BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for emergency relief by Supra Telecommunications & Information Systems against BellSouth Telecommunications, Inc., concerning collocation and interconnection agreements.	DOCKET NO. 980800-TP ORDER NO. PSC-99-0582-FOF-TP ISSUED: March 29, 1999

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

ORDER ON MOTIONS FOR RECONSIDERATION AND REQUEST FOR STAY

BY THE COMMISSION:

CASE BACKGROUND

On June 30, 1998, Supra Telecommunications & Information Systems (Supra) filed a Petition for Emergency Relief against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, Supra asked that we require BellSouth to permit Supra to physically collocate in BellSouth's North Dade Golden Glades and West Palm Beach Gardens central offices. On July 20, 1998, BellSouth filed its Answer and Response to Supra's Petition.

Subsequent to Supra's Complaint, on August 27, 1998, BellSouth filed Petitions seeking waivers of the requirements of the Telecommunications Act of 1996 (Act), Section 251(c)(6), and paragraphs 602-607 of the Federal Communications Commission's First Report and Order (96-325) to provide physical collocation. By its Petitions, BellSouth claimed that it can no longer provide physical

collocation in its West Palm Beach Gardens and North Dade Golden Glades central offices, because it no longer has sufficient space[1].

On October 21, 1998, we held a hearing in which we received evidence concerning space availability and interpretation of BellSouth's obligations under its collocation agreement with Supra.

On December 3, 1998, our staff filed its post-hearing recommendation addressing the complaint issues. Our staff filed a separate recommendation regarding the Motions for Reconsideration of our decision on the "first-come, first served" rule. We considered our staff's recommendations at our December 15, 1998, Agenda Conference.

On December 17, 1998, Supra filed Exceptions/Objections to Staff Recommendations, two days after we had considered staff's recommendation at our Agenda Conference. On December 22, 1998, BellSouth filed a Motion to Strike Supra's Exceptions/Objections to Staff Recommendations. On January 5, 1999, Supra filed a Response and Opposition to BellSouth's Motion to Strike Supra's Exceptions and Objections.

On January 6, 1999, we issued Order No. PSC-99-0060-FOF-TP resolving Supra's complaint. Therein, we determined that there is space available in the West Palm Beach Gardens and North Dade Golden Glades central offices to accommodate Supra's requests for physical collocation. We determined that BellSouth must allocate 200 square feet in each office to Supra. In addition, we determined that BellSouth should not be required to allow Supra to physically collocate its Cisco equipment or the Ascend TNT.

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[1] By Order No. PSC-98-1417-PCO-TP, issued October 22, 1998, we determined that Supra should have first priority in the North Dade Golden Glades and West Palm Beach Gardens central offices for purposes of pursuing its complaint in this Docket.

On November 6, 1998, BellSouth filed a Motion for Reconsideration of Order No. PSC-98-1417-PCO-TP. That same day, e.spire Communications, Inc. and NextLink Florida, Inc. ("e.spire and NextLink" or "Joint Petitioners") filed a Joint Petition for Reconsideration of Order No. PC-98-1417-PCO-TP. We denied the motions by Order No. PSC-99-0047-FOF-TP, issued January 5, 1999.

On January 21, 1999, Supra filed a Motion for Reconsideration of Order No. PSC-99-0060-FOF-TP. Supra also submitted a request for oral argument on its motion. That same day, BellSouth also filed a Motion for Reconsideration. On January 29, 1999, Supra filed its Response in Opposition to BellSouth's Motion for Reconsideration. On February 1, 1999, BellSouth filed its Opposition to Supra's Motion for Reconsideration and Motion to Strike Portions of Supra's Motion. BellSouth also filed an Opposition to Supra's request for oral argument. On February 15, 1999, Supra filed its Response to BellSouth's Motion to Strike.

On February 4, 1999, BellSouth filed a Motion for Stay Pending Appeal of Order No. PSC-99-0047-PCO-TP. On February 15, 1999, Supra filed its Response to BellSouth's Motion for Stay.

Our determinations on these various motions are set forth herein.

