

# Public Service Commission

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COMMISSION CLERK

**DATE:** JULY 11, 2002

**TO:** DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** OFFICE OF THE GENERAL COUNSEL (FUDGE) *off/c*  
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (SIMMONS, HARVEY) *SAS*

**RE:** DOCKET NO. 000121A-TP - INVESTIGATION INTO THE ESTABLISHMENT OF OPERATIONS SUPPORT SYSTEMS PERMANENT PERFORMANCE MEASURES FOR INCUMBENT LOCAL EXCHANGE TELECOMMUNICATIONS COMPANIES. (BELLSOUTH TRACK)

**AGENDA:** 07/23/02 - REQUEST FOR OFFSET - ORAL ARGUMENT WAS NOT REQUESTED. HOWEVER, IN ITS DISCRETION, THE COMMISSION MAY ENTERTAIN ORAL ARGUMENT.

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\000121Arevised.RCM

### CASE BACKGROUND

The Commission opened Docket No. 000121-TP to develop permanent performance metrics for the ongoing evaluation of operations support systems (OSS) provided for alternative local exchange carriers' (ALECs) use by incumbent local exchange carriers (ILECs). Associated with the performance metrics is a monitoring and enforcement program that is to ensure that ALECs receive nondiscriminatory access to the ILEC's OSS. Performance monitoring is necessary to ensure that ILECs are meeting their obligation to provide unbundled access, interconnection and resale to ALECs in a nondiscriminatory manner. Additionally, it establishes a standard against which ALECs and this Commission can measure performance over time to detect and correct any degradation of service provided to ALECs.

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Docket No. 000121-TP consists of three phases. Phase I began with workshops conducted by staff with members of the ALEC and ILEC communities. These workshops were held on March 30, 2000, August 8, 2000, and December 13, 2000. The purpose of Phase I was to determine and resolve any policy and legal issues in this matter. Phase II involved establishing permanent metrics for BellSouth Telecommunications, Inc. (BellSouth), including a specific monitoring and enforcement program. With the completion of Phase II, the Commission is beginning Phase III of this docket, which entails the establishment of performance metrics and a performance monitoring and evaluation program for the other Florida ILECs.

By Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, (Final Order), the Commission established permanent performance measures and benchmarks as well as a voluntary self-executing enforcement mechanism (Performance Assessment Plan) for BellSouth. By Order No. PSC-02-0187-FOF-TP, issued February 12, 2002, as amended by Order No. PSC-01-0187A-FOF-TP, issued March 13, 2002, BellSouth's Performance Assessment Plan was approved.

By Order No. PSC-02-0503-PCO-TP, issued April 11, 2002, Docket No. 000121-TP was divided into three sub-dockets: (1) 000121A-TP, in which filings directed towards the BellSouth track would be placed; (2) 000121B-TP, in which filings directed towards the Sprint track would be placed; and (3) 000121C-TP, in which filings directed towards the Verizon track would be placed.

On June 4, 2002, BellSouth filed an Expedited Petition for Temporary Relief of the Requirements of Order No. PSC-01-1819-FOF-TP. On June 28, 2002, Supra filed a Motion to Dismiss. On July 5, 2002, BellSouth filed its response.

This is staff's recommendation on the Motion and BellSouth's Petition. Staff notes that this recommendation was deferred from the July 9, 2002, Agenda and has since been revised to address Supra's Motion to Dismiss (Issue 1).

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should Supra's Motion to Dismiss be granted?

**RECOMMENDATION:** No, Supra's Motion to Dismiss should be denied.  
**(FUDGE)**

**STAFF ANALYSIS:** 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. However, staff notes that Supra's Motion to Dismiss questions this Commission's authority to hear the subject matter. Thus, regardless of whether all of BellSouth's allegations in its Petition were facially correct, if the Commission were to determine that it lacks subject matter jurisdiction, the Petition would have to be dismissed.

