ATTACHMENT C

BellSouth Telecommunications, Inc.
FPSC Docket No. 001305-TP
Request for Confidential Classification

6/5/02

REQUEST FOR CONFIDENTIAL CLASSIFICATION FOR PORTIONS OF BELLSOUTH'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-02-0637-PCO-TP FILED ON MAY 15, 2002 IN FLORIDA DOCKET NO. 001305-TP

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appeal

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Ex-parte · 05245-02

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information System, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 001305-TP
	)	Filed: May 15, 2002

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Rule 25-22.036, Florida Administrative Code, respectfully requests that the Florida Public Service Commission ("Commission") Panel assigned to this docket reconsider Order No. PSC-02-0637-PCO-TP and deny Supra Telecommunications and Information Systems, Inc.'s ("Supra") Motion for an Extension of Time ("Motion") to file an executed agreement in its entirety. For the reasons discussed in detail below, reconsideration is warranted because, in granting Supra's Motion in part, the Prehearing Officer failed to consider significant points of fact and law that require the denial of Supra's Motion. Alternatively, if this Motion for Reconsideration is denied, BellSouth respectfully requests that the Commission Panel order the expedited process and affirmative relief described herein to minimize and offset Supra's continual abuse and disregard of the regulatory process, the Commission's Orders, and its obligations to pay BellSouth.

INTRODUCTION

In the almost two years that this docket has existed, one theme has emerged: Supra's goal is to frustrate and delay the arbitration process to avoid

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executing and operating under a new Interconnection Agreement with BellSouth. While Supra's goal was evident prior to the hearing in this matter, it became readily apparent after Staff's February 8, 2002 Recommendation and the Commission's March 5, 2002 vote. Since Staff's Recommendation, Supra has submitted at least 12 filings with the Commission, all of which sought delay.

To date, by continually raising baseless, repetitive, and bad faith motions, premised on fictitious "conspiracy theory" claims and speculation, Supra has effectively achieved its goal as the parties are still operating under an interconnection agreement that expired almost two years ago. Indeed, 79 days after Staff issued its Revised Recommendation, and 71 days after the Commission Panel's vote, and 50 days after the issuance of the Final Order on Arbitration, Supra has yet to execute the new Interconnection Agreement with BellSouth and has refused even to discuss the Agreement with BellSouth. Thus, the delay continues. The Prehearing Officer's decision to grant Supra's Motion for Extension of Time does nothing but reward Supra for its utter disregard for the regulatory process and the Commission itself.

The reason for Supra's delay tactics is simple – until the Commission explains to Supra that it operates under a new agreement with BellSouth, Supra refuses to pay BellSouth for services received. For instance, for services provided to Supra since January 2002, Supra has paid BellSouth nothing despite the fact that BellSouth has billed Supra, in undisputed charges alone, over $17 million. At the same time, Supra is receiving payment from a customer base that exceeds over 270,000 customers. Accordingly, every month, Supra charges and

receives payment from its customers and simply pockets the revenue instead of paying BellSouth for the wholesale services it receives. While this situation is obviously intolerable to BellSouth, the Commission should be concerned about the impact on other ALECs with whom Supra competes. By refusing to pay its current bills, Supra obtains a preference over the other ALECs who timely pay their bills. Supra can devote additional resources to advertising and other means to increase its customer base.

Under the new Agreement, however, Supra will not be able to ignore its payment obligations without fear of repercussion because the new Agreement, pursuant to the Commission Panel's Order, and consistent with all other retail and wholesale service relationships, allows BellSouth to require payment for undisputed amounts in order for Supra to continue to use BellSouth's services. Thus, under the new Agreement, Supra's current revenue windfall will cease – either because it will pay BellSouth for services received or its services will be discontinued. With this Motion for Reconsideration and request for certain affirmative relief in the alternative, the Commission Panel has yet another opportunity to put an end to this charade.