BELLSOUTH'S MOTION TO STRIKE SUPRA'S EXCEPTIONS AND OBJECTIONS

Supra filed its Exceptions/Objections to our staff's post-hearing recommendation pursuant to Rule 25-22.056, Florida Administrative Code. Rule 25-22.056, Florida Administrative Code, is, however, no longer in effect. The applicable rule, Rule 28-106.217, Florida Administrative Code, states, in pertinent part:

> (1) Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order except in proceedings conducted pursuant to Section 120.57(3), F.S.

We note that in providing for exceptions to be filed only with regard to recommended orders, the new Uniform Rule is similar to the old Rule 25-22.056(4), Florida Administrative Code, which was cited by the parties.

BellSouth argues that Rule 25-22.056, Florida Administrative Code, allows the filing of exceptions to proposed orders submitted by a Commissioner sitting as hearing officer, or by the Division of Administrative Hearings. BellSouth asserts that the Rule does not contemplate the filing of exceptions to our staff's post-hearing

recommendation when the hearing is conducted by a panel of commissioners, rather than a hearing officer. The hearing in this Docket was conducted by a panel of commissioners. BellSouth maintains, therefore, that Supra's Exceptions/Objections are inappropriate and should be stricken.

Supra responds that it has properly filed its Exceptions/Objections in accordance with Rule 25-22.056, Florida Administrative Code. Supra argues that staff's post-hearing recommendation is clearly a recommended order and, therefore, exceptions are permitted under the Rule. Furthermore, Supra argues that nothing in the Florida Administrative Code prohibits the filing of exceptions to staff's recommendations. Thus, Supra asks that BellSouth's Motion to Strike be denied.

Determination

We emphasize that Rule 28-106.217, Florida Administrative Code, and the old Rule 25-22.056(4), Florida Administrative Code, both only contemplate the filing of exceptions when a recommended order is submitted. As set forth in Legal Environmental Assistance Foundation, Inc. V. Florida Public Service Commission, Case No. 93-2956RX:

> The advisory memoranda prepared by Commission staff who do not testify at hearing are not documents which constitute proposed orders or recommended orders. They are contemplated by and consistent with Section 120.66(1)(b), Florida Statutes. The advisory memoranda are not matters about which exceptions may be taken.

(Emphasis added.) Final Order at page 30, issued August 27, 1993, *affirmed* Legal Environmental Assistance Foundation, Inc. v. Florida Public Service Commission, 641 So. 2d 1349 (Fla. 1st DCA 1994). We shall, therefore, grant BellSouth's Motion to Strike Supra's Exceptions/Objections to Staff's Recommendations. Exceptions to staff's recommendation are not contemplated under Rule 28-106.217, Florida Administrative Code.

BELLSOUTH'S MOTION TO STRIKE PORTIONS OF SUPRA'S MOTION FOR RECONSIDERATION

BellSouth argues that the June 29, 1998, Press Release referenced and attached to Supra's Motion for Reconsideration should not be made a part of the record. BellSouth asks, therefore, that the attachment and the references to it within the text of Supra's Motion be stricken.

BellSouth argues that Supra's request to make the Press Release a late-filed exhibit is improper, because it is being proffered after the issuance of our post-hearing order. BellSouth also believes it is improper, because BellSouth has not been afforded an opportunity to object or cross-examine witnesses regarding the exhibit. In addition, BellSouth objects to the exhibit, because Supra has not shown good cause for not having provided this exhibit at hearing. Supra only indicates that it is responsive to questions that Witness Nilson was unable to answer at hearing. BellSouth asserts that this is not good cause. Therefore, BellSouth asks that the Press Release attached to Supra's Motion for Reconsideration and the portions of Supra's Motion that refer to the Press Release be stricken.

In response, Supra argues that witness Nilson was asked certain questions at hearing regarding the Ascend TNT equipment to which he was unable to respond at the time. Supra argues that the press release essentially restates Mr. Nilson's testimony, but with greater specificity. Supra claims that it supports Mr. Nilson's contention that this equipment can provision voice traffic. Supra further asserts that witness Nilson could not be expected to memorize "minutia" about the Ascend TNT equipment. Supra adds that for us to base our decision on the witness's inability to remember every detail of the equipment's functionality would be unfair, particularly when Supra has a press release that could be entered as a late-filed hearing exhibit to support the witness's testimony. In addition, Supra states that BellSouth need not conduct further cross of Mr. Nilson regarding this exhibit, because the exhibit is essentially the same information that was provided in the witness's testimony at hearing.

