**FLORIDA PUBLIC SERVICE COMMISSION**
**Capital Circle Office Center • 2540 Shumard Oak Boulevard**
**Tallahassee, Florida 32399-0850**

**M E M O R A N D U M**

**December 3, 1998**



**TO:** **DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)**

**FROM:** **DIVISION OF LEGAL SERVICES (B.KEATING)**
**DIVISION OF COMMUNICATIONS (STAVANJA, FAVORS)**

**RE:** **DOCKET NO. 980800-TP - PETITION FOR EMERGENCY RELIEF BY SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS AGAINST BELLSOUTH TELECOMMUNICATIONS, INC., CONCERNING COLLOCATION AND INTERCONNECTION AGREEMENTS.**

**AGENDA:** **12/15/98 - REGULAR AGENDA - MOTIONS FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED**

**CRITICAL DATES:** **NONE**

**SPECIAL INSTRUCTIONS:** **S:\PSC\LEG\WP\980800RC.RCM**

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## 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 asks that the Commission 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. The Commission conducted an administrative hearing regarding this matter on October 21, 1998.

Subsequent to Supra's Complaint, on August 7, 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 to provide physical collocation. By its

Petitions, BellSouth claims 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.

After Supra's Petition was set for hearing, a unique priority issue arose that appeared to affect other ALECs who had requested space in these offices. Staff believed that the issue needed to be addressed before Supra's complaint proceeded to the October 21, 1998, hearing. Staff became aware that Supra was not the first company to request physical collocation in these two central offices. Supra was, however, the only company to file a complaint under its physical collocation agreement with BellSouth when BellSouth informed it that space was not available in these two offices. In view of this situation, the Commission panel assigned to this case heard oral argument on September 22, 1998, on the following limited issue:

> In view of 47 C.F.R. § 51.323(f)(1), may Supra be considered to have first priority for physical collocation in BellSouth's Golden Glades and West Palm Beach Gardens central offices if the Commission determines, after hearing, that physical collocation is appropriate in these offices?

Participation in the oral argument did not constitute a grant of intervention in Docket No. 980800-TP. By Order No. PSC-98-1417-PCO-TP, issued October 22, 1998, the Commission 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. The Commission reasoned that Supra should have priority in this specific instance, because Supra filed its Complaint after BellSouth denied Supra phsyical collocation in these offices, well before BellSouth filed petitions for waivers for these offices, and before any other ALEC complained or otherwise brought this matter to the Commission's attention. Order at p. 10.

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. The Joint Petition is supported by the Florida Competitive Carriers Association(FCCA).

BellSouth and the Joint Petitioners also filed requests for oral argument. Supra filed Responses in Opposition to the Motion for Reconsideration and the Joint Petition on November 12, 1998. Supra also responded to the requests for oral argument. On November 23, 1998, FCCA filed a Petition to Intervene on a Limited Basis. On December 1, 1998, Supra filed a Response to FCCA's Petition. This is staff's recommendation on the requests for oral argument, the motions for reconsideration, and FCCA's Petition to Intervene.

## DISCUSSION OF ISSUES

**ISSUE 1**: Should the Commission grant FCCA's Petition to Intervene on a Limited Basis?

**RECOMMENDATION**: No. The Commission should deny FCCA's Petition. Staff recommends that the Commission acknowledge that FCCA supports NextLink's and e.spire's Joint Petition for Reconsideration, but deny FCCA's Petition to Intervene for being untimely filed.

**STAFF ANALYSIS**: FCCA filed its Petition to Intervene pursuant to Rule 28-106.205, Florida Administrative Code. This rule is not applicable, however, because the Commission has obtained an exception from the Uniform Rules to retain its existing rule on intervention, Rule 25-22.039, Florida Administrative Code. Thus, Rule 25-22.039, Florida Administrative Code, is applicable to FCCA's Petition. Rule 25-22.039, Florida Administrative Code, states, in pertinent part,

> Petition for leave to intervene must be filed at least five (5) days before the final hearing, must conform with Commission Rule 25-22.036(7)(a), and must include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

FCCA argues that it should be allowed to intervene for the limited purpose of supporting the Petition for Reconsideration filed by NextLink and e.spire. FCCA argues that many of its members have ALEC certificates and will be affected if the

Commission does not reconsider its decision in Order No. PSC-98-1417-PCO-TP. FCCA argues that it should be allowed to intervene at this late date, because the Commission has not yet had an evidentiary hearing on this issue and because the industry received insufficient notice that the Commission was addressing this issue in this Docket. FCCA adds that the Commission decision violates Section 120.56, Florida Statutes, because it represents an unpromulgated rule. Thus, FCCA believes that it should be allowed to intervene.