I. MOTION FOR RECONSIDERATION

A. Background

Consistent with its goal to frustrate the arbitration process and delay executing a new Interconnection Agreement with BellSouth, Supra filed its Motion for Extension of Time the day before the parties were required to file the Agreement pursuant to Order No. PSC-02-0413-FOF-TP ("Final Order") – April

25, 2002. In its Motion, Supra requested an extension of 30 days from the date the Commission issued a final order disposing of Supra's Motions for Reconsideration[1] and Supra's Motion to Recuse, for the parties to file an executed Agreement. Supra's request for an extension, although based on the suggestion that the extension "will ensure that the parties will not have to negotiate the necessary final language more than once," (Motion at 3), was a bad faith filing based on falsehoods meant to mislead the Commission.

Pursuant to the Final Order, BellSouth filed the Agreement (executed only by BellSouth) on April 25, 2002 and filed an Opposition to Supra's Motion on May 1, 2002. BellSouth raised five arguments against the extension: (1) that Supra's request was moot because BellSouth already executed and filed the Interconnection Agreement pursuant to the Commission's Final Order; (2) that BellSouth would be extremely prejudiced by an postponement of the filing of the new Agreement; (3) that in contrast, Supra would not suffer any prejudice if Motion was denied; (4) that Supra's request for an extension was nothing but a bad faith attempt to delay these proceedings; and (5) that research revealed no prior Commission order granting an extension of time to file an executed interconnection agreement when one party would be prejudiced and/or both parties did not consent to the extension.

On May 8, 2002, the Prehearing Officer granted Supra's Motion in part by giving the parties 14 days from the date the Commission Panel issued a final order disposing of Supra's Motion for Reconsideration to file an executed

[1] Supra filed two motions for reconsideration: a 200 page baseless Motion for Reconsideration of the Commission's substantive decisions in the Final Order and a 47 page baseless Motion for Reconsideration of the Commission's denial of Supra's request for a rehearing.

interconnection agreement. See Order No. PSC-02-0637-PCO-TP at 2. The Prehearing Officer denied Supra's request for an extension from the date of a ruling on its Motion to Recuse. Id. In granting the Motion, the Prehearing Officer (1) distinguished the case cited by BellSouth for the proposition that a party cannot refuse to sign an interconnection agreement following arbitration; and (2) cited to a previous and distinguishable Commission Order, wherein the Commission granted BellSouth a 14 day extension of time to file an executed interconnection agreement. Id. The Prehearing Officer did not address any of BellSouth's other arguments.

B. The Commission Failed to Consider Supra's Bad Faith Tactics in Resolving Supra's Motion.

A motion for reconsideration is appropriate if the Commission overlooked or failed to consider a point of fact or law. See Diamond Cab Co. of Miami v. King, 148 So. 2d 889 (Fla. 1962). In the instant matter, the Prehearing Officer failed to consider several facts that should have been considered in deciding Supra's Motion. The most detrimental fact that the Prehearing Officer failed to consider is that Supra's reason for the extension was predicated on a falsity. Specifically, the Prehearing Officer overlooked the fact that Supra's premise for an extension – to avoid negotiating the "necessary final language more than once" (Motion at 3) – is a sham and nothing but a ruse to camouflage its real intent. Indeed, contrary to Supra's stated reason for the extension, the uncontroverted evidence establishes that Supra has not even attempted to negotiate "necessary final language" for **any** provision in the new Agreement,

even those five issues for which Supra has not sought reconsideration, since the Commission Panel's vote on March 5, 2002.

For instance, after the Commission Panel's March 5, 2002 vote, BellSouth commenced preparation of a proposed Interconnection Agreement incorporating the decisions of the Commission. On March 12, 2002, Greg Follensbee of BellSouth, forwarded a draft of BellSouth's proposed Interconnection Agreement to Supra via e-mail and Federal Express. A copy of the transmittal message is attached hereto as Exhibit A. Paul Turner of Supra replied to Mr. Follensbee on March 15, 2002, stating that Supra believed it premature to schedule a conference call to review the proposed Agreement because the Commission had not yet issued a written order and because the parties' rights to seek reconsideration and appeal were not yet exhausted. A copy of Mr. Turner's correspondence is attached hereto as Exhibit B.