Determination

BellSouth's objection to Supra's request to have the Press Release entered into the record of this proceeding as a late-filed exhibit does not constitute an opportunity to cross-examine,

challenge, or rebut documents offered, as required in Sections 120.569(2)(h) and 120.70(1)(b), Florida Statutes. Cf. Citizens of State of Florida v. Florida Public Service Commission, 383 So. 2d 901 (Fla. 1980)(opposition to motions was not 'opportunity to examine and contest the material' under Section 120.61, Florida Statutes, pertaining to requests to take official recognition). We note that the press release was issued June 29, 1998, and could have been submitted at the October 21, 1998, hearing in this Docket. It would, therefore, be improper to consider the Press Release as evidence and to allow it to be entered into the record as a late-filed exhibit. As such, BellSouth's Motion to Strike the Press Release and the references to it in Supra's Motion for Reconsideration is granted.

SUPRA'S REQUEST FOR ORAL ARGUMENT

Rule 25-22.058, Florida Administrative Code, requires a movant to show ". . . with particularity why Oral Argument would aid the Commission in comprehending and evaluating the issues before it."

Supra believes that oral argument is necessary, because the factual and legal issues presented are technical and complicated. Supra believes that a proper determination requires a full understanding that can only be reached after hearing oral argument. Supra adds that oral argument will allow for a fair consideration of its Motion for Reconsideration.

BellSouth argues that Supra's request for oral argument is insufficient under Rule 25-22.058, Florida Administrative Code. BellSouth states that the Rule requires that the basis for requesting oral argument be stated "with particularity." BellSouth maintains that Supra's assertions that the issues to be addressed are technically and legally complicated are insufficient to explain why oral argument is necessary. BellSouth adds that it does not believe oral argument is necessary. Thus, BellSouth asks that Supra's request be denied.

Determination

In this particular case, it appeared to us that the matters addressed in Supra's Motion for Reconsideration were ably presented in the pleadings. Oral argument would not have assisted us in evaluating the Motion for Reconsideration. Thus, we denied Supra's Request for Oral Argument at our March 16, 1999, Agenda Conference.

SUPRA'S MOTION FOR RECONSIDERATION

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 we failed to consider in rendering our 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); 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 asks us to reconsider and reverse our decision that BellSouth should not be required to allow certain equipment to be collocated in its central offices. Supra believes that we erred in not requiring BellSouth to allow collocation of the Ascend TNT and Cisco Systems remote access concentrators.

Supra argues that the evidence presented clearly demonstrates that the Ascend TNT equipment can provide telecommunications services to PBX customers by using an SS7 gateway. Supra maintains that the evidence further demonstrates that Supra plans to use this equipment to provide basic telecommunications services to business customers. Supra explains that Section III, Paragraph A of the parties' agreement and the testimony of witness Milner, demonstrate that BellSouth has agreed that it will allow Supra to collocate equipment that can and will be used to provide telecommunications services, even if the equipment can also provide information services.

Supra argues that it was the only party that provided any evidence regarding the capabilities of the Ascend TNT equipment. Supra emphasizes that BellSouth offered no evidence regarding the capabilities of this equipment. Supra claims that the evidence clearly demonstrates that the Ascend TNT equipment combines both voice and data capabilities. Supra refers to testimony provided at hearing by Supra's witness Nilson wherein the witness explained that the Ascend TNT equipment can switch a local call using the Ascend SS7 gateway, and it will be connected directly to

BellSouth's network. The witness further testified that the equipment can switch both data and voice traffic, and that Supra intends to use it to provide both kinds of service. Supra contends that BellSouth offered no evidence to the contrary other than BellSouth witness Milner's contention that the Ascend TNT is a remote access concentrator. Supra notes that witness Milner did not claim that only a class 5 switch could carry voice and data traffic. As such, Supra argues that we did not base our decision regarding the Ascend TNT equipment upon a preponderance of the evidence in the record in accordance with Section 120.57(1)(j), Florida Statutes. Supra asserts that we should, therefore, reconsider our decision.