In its Response, Supra argues that FCCA's Petition was not timely filed in accordance with Rule 25-22.039, Florida Administrative Code. Supra also argues that FCCA has failed to demonstrate that it has a substantial interest in this proceeding. Supra disputes FCCA's assertion that the Commission's decision reflects a change in policy that will affect FCCA, because Order No. PSC-98-1417-PCO-TP states that the Commission's decision arises from the specific circumstances of this case. Furthermore, Supra explains that the Commission's decision is not an unpromulgated rule in violation of Section 120.56, Florida Statutes, because it does not represent a statement of "general applicability," as defined in Section 120.52(16), Florida Statutes. For these reasons, Supra asks that FCCA's Petition to Intervene be denied.

The Notice of Emergency Oral Argument on this procedural issue was issued and faxed on September 15, 1998, to BellSouth, Supra, all Florida-certificated ALECs, and all interested persons. As clearly set forth in the Notice of Emergency Oral Argument and in Order No. PSC-98-1417-PCO-TP, participation in the September 22, 1998, oral argument on the procedural issue did not constitute a grant of intervention in Docket No. 980800-TP.

FCCA filed its Petition to Intervene on November 23, 1998, which is more than two months after the oral argument on this issue was held, a month after Order No. PSC-98-1417-PCO-TP was issued, a month after the evidentiary hearing in this Docket was held, and 17 days after e.spire's and NextLink's Joint Petition for Reconsideration, which indicated that FCCA supported reconsideration of Order No. PSC-98-1417-PCO-TP, was filed. Staff believes that FCCA's Petition to Intervene should be denied as untimely filed.

FCCA argues that the Commission has not had an evidentiary hearing on this issue, and, therefore, FCCA has technically filed its Petition in compliance with the time requirements in Rule 28-106.205, Florida Administrative Code, (25-22.039, Florida Administrative Code). The priority issue has, however, been

clearly identified as a procedural issue upon which the Commission will not conduct an evidentiary hearing. Thus, under FCCA's argument, it could have filed its Petition to Intervene at any point prior to the closing of this Docket. Clearly, Rule 25-22.039, Florida Administrative Code, should not be construed to achieve this absurd result.

Staff also believes that sufficient notice was given that the Commission would be addressing this procedural issue in this Docket. Actual notice was provided to the parties in the Docket, as well as all Florida-certificated ALECs and interested persons. FCCA certainly had constructive notice that this issue would be addressed, because all of its members that hold ALEC certificates in Florida received notice of the oral argument. At a minimum, FCCA could have filed its Petition at the time that e.spire and NextLink filed their Petition for Reconsideration, which indicated that FCCA supported the Petition. Furthermore, staff believes that it would be unduly burdensome to the parties to be required to respond to FCCA's "eleventh hour" petition.

In addition, the Commission's decision clearly does not represent an unpromulgated rule in violation of Section 120.56, Florida Statutes. As set forth in the Order, the Commission's decision was based upon the specific facts of this case. Staff adds that FCCA's assertion appears to be improper within the context of a Petition to Intervene, and could be construed as an improperly filed Motion for Reconsideration.

For these reasons, staff recommends that FCCA's Petition to Intervene be denied. Staff suggests that the Commission simply acknowledge that FCCA supports e.spire's and NextLink's Joint Petition for Reconsideration. Staff notes that if the Commission rejects staff's recommendation and grants FCCA's Petition, FCCA takes the case as it finds it, in accordance with Rule 25-22.039, Florida Administrative Code.

**ISSUE 2**: Should the Commission grant the Requests for Oral Argument filed by BellSouth, e.spire, and NextLink?

**RECOMMENDATION**: No. The issue is clearly set forth in the pleadings and in the record. Staff does not believe that oral argument would aid the Commission in evaluating the Motions for

Reconsideration. Staff recommends that the Requests for Oral Argument be denied.

**STAFF ANALYSIS**: 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."

In support of its request for oral argument on its Motion for Reconsideration, BellSouth argues that this is a case of first impression that will affect implementation of the Telecommunications Act of 1996 in Florida. BellSouth states that it disagrees with the conclusion in Order No. PSC-98-1417-PCO-TP that this situation is unique and not likely to recur. BellSouth asserts that it has included several reasons in its Motion for Reconsideration demonstrating that this situation is likely to recur. BellSouth believes it is important to discuss these reasons. The Joint Petitioners also believe it is important for the Commission to hear oral argument. The Joint Petitioners note that this issue has not been to hearing and that only the panel assigned to this Docket has heard oral argument on this issue, not the full Commission.