Supra's Motion to Dismiss

In support of its allegation that the Commission lacks subject matter jurisdiction over the Petition, Supra states that the Interconnection Agreement (Agreement) provides that negotiation and arbitration shall be the exclusive remedy for all disputes between BellSouth and Supra. Supra cites to Order No. PSC-00-2250-FOF-TP, issued November 28, 2000, in Docket No. 001097-TP, in which the Commission dismissed the portion of BellSouth's Complaint "alleging Supra's failure to pay for services received under the present agreement, because of the exclusive arbitration clause." Therefore, Supra states that pursuant to the Agreement and Commission precedent, any claim by BellSouth that it is owed money must be brought before the arbitrators.

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Supra recites BellSouth's request to be relieved of its obligation to make payments under the Performance Assessment Plan until such time as "(1) Supra demonstrates that it intends to make full and complete restitution to BellSouth; (2) Supra makes full and complete restitution to BellSouth; and (3) Supra remains current in its bills for at least six months." Supra then alleges that BellSouth's request is improper, because BellSouth cannot show that "Supra (1) has been found to owe anything, or (2) that Supra is not current in its bill."

Supra also alleges that BellSouth has failed to state a cause of action. Supra states that while BellSouth filed its Petition under Rules 28-106.201<sup>1</sup> and 25-22.036(2)<sup>2</sup>, Florida Administrative Code, BellSouth has failed to meet the requirements of those rules. Supra states that those rules require a showing that the petition is directed at some proposed agency action taken by the Commission, and a showing that the petition was timely filed. Consequently, Supra believes that BellSouth has failed to meet the requirements of Rules 28-106.201 and 25-22.036(2), Florida Administrative Code, because the Petition is not a result of any proposed agency action.

Supra states Rule 25-22.036, Florida Administrative Code, is limited to 120.569 and 120.57, Florida Statutes, formal hearings. Supra relies on the specific authority cited by Rule 25-22.036, Florida Administrative Code, which are Sections 350.01(7) and 350.127(2), Florida Statutes, and indicates that those Sections expressly reference Sections 120.569 and 120.57, Florida Statutes. Supra also points out that Sections 120.569 and 120.57, Florida Statutes, are also expressly referenced under 25-22.029, Florida Administrative Code. Supra then states that Rule 25-22.029, Florida Administrative Code, "makes clear that petitions for

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<sup>1</sup>Supra argues extensively why BellSouth's Petition is improper under Rule 28-106.201, Florida Administrative Code, entitled Initiation of Proceedings which outlines what the petition must contain. Staff notes that BellSouth's Petition was filed pursuant to Rule 28-106.204, Florida Administrative Code, entitled Motions and requires that all requests for relief be by motion. Consequently, staff has not addressed Supra's arguments regarding Rule 28-106.201, Florida Administrative Code.

<sup>2</sup>Rule 25-22.036, Florida Administrative Code, governs the initiation of formal proceedings. Rule 25-22.036(1), Florida Administrative Code, explains when an application may be filed; Rule 25-22.036(2), Florida Administrative Code, explains when a complaint may be filed; and Rule 25-22.036(3), Florida Administrative Code, details the form and content of an application or complaint.

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hearings pursuant to ss. 120.569 and 120.57, F.S. - pursuant to Rule 25-22.029 - can only be filed after the issuance of 'proposed agency action' by the Commission." (emphasis in original) Supra alleges that this same limitation exists for Rule 25-22.036, Florida Administrative Code, because the specific authority cited by Rule 25-22.036, Florida Administrative Code, "are the exact two statutory citations which follow Rule 25-22.029, F.A.C.:ss. 350.01(7) and 350.127(2)."

Supra points out that Section 350.01(7), Florida Statutes, "allows the chair of the Commission to designate a Commissioner to conduct a hearing as provided under ss. 120.569 and 120.57, F.S., and the rules adopted pursuant to these sections." Supra then alleges that because Rule 25-22.036, Florida Administrative Code, was promulgated pursuant to Section 350.01(7), Florida Statutes, BellSouth's Petition must address some "proposed agency action" taken by the Commission, which it does not.

In addition, Supra cites to Section 350.127(2), Florida Statutes, which authorizes the Commission to adopt rules to implement duties conferred by statute. Supra indicates that the Commission cites Section 350.127(2), Florida Statutes, as authority for promulgating Rule 25-22.036, Florida Administrative Code, to "implement provisions of law [s. 350.01(7)] conferring duties upon it." Consequently, Supra believes that Rule 25-22.036, Florida Administrative Code, can only be cited by a party seeking a formal hearing pursuant to Sections 120.569 and 120.57, Florida Statutes, which according to Supra, can only be requested after the issuance of proposed agency action.

