BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier-to-carrier information.	DOCKET NO. 030349-TP ORDER NO. PSC-04-0182-FOF-TP ISSUED: February 23, 2004

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

On April 18, 2003, Supra Telecommunications and Information Systems, Inc. (Supra) filed an Emergency Petition for Expedited Review of BellSouth Telecommunications, Inc.'s (BellSouth) $75 Cash Back Promotion and Investigation into BellSouth's Pricing and Marketing Practices.

Supra alleged that BellSouth's $75 Cash Back Promotion violated Florida law and that BellSouth was allegedly using carrier-to-carrier information for marketing purposes in violation of 47 U.S.C. Section 222(b) and Section 364.01(4)(g), Florida Statutes. In an Amended complaint, filed on June 9, 2003, Supra removed the allegations regarding the $75 Cash Back Promotion, stating that the purpose of the amendment is to narrow the focus of its petition to issues involving violations of 47 USC § 222, Section 364.01(4)(g), Florida Statutes, and Commission policy. This removed the anti-competitive elements of Supra's complaint.

A hearing on the Amended Complaint was conducted on August 29, 2003. By Order No. PSC-03-1392-FOF-TP (Final Order), issued on December 11, 2003, we found that BellSouth, due to a manual coding error, did, between July 18, 2003, and August 27, 2003, share and/or use carrier-to-carrier information, acquired from its wholesale OSS and/or wholesale operations, in its retail division, with its in-house marketers and/or third party marketers for marketing purposes. Since the mistake was minor, no harm was caused to Supra, and the error was corrected immediately by BellSouth, BellSouth was not be penalized or fined for this coding error, but BellSouth was put on notice that future non-compliance of Order No. PSC-02-0875-PAA-TP, or any other order or rule of this Commission, would not be tolerated.

On December 23, 2003, Supra filed a Motion for Reconsideration of Order No. PSC-03-1392-FOF-TP asking for reconsideration arguing that we had failed to apply specific controlling legal precedent contained in paragraphs 27 and 28 of FCC Order 03-42. On January 6, 2004, BellSouth filed its Opposition to Supra's Motion for Reconsideration.

We are vested with jurisdiction in this matter pursuant to Sections 364.01, 365.051, 364.08, and 364.285, Florida Statutes.

I. Supra's Motion for Reconsideration

In its Motion, Supra asserts that reconsideration is required because we failed to apply specific controlling legal precedent, and also failed to consider specific facts.

Supra contends that several sentences contained in paragraphs 27 and 28 of FCC Order 03-42 were completely ignored in the Final Order. Supra states that if we believe that these sentences are not controlling, then we are duty bound to explain in writing why these sentences are not controlling and inapplicable to this instance, or reverse its decision. Paragraphs 27 and 28 state:

> 27. We clarify that, to the extent that the retail arm of an executing carrier obtains carrier change information through its normal channels in a form available throughout the retail industry, and after the carrier change has been implemented (such as in disconnect reports), we do not prohibit the use of that information in executing carriers' winback efforts. This is consistent with our finding in the *Second Report and Order* that an executing carrier may rely on its own information regarding carrier changes in winback marketing efforts, so long as the information is not derived exclusively from its status as an executing carrier.89 Under these circumstances, the potential for anti-competitive behavior by an executing carrier is curtailed because competitors have access to equivalent information for use in their own marketing and winback operations.
>
> 28. We emphasize that, when engaging in such marketing, an executing carrier may only use information that its retail operations obtain in the normal course of business. Executing carriers may not at any time in the carrier marketing process rely on specific information they obtained from submitting carriers due solely to their position as executing carriers. We reiterate our finding in the *Second Reconsideration Order* that carrier change request information transmitted to executing carriers in order to effectuate a carrier change cannot be used for any purpose other than to provide the service requested by the submitting carrier. We will continue to enforce these provisions, and will take appropriate action against those carriers found in violation. In addition, we note that our decision here is not intended to preclude individual State actions in this area that are consistent with our rules.

Supra asserts that if paragraph 27 addresses certain activity after a switch is complete, then the first sentence of paragraph 28 is also referring to reacquisition efforts when it uses the phrase "when engaging in such marketing, . . ."