In addition, Supra argues that we erred as a matter of law by not requiring that BellSouth allow Supra to collocate the Ascend TNT equipment. Supra argues that BellSouth is required to apply its collocation policies in a nondiscriminatory manner, pursuant to 47 U.S.C. § 251. Supra asserts that BellSouth cannot allow some ALECs to collocate equipment and then deny Supra that same opportunity. Because the evidence was uncontradicted that this equipment can carry both voice and data traffic, Supra believes it is discriminatory not to allow Supra to collocate this type of equipment when BellSouth has a policy to allow the physical collocation of equipment that will provision voice and traffic data. Supra suggests that BellSouth has applied its policy in a discriminatory manner by allowing other ALECs to collocate equipment, but not allowing Supra to collocate equipment that is capable of substantially the same functions. Supra also believes that Section 251(c)(6) of the Act and Paragraphs 576, 581, and 579, of the FCC's First Report and Order, FCC 96-325, require that Supra be allowed to collocate this equipment, because it is equipment that is to be used for the interconnection and access to unbundled network elements.

Furthermore, Supra argues that our Order improperly shifts the burden of proof to Supra regarding the function and capabilities of the Ascend TNT equipment. Supra refers to the FCC's statement that when an ALEC seeks to collocate equipment pursuant to Section 251(c)(6), the LEC has the duty to demonstrate to the state commission that such equipment is not necessary if the LEC wishes to prohibit collocation of the equipment. BellSouth presented no evidence regarding this equipment, but we did not require BellSouth to allow this equipment to be collocated. Thus, Supra believes we erred by placing the burden of proof on Supra.

Regarding the Cisco equipment, Supra argues that we also erred by not requiring BellSouth to allow Supra to collocate this equipment. Supra asserts that this equipment is a complementary part of Supra's planned network. Supra concedes that the equipment itself does not carry PBX traffic. Supra notes, however, that a carrier that has interconnected to the LEC network may also provide data services through the same arrangement, pursuant to 47 C.F.R. § 51.100(b). Supra maintains that it will be carrying voice traffic over the same arrangement that will include the Cisco equipment. Supra further explains that the Cisco equipment will make its network more efficient and will assist in bill provisioning and alarm monitoring. Supra emphasizes that these are not enhanced services offered to the public. Instead, they are user features that will assist Supra in operating its business. Thus, Supra argues that we erred by not requiring BellSouth to allow Supra to collocate this equipment as well.

Finally, Supra asks us to unilaterally adopt the policy that this type of equipment should be allowed to be collocated by any ALEC. Supra believes that this would place ALECs on an even level with the ILECs, would promote the innovative creation and use of equipment, and would eliminate costly legal battles over what can and cannot be collocated. Supra states that such a position would foster competition and further the goals of the Telecommunications Act of 1996.

BellSouth responds that each of the points raised by Supra was considered by us in rendering our Order. BellSouth states that Supra is simply rearguing matters addressed at hearing, with the exception of the Press Release attached to its Motion. (See Issue 2). BellSouth asserts, therefore, that Supra has not identified any legal point upon which we erred, or any fact that we overlooked in rendering our decision. Thus, BellSouth asks that Supra's Motion for Reconsideration be denied.

Determination

We agree with BellSouth that the arguments presented by Supra are the same ones presented at hearing and addressed by us in Order No. PSC-99-0060-FOF-TP at pages 29 - 36. Although BellSouth did offer very little evidence rebutting Supra's assertions regarding the capabilities of the equipment at issue, Supra presented little evidence that the equipment can provide anything other than data services beyond the testimony of its witnesses. In fact, Supra's witness Graham stated that the Cisco equipment provides enhanced

services, and Supra's witness Nilson stated that the Cisco equipment is used for transmitting data traffic to data networks, a point not emphasized in Supra's Motion. See EXH 15, p. 22; TR 183.