On March 27, 2002, subsequent to the Commission Panel's release of the Final Order, Mr. Follensbee again contacted Mr. Turner via e-mail, citing the express requirement that the parties submit an executed Interconnection Agreement within 30 days of the Final Order and requested that the parties within with 5 business days to finalize the new Interconnection Agreement. Mr. Turner responded on March 28, 2002, stating that Supra might file a Motion for Reconsideration and seek a stay of the Final Order. Supra again refused to discuss the Agreement with BellSouth. A copy of the correspondence between the parties is attached hereto as Exhibit C. Supra's refusal to discuss the final language of the new Agreement continues today.

Accordingly, the unrefuted evidence establishes that Supra has refused to negotiate the final provisions of the new Interconnection Agreement, even those five provisions for which Supra has not sought reconsideration. Thus, directly contravening Supra's stated reason for the extension, an extension is not needed to avoid multiple negotiations because Supra has failed to negotiate at all.

As required by Section 120.569, Florida Statutes, a filing cannot be interposed for an improper purpose such as to harass or delay. Further, regarding requests for extensions, Rule 28-106.204(5), Florida Administrative Code, requires that any request for an extension state good cause for the request. Misleading the Commission as to the reason for the extension in order to delay this proceeding violates these rules. Indeed, by ignoring the fact that Supra's reasoning for the extension is a complete falsehood, the Prehearing Officer effectively sanctioned Supra's bad faith filing. The Commission Panel should not reward Supra for its callous disregard for the Commission's rules and the Commission Panel itself by giving Supra an unwarranted extension.

The Prehearing Officer failed to consider all of these facts in deciding Supra's Motion. Accordingly, the Commission Panel should reconsider the Prehearing Officer's decision and deny Supra's Motion for an extension in its entirety because it is not based on a valid, good faith request.

C. The MCI Order Is Distinguishable.

The only authority on which the Prehearing Officer relied in granting Supra's motion was an order issued by the Commission in 1997 in Docket No. 960833-TP. In that docket, the Commission granted BellSouth's motion for an

extension of time to file an interconnection agreement despite MCI's objection to the request. With all due respect, the Prehearing Officer's reliance on that order was entirely misplaced.

In Docket No. 960833-TP, the parties arbitrated numerous issues before the Commission with respect to an interconnection agreement. In its order resolving the parties' issues, the Commission directed the parties to file a final interconnection agreement within thirty days. The parties did so. But, the parties found that they could not agree on the manner in which the Commission's rulings should be reflected in the language of the agreement. Therefore, within thirty days, the parties submitted a joint agreement that asked the Commission to further clarify its rulings on certain specific issues. The Commission agreed to do so and, at an agenda conference on February 21, 1997, the Commission ruled on the remaining issues and ordered the parties to file a final agreement by March 7, 1997.

Within a few days of the agenda conference, it became apparent that BellSouth and MCI could not agree on what the Commission had ordered. Apparently, several Commissioners had participated in the discussion of the remaining issues. Yet, in accordance with the instructions to the parties at the agenda conference, the final agreement was due to be filed before the written order reflecting the Commission's rulings was due to be issued. Therefore, BellSouth filed a motion asking that the time for filing the final agreement be postponed until after the written order was released so that there would be no

confusion about what the Commission had actually ordered. Although MCI objected to BellSouth's motion, the Commission granted it.

Plainly, the Commission's decision to grant BellSouth's motion for extension of time in Docket No. 960833-TP provides no support for the Prehearing Officer's decision to grant Supra's motion in this case. In this case, there is a clear, written order from the Commission deciding the issues that were raised in the arbitration, and the parties have had ample time to incorporate those decisions into the new agreement. To date, Supra has done nothing other than attempt to delay these proceedings. Since the Revised Commission Staff Recommendation was issued on February 25, 2002, Supra has redoubled those efforts. As noted above, focusing on the time period after the Commission's vote on March 5, 2002, Supra has steadfastly refused to participate in any discussions that would lead to a final agreement, even with regard to issues on which reconsideration has not been sought. Under these circumstances, the Prehearing Officer should not have granted Supra's motion.