Next, Supra relies on the laws implemented section found at the end of Rule 25-22.036, Florida Administrative Code, which expressly cites to Sections 120.569 and 120.57, Florida Statutes. Supra states that the plain meaning of 120.569, presumes that the agency has issued some proposed agency action within the past 21 days.<sup>3</sup> Therefore, Supra moves that the Commission dismiss

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<sup>3</sup>Supra cites the relevant part of Section 120.569(1), Florida Statutes, as follows:

The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency . . . Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney or record at the address of

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BellSouth's petition for lack of subject matter jurisdiction and failure to state a cause of action.

BellSouth's Response

BellSouth contends that the Commission has subject matter jurisdiction, because the Commission does not need to "make a finding of fact that BellSouth is actually owed money" as suggested by Supra." BellSouth alleges that it is undisputed that BellSouth is owed money for wholesale telecommunications services and that Supra admits the parties are arbitrating Supra's continued failure to pay the monthly bills it receives. "Motion at p. 3('In fact, the parties' disputes are presently before said arbitrators')"

BellSouth states that it is not requesting that the Commission resolve the parties' billing dispute, only that it be permitted to withhold payment to Supra under the Performance Assessment Plan because of the amount Supra owes BellSouth. BellSouth points out that it is not suggesting that Supra will never receive payments under the Plan, only that it will retain the amount owed Supra until the pending billing dispute is resolved.

Next, BellSouth states that Supra's arguments regarding the validity of the Petition ignore the express language of Rule 25-22.036(2), Florida Administrative Code, which does not contain a requirement that a complaint can only be initiated after the issuance of a PAA. BellSouth contends that its Petition complies with Rule 25-22.036, Florida Administrative Code, because it was filed "to address the issue of BellSouth's obligations under the Performance Assessment Plan, which was established by the Commission." BellSouth then cites several Commission decisions which indicate that a party can initiate a complaint proceeding in the absence of a PAA. (Response p. 5-6).

Next, BellSouth addresses Supra's argument that because 25-22.029, Florida Administrative Code, allows a party to protest a PAA, then "all formal hearings under the APA must be based on the issuance of a PAA." BellSouth argues that in addition to a party's ability protest a PAA under 25-22.029, Florida Administrative Code, a party also has the right to institute a complaint pursuant to 25-

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record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57 or s. 120.68.

22.036, Florida Administrative Code. BellSouth argues that adoption of Supra's argument "would lead to the absurd conclusion that a party has no right to initiate a Rule 25-22.036, Florida Administrative Code, proceeding absent the issuance of a PAA, which is in direct conflict with Commission precedent and the practice of all parties before the Commission."

Finally, BellSouth states that the Commission has the authority to address the issues raised in BellSouth's Petition because the Commission has "the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and issue orders accordingly." FPSC v. Bryson, 569 So.2d 1253, 1255 (Fla. 1990).

#### Staff Analysis

Supra argues that the Commission lacks subject matter jurisdiction to hear BellSouth's Petition, because the Agreement requires that all disputes must be resolved through negotiation and arbitration. Supra cites to Order No. PSC-00-2250-FOF-TP, issued November 28, 2000, in Docket No. 001097-TP (Order Granting Oral Argument and Granting in Part and Denying in Part Motion to Dismiss), in support of its argument.

In Docket No. 001097-TP, BellSouth filed a complaint against Supra alleging that Supra owes BellSouth a substantial sum under their current agreement and requesting that Supra be required to pay all outstanding balances, and to timely pay on a going forward basis. In the alternative, BellSouth requested permission to disconnect Supra from BellSouth's ordering interfaces and to disconnect Supra's end users. BellSouth also sought resolution of a billing dispute arising under the prior agreement. Supra filed a Motion to Dismiss the Complaint. The Commission granted in part and denied in part Supra's Motion to Dismiss. The Commission found that the dispute resolution provision contained in each agreement should be followed and proceeded to grant that portion of Supra's Motion to Dismiss regarding the current agreement, because that agreement contained an arbitration clause. However, the Commission denied the portion of the Motion regarding the billing dispute under the prior agreement, because that agreement did not contain an arbitration clause, but instead provided that all disputes be resolved by petition to the Florida Public Service Commission.