As for the Ascend TNT, the testimony presented was unclear as to the purpose and capabilities of the equipment. Witness Nilson did indicate that the equipment could carry both data and voice traffic, but he also stated that the primary purpose of the equipment is to "off load the public switch telephone network from congestion." (TR 207). The witness was unable to answer a number of other questions regarding the capabilities of this equipment. Witness Nilson also indicated that Supra may not collocate this type of equipment in every office in which it has requested physical collocation. He stated that Supra would have to consider the space available and "give priority to our switching needs." (EXH 14, pp.14-15) Thus, it appears that this equipment is not "necessary" as set forth in Section 251(C)(6) of the Act, even if one assumes that "necessary" may also be characterized as meaning "used" or "useful," as indicated by the FCC in Paragraph 581 of FCC Order 96-325, and argued by Supra.

Supra has also argued that we improperly placed the burden of proof on Supra, because BellSouth presented little or no evidence regarding the equipment at issue. We are not, however, required to base any decision upon factual evidence that is unclear, whether it is uncontradicted or not, nor are we required to accept Supra's legal interpretations without further analysis of our own. The preponderance of the evidence presented in this case regarding the Ascend TNT and the Cisco equipment was simply unclear. We did note at page 35 of our Order that it appears that the FCC may soon require ILECs to allow these types of equipment to be collocated. We stated that:

> The evidence presented in this case was not, however, sufficient to demonstrate that this equipment is capable of providing basic telecommunications service.

Finally, regarding Supra's argument that BellSouth is not providing collocation in a nondiscriminatory fashion, this argument was specifically addressed at page 35 of our Order.

For all of the above reasons, Supra's Motion for Reconsideration is denied.

BELLSOUTH'S MOTION FOR RECONSIDERATION

We have considered BellSouth's Motion for Reconsideration in accordance with the same standard by which we considered Supra's Motion for Reconsideration, as set forth herein.

BellSouth asserts that it obtained exemptions for these offices from the FCC in 1993 and 1994. BellSouth claims that these offices have not changed in size since that time. BellSouth argues, therefore, that we erred in determining that space is available in these offices and in determining the location of the available space.

With regard to the North Dade Golden Glades central office, BellSouth argues that Exhibit 17 demonstrates that most of the space that is reserved for growth of the O3T and O4T switches will be used within a two to three year period. Once that projected growth has taken place, BellSouth argues that there will be very little space left in the identified area of this central office. BellSouth emphasizes that the space left will actually be even less than it would appear, because the local code officials require the installation of fire-rated walls around Supra's equipment. BellSouth believes that we failed to take these restrictions into consideration in our determination that there is space available for Supra in this office. Thus, BellSouth asserts that we should reconsider our decision to allocate 200 square feet in the North Dade Golden Glades office to Supra.

As for the West Palm Beach Gardens office, BellSouth asserts that the uncrating and equipment storage areas identified by us are the only areas available in the office where vendors can access the building and bring equipment into the office. BellSouth claims that this space is necessary for vendors to organize their work before they begin an installation project. BellSouth asserts that such projects may include the organization and installation of numerous pieces of equipment, as indicated in Exhibit 17. BellSouth argues that physical collocation actually requires about 500 square feet in order to meet the requirements of the local building code. If this much space is allocated to Supra in the uncrating and equipment storage areas, BellSouth maintains that there will be no space for vendors to use to bring their equipment into the central office.

For these reasons, BellSouth argues that its Motion for Reconsideration should be granted.

Supra responds that BellSouth has failed to identify any fact or point of law that we overlooked or failed to consider. Supra asserts that BellSouth's motion only raises arguments previously considered by us. Supra further asserts that BellSouth's motion does not actually challenge our decision that there is space available in these offices; instead, BellSouth argues that the areas identified by us as available for physical collocation are not suitable. Supra states that even if BellSouth's motion were granted, it would not change the outcome of our ruling that there is space available for Supra to physically collocate.

Supra believes that BellSouth has misinterpreted our decision. Supra explains that we did not require BellSouth to make specific areas available for Supra. Supra notes that we only required BellSouth to make 200 square feet available to Supra. Supra also emphasizes that we specifically stated that BellSouth would not be required to provide space to Supra "in a specific room or area discussed herein." Order at pages 20 and 26. Supra adds that BellSouth's statement that we "committed error in determining that space was available in the two central offices," is not a sufficient justification for reconsideration filed pursuant to Rule 25-22.060(2), Florida Administrative Code.