Accordingly, the Commission Panel should reconsider the Prehearing Officer's Order and deny Supra's Motion for Extension of Time.

II. REQUEST FOR EXPEDITED APPROVAL OF AGREEMENT

In the alternative, if the Commission Panel will not reverse the Prehearing Officer's decision, the Commission Panel should expedite the decision on the pending motions for reconsideration and several other procedural issues. First, BellSouth requests that the Commission Panel decide the pending motions for reconsideration and the instant Motion at the June 11, 2002 agenda conference.

Second, BellSouth requests that the Commission Panel expedite the process for issuing a written order once the motions for reconsideration have been decided. Specifically, BellSouth requests that the Commission Panel order that the final order disposing of Supra's Motions for Reconsideration be issued within five (5) days of the Commission Panel's vote at the June 11, 2002 agenda conference.

Third, BellSouth requests that the Commission Panel provide specific instructions to the parties in its written order and detail the consequences of a party's refusal to sign the agreement. Specifically, BellSouth requests that the Commission Panel (a) prescribe the language changes, if any, to the agreement submitted by BellSouth on April 25, 2002, that are necessary to effect whatever ruling the Commission Panel makes on the reconsideration motions; (b) order the parties to submit a signed agreement containing the conforming language within seven (7) days of the order; (c) order BellSouth to file the Agreement with its signature within the time specified and approve the contract as submitted if Supra fails to sign the agreement within the ordered time period; and (d) order the parties to immediately operate under the new Agreement in accord with Section 2.3 of the October, 1999 agreement or relieve BellSouth of the obligation to provide wholesale services to Supra in Florida if Supra refuses to sign the follow-on Agreement within the time specified. If the Commission Panel does not anticipate these possibilities, then BellSouth will be left to pursue further administrative remedies before the Commission Panel that will take time to

resolve. At present, Supra is withholding nearly $15 million from BellSouth every month. A delay of only one month will be extremely prejudicial to BellSouth.[2]

Fourth, BellSouth requests that the Commission Panel sanction Supra for the bad faith actions described herein and in the various motions filed in this docket by BellSouth and award BellSouth attorneys' fees and all other appropriate relief.

In short, if the Commission Panel is unwilling to reverse the Prehearing Officer's ruling, the Commission Panel should nevertheless recognize the untenable position Supra has placed both BellSouth and the Commission itself in and the Commission Panel should take whatever action is necessary to expedite the execution of the follow-on agreement and thereby put an end to the virtual free ride that Supra has enjoyed since October, 1999.

WHEREFORE, BellSouth requests that the Commission Panel grant BellSouth the following relief: Overturn the Prehearing Officer's ruling in Order No. PSC-02-0637-PCO-TP. In the alternative, BellSouth requests that the Commission Panel

(1) Decide the pending motions for reconsideration and the instant motion at the June 11, 2002 agenda conference;

(2) Issue a final order disposing of the motions for reconsideration and the instant motion within five (5) days of the Commission Panel's vote at the June 11, 2002 agenda conference;

(3) Provide specific instructions to the parties, including:

[2] As an alternative protective measure, the Panel could order Supra to submit to the Commission all payments it is withholding from BellSouth while the administrative process is concluded.

(a) specific language changes, if any, to the agreement submitted by BellSouth on April 25, 2002;

(b) a requirement that the parties submit an executed agreement containing the conforming language within seven (7) days of the order;

(c) a requirement that BellSouth file the agreement with its signature regardless of whether Supra executes the agreement;

(d) a requirement that if Supra refuses to sign the agreement, the parties either immediately begin operating under the new agreement in accordance with Section 2.3 of the October, 1999 agreement or, BellSouth is relieved of the obligation to provide services to Supra;

(4) Sanction Supra for bad faith;

(5) Attorney's fees; and

(6) All other appropriate relief.

Respectfully submitted this 15th day of May, 2002.

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