Staff believes that Order No. PSC-00-2250-FOF-TP, is distinguishable from the facts in this case. In Docket No. 001097-TP, BellSouth was seeking resolution of disputes that arose from the parties' interconnection agreements. In this case, BellSouth is not seeking resolution of the parties' ongoing billing dispute, but relief from a Commission Order. While Supra argues that BellSouth cannot show that "Supra (1) has been found to owe anything, or (2) that Supra is not current in its bill," the standard of review for a Motion to Dismiss is to assume that all allegations in the Petition are true. So, the question becomes: assuming that Supra owes the amount alleged by BellSouth, may the Commission allow BellSouth to offset the amount, if any, it owes Supra? Staff believes that the Commission has the authority to relieve a party of the obligations of a Commission order. The Commission has the discretion to grant the temporary relief requested based merely on the fact that it is undisputed that there is a billing dispute among the parties.

Supra also alleges that BellSouth cannot initiate a proceeding pursuant to Rules 28-106.201, and 25-22.036, Florida Administrative Code. However, staff agrees with BellSouth that Supra's interpretation of the Rules is "twisted and convoluted" and is contrary to the plain meaning of the Rules and longstanding Commission precedent. See Docket No. 980119-TP, In re: Complaint of Supra Telecommunications & Information Systems, Inc. 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 (This docket was established and proceeded to hearing based on a complaint filed by Supra).

Rule 25-22.036(1), Florida Administrative Code, clearly allows a party to file an application seeking authority from the Commission to engage in an activity subject to Commission jurisdiction. Moreover, Rule 28-106.204, Florida Administrative Code, requires that all requests for relief be by motion. BellSouth's Petition is in compliance with the applicable Rules. BellSouth is seeking temporary relief of an Order of this Commission, which is subject to Commission jurisdiction. Therefore, staff recommends that Supra's Motion to Dismiss be denied.

**ISSUE 2:** If the Commission approves staff's recommendation in Issue 1, should BellSouth Telecommunications, Inc.'s Expedited Petition for Temporary Relief of the Requirements of Order No. PSC-01-1819-FOF-TP be granted?

**RECOMMENDATION:** No, BellSouth should endeavor to meet all performance metrics. For those metrics that BellSouth does not meet, it should make payments as required by the Performance Assessment Plan. **(FUDGE)**

**STAFF ANALYSIS:** In its Petition, BellSouth requests that it be relieved of the requirement to make payments under the Performance Assessment Plan to Supra until: "(1) Supra demonstrates that it intends to make full and complete restitution to BellSouth; (2) Supra makes full and complete restitution to BellSouth; and (3) Supra remains current in its bill payments for at least six months."

BellSouth alleges that Supra has abused the litigation process to avoid its payment obligations to BellSouth. BellSouth maintains that due to the magnitude of the debt owed by Supra, it would be inequitable for BellSouth to make payments to Supra when Supra refuses to pay for wholesale services it receives.

Staff notes that the purpose of the Performance Assessment Plan is to encourage BellSouth to provide nondiscriminatory service by compensating ALECs for additional costs they incur when BellSouth's performance falls short. Although there is a provision which limits BellSouth's liability for payments in certain circumstances, there is no provision in the Plan to offset the penalties owed by BellSouth against alleged debts owed by Supra, or any other ALEC. As the Commission stated in its Final Order, "[w]e agree with BellSouth that in general, disputes under agreements are to be remedied by a complaint to this Commission or pursuant to the terms of those agreements."