Supra further asserts that the evidence of record is clear that there is space in these offices. Supra notes that its witnesses identified several locations that would be suitable for physical collocation. Thus, Supra argues that even if we reversed our Order with regard to the spaces identified, the ultimate outcome would likely still be the same. As such, Supra argues that BellSouth's Motion for Reconsideration should be denied.

Determination

BellSouth has not identified any facts that we overlooked, or any point of law upon which we made a mistake in rendering our decision in Order No. PSC-99-0060-FOF-TP. We specifically considered and rejected the arguments raised by BellSouth regarding the areas identified and the space necessary to fill Supra's physical collocation request at pages 15 - 20, and 21 - 25 of Order No. PSC-99-0060-FOF-TP. Exhibit 17, upon which BellSouth appears to base its Motion, is specifically considered at page 24 of that Order. BellSouth has identified nothing that we overlooked or failed to consider in rendering our decision.

Furthermore, BellSouth has apparently misconstrued our rationale for identifying the areas that appear to be suitable for physical collocation by Supra. In its Motion, BellSouth states that

> The Order further held that the available space in the North Dade Golden Glades central office consisted of 987 square feet held for the O3T and O4T tandem switches and the STP. . . . The Order found that the available space in the West Palm Beach Gardens central office consisted of 454 square feet in the operating room and the equipment staging area.

Motion at p. 2. Although it is not entirely clear from BellSouth's motion, BellSouth appears to believe that we determined that the entire 987 square feet held for the O3T and the O4T switches and the STP is available for physical collocation, and that the entire 454 square feet in the uncrating (operating) and equipment staging area is available for physical collocation. Further, BellSouth seems to believe that we required BellSouth to allow Supra to physically collocate in these specific areas.

We did not, however, require BellSouth to allow Supra to collocate in these specific areas, nor did we determine that these entire areas were available. In fact, we clearly stated that it appeared that there was space in these areas that could be used by Supra for physical collocation, but that we would not require BellSouth to provide Supra with physical collocation space in a specific room or area. Order at pages 20 and 26. We emphasized that, "We shall not require BellSouth to provide Supra with physical collocation in a specific room or area discussed herein." Order at pages 26. Nevertheless, based upon the evidence presented in this Docket, we did determine that there is sufficient space to allow Supra to physically collocate in both of these central offices. Order at pages 20 and 25.

Based on the foregoing, BellSouth's Motion for Reconsideration is denied.

MOTION FOR STAY PENDING APPEAL

Rule 25-22.061(2), Florida Administrative Code, states that

> Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:
>
> (a) Whether the petitioner is likely to prevail on appeal;
> (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
> (c) Whether the delay will cause substantial harm or be contrary to the public interest.

BellSouth asks that we stay our decision that Supra should have priority in these offices pending the outcome of BellSouth's appeal of our decision. BellSouth states that it believes it will prevail on appeal of this issue. In particular, BellSouth emphasizes that neither the Act nor the FCC provided for exceptions to the "first-come, first-served" rule for filling requests for physical collocation. BellSouth does not believe that Supra's complaint is a basis for an exception to the rule.

BellSouth also asserts that it will be irreparably harmed if our decision is implemented and then overturned on appeal. BellSouth explains that if our Order is not stayed, it will have to provide Supra with collocation space. If the Order is reversed, BellSouth may either have to "conjure space out of thin air" for the ALECs that were in line ahead of Supra, or it may have to find a way to remove Supra from the offices. Thus, BellSouth asks that the status quo be maintained pending the outcome of its appeal.

BellSouth also asserts that Supra will not be harmed by a stay of our Order. BellSouth contends that Supra's applications for these offices are not in the firm order stage. BellSouth also believes that Supra is continuing to operate as a reseller; thus, it will still be able to offer competitive local exchange service during the pendency of the appeal. BellSouth claims that any harm to Supra or the public derived from a stay of our Order will be minor, while the harm to BellSouth if the stay is not granted could be much more significant.

In addition, BellSouth asks that no bond be set as a condition of the stay, because the stay will not prejudice Supra or the public.