Supra alleges that the "carrier marketing process" includes both marketing efforts before and after the switch. Supra further maintains that paragraph 28 also states that wholesale information may not be used "at any time." This, Supra declares, means before and after the switch. However, Supra states, we concluded in the Final Order that once the switch is complete, the wholesale information becomes retail.

Supra contends that the Final Order fails to consider specific facts that the information that ultimately resides in the Permanent Sunrise Table originates from BellSouth's wholesale operations, and that the information does contain specific wholesale information. Supra contends the Final Order makes the finding that the information is purged without defining what is, and what is not, wholesale information. Final Order at 18-19. Supra further contends that in the context of a customer switching away from BellSouth, the Final Order provides no explanation of why the Working Telephone Number (WTN) and the customer code are not wholesale information. Since the WTN remains in the record or file that goes into the Permanent Sunrise Table, Supra contends that our conclusion that no wholesale information remains on the record when it reaches this Table is factually incorrect.

Supra argues that if the threshold event that turns wholesale information into retail information was the completion of the conversion, the FCC would not have placed a definitive limitation that a carrier change request "cannot be used for any purpose than to provide the service requested by the submitting carrier." Using the WTN to trigger a notification to BellSouth's retail marketers of a completed switch would, Supra explains, violate the plain meaning of the FCC's limitation. Therefore, Supra concludes that if the WTN is necessary to effectuate a carrier change request, BellSouth cannot use this specific information for any other purpose than to effectuate the change.

Supra states that paragraph 27 of FCC Order 03-42 emphasizes the prohibition against BellSouth using information of a completed switch exclusively from its status as the executing carrier and that we ignored that prohibition in reaching our decision. Supra contends that "its own information" refers to BellSouth's own CPNI. Supra states that when a lead is finally generated by BellSouth's retail marketing arm, (MKIS) in accordance with FCC restrictions, BellSouth can use information of a customer's former service in order to target a promotion. However, Supra states that information is only BellSouth's "own" if BellSouth's customer provided the information to BellSouth, not if the knowledge is provided to BellSouth's wholesale division by notification of a switch, because information transmitted in a carrier change request cannot be used for any other purpose than to effectuate a carrier change. Supra concludes that the phrase "not derived exclusively" requires MKIS to identify a source, other than Operation Sunrise, for its knowledge that a specific customer has switched. Supra states that BellSouth's

retail marketing arm could receive the information either from an external source, through an in-bound call from the former retail customer, or accidentally learn of the switch in returning a call to a customer on other business.

In addition, Supra states that although we state in our order, "We find the information of the carrier change is obtained in the normal course of business as CRIS is updated" (Final Order p. 27), we did not cite any specific language from the two prior Commission orders we relied upon to substantiate our finding. Further, Supra contends, we offer no explanation of the sentences in paragraphs 27 and 28 of FCC Order 03-42.

Further, Supra states that we ignored FCC Order 98-334, paragraph 109, which places a specific burden on the executing carrier as a neutral administrator. Supra maintains that the executing carrier's role as neutral administrator is undermined if MKIS relies on information generated from Operation Sunrise. Supra further contends that allowing the executing carrier to use information directly from a CLEC service order undermines competition in Florida.

II. BellSouth's Response in Opposition

BellSouth states that we fully considered the entirety of paragraphs 27 and 28 of FCC Order 03-42, citing pages 9-10 and 20-21 of the Final Order. Further, BellSouth states that Supra made the same arguments in its post hearing brief, prefiled testimony, and in Mr. Nilson's summary at hearing.

BellSouth further contends that we considered Supra's argument that Sunrise uses information derived exclusively from BellSouth's status as an executing carrier and is thus prohibited, on pages 26-27 of the Final Order. Moreover, BellSouth adds, Supra's argument that any information obtained from a CLEC LSR regarding the loss of a BellSouth customer renders the FCC's language useless and defies the realties of a competitive market as noted by Commissioner Deason at the hearing. TR at 153.

In addition, BellSouth argues that Supra's argument that FCC Order 03-42, which places a specific burden on the executing carrier as a neutral administrator, is misplaced. Supra, BellSouth states, relied on paragraph 109 of FCC Order 98-334, whereas FCC Order 03-42 relied on paragraph 107 of Order 98-334. In any event, BellSouth states, the argument that Supra puts forth was fully considered in our Final Order.