Under the Plan, BellSouth is relieved of its payment obligations, if an ALEC's acts or omissions cause a performance measure to be missed or failed. "In addition to these specific limitations of liability, BellSouth may petition the Commission to consider a waiver based upon other circumstances." In interpreting what "other circumstances" would apply, staff relies on the longstanding rule of ejusdem generis which provides that "where the enumeration of specific things is followed by a more general

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word or phrase, the general phrase is construed to refer to a thing of the same nature as the preceding specific things." Florida Dep't of Revenue v. James B. Pirtle Constr. Co., 690 So. 2d 709, 711 (Fla. 4th DCA 1997). Consequently, staff believes that "other circumstances" should be interpreted to require a showing that the ALEC's acts or omission caused BellSouth to miss or fail a performance measure. In this instance, BellSouth is not alleging that Supra's acts or omissions have caused BellSouth to miss or fail a performance measure. Instead, BellSouth is simply arguing that because Supra owes BellSouth money, it would be inequitable for BellSouth to pay.

Staff believes that allowing BellSouth to offset would defeat the self-effectuating nature of the Plan. The self-effectuating provision of the Plan was established to provide timely incentives to correct non-compliant behavior. Allowing BellSouth to offset the amount of penalties owed or to hold amount in escrow, would diminish the effectiveness of the penalty. Moreover, a determination of the appropriate amount to offset would have to be made.

While the amount, if any, BellSouth would owe was established by the Final Order and is readily calculable, the amount Supra allegedly owes BellSouth remains in dispute. In addition, BellSouth and Supra's billing dispute is being resolved through different forums, which are outside the control of this Commission. Consequently, waiting for a determination of the amount, if any, Supra owes BellSouth would result in delayed correction of the offending behavior.

While allowing BellSouth to place any penalty amount due to Supra in escrow would appear to be an equitable solution, the amount, if any, that Supra might owe still remains in dispute. Thus, there is no equitable way to determine a specific amount BellSouth should be allowed to escrow. Although the Commission could allow BellSouth to escrow the entire amount it may owe Supra, this would deny Supra compensation for the additional costs it may incur because of BellSouth's poor performance.

Nevertheless, if the Commission believed equity dictated that BellSouth not be required to pay Supra, then BellSouth should be

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required to escrow<sup>4</sup> the entire amount until further order of the Commission. The Commission would monitor the resolution of the billing dispute at which time the Commission would determine how to disburse the money held in escrow. The escrow account should be established between BellSouth and an independent financial institution pursuant to a written escrow agreement. The Commission should be a party to the written escrow agreement and a signatory to the escrow account. The written escrow agreement should state the following: that the account is established at the direction of this Commission for the purpose set forth above; that no withdrawals of funds shall occur without our prior approval through the Director of the Division of the Commission Clerk and Administrative Services; that the account shall be interest bearing; that information concerning that escrow account shall be available from the institution to this Commission or our representative at all times; that the payments due Supra should be deposited in the escrow account within seven days after the payments become due; and that pursuant to Cosentino v. Elson, 263 So.2d 253 (Fla 3d DCA 1972), escrow accounts are not subject to garnishments.

BellSouth should deposit all payments due Supra each month into the escrow account. The escrow agreement shall also state the following: if a disbursement to Supra is required, all interest earned on the escrow account shall be distributed to Supra; and if a disbursement to Supra is not required, the interest earned on the escrow account shall revert to BellSouth.

If, however, BellSouth is allowed to offset or escrow, in this instance, staff is very concerned that there is a possibility the Commission would be reviewing more of these requests. Staff believes this would ultimately enmesh the Commission in an administrative quagmire not contemplated when the Commission established the "self-effectuating" penalty mechanism. BellSouth states in its Response to the Motion to Dismiss: "[i]ndeed, this request is not limited to Supra. The Commission could address this general issue with regard to any ALEC." Staff believes that the Commission should avoid, in this instance and on a generic basis,

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<sup>4</sup>In order to place money under bond, letter of credit, or a corporate undertaking, the exact amount to be held must be determined. Therefore, to avoid a monthly determination of the amount to be held, staff has recommended that the payments be escrowed.

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establishing a method of offsetting payments due under the Performance Assessment Plan.

Staff believes that the most effective way for BellSouth to avoid payments to Supra during resolution of the billing dispute, is by ensuring that it meets all its performance metrics. As such, staff recommends that BellSouth's request be denied.

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No, this docket should remain open to conduct the six month review process outlined in the Final Order. **(FUDGE)**

**STAFF ANALYSIS:** This docket should remain open to conduct the six month review process outlined in the Final Order.