirements;
  - b. telephone number access;
  - c. provision of dial tone;
  - d. electronic access to Operations Support Systems (OSS) and OSS interfaces (Ordering and provisioning, Installation, maintenance and repair);
  - e. notification requirements;
  - f. timeliness of installation, repair, and maintenance.
2. Has BellSouth provided adequate written rules, regulations, codes, instructions, descriptions of procedures, other written materials, technical guidance, and actual support service, or made any modifications of procedures, if necessary, in timely fashion, to permit Supra to understand and utilize effectively BellSouth's procedures for billing, ordering, provisioning, installation, repair, etc., that are essential to Supra's ability to provide local exchange service on parity with BellSouth?
3. Has BellSouth acted appropriately in its billing of Supra and has Supra timely paid its bills to BellSouth?
4. Has BellSouth appropriately applied Sections A2.3.8A and A2.3.8B of its General Subscriber Services Tariff to Supra?
5. Has BellSouth responded appropriately to consumer queries regarding Supra?
6. What relief, if any, should the Commission order for Supra or BellSouth?