BellSouth also asserts that Supra's argument that the use of the customer code in Sunrise is improper was considered in the Final Order. Final Order at 18-19.

Finally, BellSouth contends that Supra raises a number of new arguments which BellSouth characterizes as: (1) the working telephone number cannot be used for marketing purposes; (2) the updating of CRIS to reflect that BellSouth lost a retail customer is not

conducted in BellSouth's ordinary course of business; and (3) Sunrise does not learn of a customer switch in the ordinary course of business. BellSouth states that these arguments should be rejected because new arguments cannot be raised in a Motion for Reconsideration.

For the foregoing reasons, BellSouth requests that Supra's Motion for Reconsideration be denied.

III. Analysis and Conclusion

We hereby deny Supra's Motion for Reconsideration, because Supra has failed to identify any fact that we overlooked, or any point of law upon which we erred in rendering our decision.

The 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 Commission failed to consider in rendering its 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 162 (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); 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's argument that "several sentences contained in paragraphs 27 and 28 of FCC Order 03-42 were completely ignored in the Commissions decision in this docket" is incorrect. These provisions were fully considered on pages 9-10, and 20-21 of the Final Order. In addition, Supra made these arguments in its post-hearing brief, in its prefiled testimony, and in Mr. Nilson's summary at the hearing. Supra Post-Hearing Brief at 4-6 and TR. 112, 115, and 129.

Further, Supra argues that the information contained in Sunrise is derived exclusively from BellSouth's status as an executing carrier, and is therefore prohibited. This argument was considered and rejected in the Final Order. Final Order at 26-27. In addition, Supra's argument that any information obtained from a CLEC LSR regarding the loss of a BellSouth retail customer, renders the FCC's language in FCC Order 03-42 useless and defies the realities of a competitive market was addressed and rejected by Commissioner Deason at the hearing. TR. at 153.

Next, Supra argues that we ignored FCC legal precedent placing a specific burden on the executing carrier as a neutral administrator. Supra states that paragraph 27 in Order 03-42 cites to paragraph 109 of Order 98-334 (Second Report and Order). Actually, paragraph 27 cites to paragraph 107 of the Second Report and Order. In the Final Order, retention versus winback

marketing was considered and it was determined that retention marketing was not a issue in this docket. In addition, we determined that Sunrise does not use information for marketing purposes that it obtains exclusively as the executing carrier. Thus, nothing in paragraphs 107 or 109 of the Second Report and Order was overlooked or not considered.

Supra also argues that we failed to consider its argument that the customer code constitutes wholesale information. However, in the Final Order on two occasions, the customer code is referred to in describing Sunrise, showing that we understood and considered the impact of the customer code and rejected Supra's argument. Final Order at 18-19.

BellSouth argues that Supra has included some new arguments in its Motion: (1) the working telephone number (WTN) cannot be used for marketing purposes; (2) the updating of CRIS to reflect that BellSouth lost a retail customer is not conducted in BellSouth's ordinary course of business; and (3) Sunrise does not learn of a customer switch in the ordinary course of business. We do not consider these arguments to be new. We find that the information that Operation Sunrise uses disconnect service order information, including the WTN, resulting from a CLEC LSR and retail service orders contained in SOCS to identify and market to former BellSouth local service customers was thoroughly covered at the hearing. The information in SOCS is the same information that is provided to BellSouth's retail side in the ordinary course of business to inform retail that it lost a customer. TR. at 142, 255. BellSouth knows through Operation Sunrise that it lost a retail customer. It does know where the customer went or what services that customer is receiving from the new provider, which would be information that BellSouth learned as a result of being the executing carrier. TR. at 198. We considered this argument and determined that "once the information in CRIS is updated showing that Supra is now the provider of service, the information that a customer has switched to Supra is no longer wholesale information." Final Order at 26. Therefore, after reviewing the evidence, applicable law, and the parties' arguments, we determined that "the information of the carrier change is obtained in the normal course of business as CRIS is updated." Final Order at 27. Supra has not identified an error in this conclusion.

In light of the above discussion, we find that the matters addressed in Supra's Motion for Reconsideration do not present a point or fact of law which was overlooked or which we failed to consider in rendering our Order. Thus, the Motion is denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Supra Telecommunications and Information Systems, Inc.'s Motion for Reconsideration is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 23rd day of February, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(SEAL)

LHD

NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.