In response, Supra asserts that BellSouth's request for a stay is premature, in part, because we have not even ruled upon BellSouth's Motion for Reconsideration. Supra also notes that we have not made a decision on BellSouth's waiver petitions; thus, there has been no decision on whether or not there is collocation space available for other ALECs in addition to Supra.

Supra also argues that BellSouth lacks standing to challenge our priority decision. Supra states that based upon our decision regarding space in this Docket, BellSouth will have to provide space to someone. It should not make a difference to BellSouth whether it provides that space to Supra or another ALEC. Supra argues that BellSouth will not be injured, nor will its rights be impaired, if Supra has priority in these offices over another ALEC. Supra adds that the two ALECs that participated in the argument regarding this issue, NextLink and e.spire, have not appealed our decision or joined in BellSouth's appeal.

In addition, Supra believes that BellSouth's lawsuit in the federal court regarding this issue is frivolous. Supra argues that the federal court has no jurisdiction over the issue. Supra also argues that BellSouth has waived any right to appeal this matter to the Florida Supreme Court or the First District Court of Appeal. Supra argues that our decision is not a decision under 47 U.S.C. §252, and, therefore, a proper appeal should have been made in accordance with Section 120.68 and 350.128, Florida Statutes. Supra adds that it does not believe that BellSouth has standing to appeal our decision and it does not believe that BellSouth has stated a valid cause of action.

Furthermore, Supra argues that BellSouth has not met the requirements of Rule 25-22.061(2), Florida Administrative Code. Supra argues that BellSouth has not demonstrated its likelihood of success on appeal. Supra argues that BellSouth's success on this issue is questionable for the reasons stated above. Supra further argues that BellSouth is not likely to succeed on appeal, because the other ALECs did not pursue physical collocation with BellSouth when they were denied space for physical collocation. Also, there has not been a final determination by us as to whether there is additional space in these offices for other ALECs.

Finally, Supra argues that a stay of our decision would delay Supra from deploying its network for possibly another two years, depending upon the length of time it takes to litigate the matter in federal court. Supra alleges that BellSouth hopes to "drag this matter out," in hope that Supra will eventually give up the fight.

For these reasons, Supra asks that the Motion for Stay be denied. If we do, however, decide to grant the Motion, Supra asks that a sufficient bond be set to offset the potential damage to Supra's business as a result of the delay. Supra suggests that a bond should be set in excess of twenty million dollars ($20,000,000).

Determination

BellSouth has adequately demonstrated that the Order should be stayed in accordance with Rule 25-22.061(2), Florida Administrative Code. Although we believe that our decision set forth in Order No. PSC-99-0047-FOF-TP is correct, the determination is one of first impression and one upon which reasonable minds may differ. We agree with BellSouth that if the Order is not stayed and Supra physically collocates in these offices, reversal of our decision could prove to be procedurally and financially difficult not only for BellSouth, but also for Supra and for this Commission.

In addition, the stay is not likely to impose substantial harm on Supra; thus, it would not be proper for us to require BellSouth to post a bond to cover Supra's suggested losses during the appeal. Further, we cannot award compensatory damages, which appears to be what Supra is requesting. Historically, we have only required the posting of a bond or corporate undertaking when the decision at issue involves the collection of monies or refunds to customers or to a party.

For the foregoing reasons, we find that it is appropriate and prudent to stay Order No. PSC-99-0047-FOF-TP pending the outcome of BellSouth's appeal. Further, BellSouth will not be required to post a bond or corporate undertaking at this time.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Motion to Strike Exceptions and Objections to Staff's Recommendations filed by BellSouth Telecommunications, Inc. is granted. It is further

ORDERED that the Motion to Strike Portions of Motion for Reconsideration filed by BellSouth Telecommunications, Inc. is granted. It is further

ORDERED that the Supra Telecommunications and Information Systems, Inc.'s Motion for Reconsideration is denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration is denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Stay Pending Appeal is granted. It is further

ORDERED that this Docket shall remain open and be placed on litigation status pending the outcome of BellSouth Telecommunications, Inc.'s appeal of this matter.

By ORDER of the Florida Public Service Commission this 29th day of March, 1999.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR 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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting 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.