Supra argues that the Commission has already done more than required in addressing this issue. Supra emphasizes that the Commission panel expedited consideration of this issue in order to address it prior to the October 21, 1998, hearing in this Docket, and allowed two non-parties to this Docket, NextLink and e.spire, to present oral argument in view of the procedural significance of this issue. Supra argues that BellSouth and the Joint Petitioners have simply restated their earlier arguments in their motions for reconsideration. Thus, Supra believes that further oral argument on this matter is not necessary and should be denied.

In this particular case, staff believes that the matters addressed in the Motions for Reconsideration are ably presented by the pleadings. The issue and related concerns are very clearly set forth in those pleadings and were thoroughly discussed at the September 22, 1998, oral argument. Staff does not believe, therefore, that further oral argument would aid the Commission panel in evaluating the Motions for Reconsideration. Thus, staff recommends that the Requests for Oral Argument be denied.

**ISSUE 3**: Should the Commission grant the Motion for Reconsideration of Order No. PSC-98-1417-PCO-TP filed by BellSouth?

**RECOMMENDATION**: No. BellSouth's Motion for Reconsideration should be denied. BellSouth has failed to identify any point of fact that the Commission overlooked, or any conclusion of law upon which the Commission made a mistake in rendering its decision in Order No. PSC-98-1417-PCO-TP. The Commission should clarify that BellSouth is encouraged, but not required, to file petitions for waiver prior to denying space for physical collocation in a central office. The Commission should also clarify that the waivers obtained by BellSouth from the FCC prior to the enactment of the Telecommunications Act of 1996 are no longer sufficient. Thus, staff suggests that the Commission clarify its Order to remove the phrase "a valid waiver" at page 9 of the Order, and replace it with the phrase "seeking a waiver from the state commission in accordance with the requirements of the Act. . . ." Furthermore, the decision on the Motion should be made by the panel assigned to this case, not by the full Commission.

**STAFF ANALYSIS**: The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the 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 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).

BellSouth

In its Motion, BellSouth argues that the full Commission should reconsider the decision in Order No. PSC-98-1417-PCO-TP, because the Commission erred in its interpretation of the FCC's Rule 47 C.F.R. § 51.323, which is the "first come, first served" rule. BellSouth also believes that the panel erred by finding that BellSouth must file a waiver for a central office before BellSouth

receives a request for physical collocation and before it denies the request for lack of space. BellSouth adds that this error will initiate a race by ALECs to the Commission to file a complaint for every central office in Florida. Finally, BellSouth asserts that the panel erred by stating that Supra brought this situation to the Commission's attention.

Specifically, BellSouth states that the FCC's First Report and Order, FCC Order 96-325, referenced and adopted the "first come, first served" requirement established in the FCC's earlier Expanded Interconnection proceeding. BellSouth notes that the FCC codified this requirement as Rule 47 C.F.R. §51.323. BellSouth argues that there are no exceptions to this rule, and further emphasizes that the filing of a complaint would certainly not be considered an exception by the FCC. BellSouth adds that the Act also provides for no exceptions to this requirement. Thus, BellSouth argues the panel erred by establishing an exception to the "first come, first served" rule.

BellSouth also argues that the panel was incorrect that BellSouth did not have valid waivers and should have sought valid waivers prior to denying space to ALECs. BellSouth argues that it did have valid FCC waivers and that it had relied on these waivers based upon its interpretation of the Act and the FCC's Rules. BellSouth notes that while the FCC Rules do indicate that an ILEC must seek an exemption from the physical collocation requirements from the state commissions, FCC Rule 47 C.F.R. §51.321(g) states that ILECs that are Class A companies must continue to provide expanded interconnection in accordance with the FCC Rules. Thus, BellSouth believed that its FCC waivers were sufficient.

BellSouth also argues that neither the Act nor the FCC's rules require it to file petitions for waiver before a request for space has been denied. BellSouth believes this requirement is unreasonable and would give rise to impossible situations. As an example, BellSouth states that it could have requests filed within days of each other. BellSouth explains that in such cases it would be impossible for BellSouth to reassess space after filling the first request. BellSouth further asserts that it would be impossible to reassess space in an office for which no previous request for physical collocation had been received.

In addition, BellSouth argues that the Commission staff already knew that BellSouth was relying on the FCC waivers.

BellSouth states that it provided the list of waivers that it had obtained from the FCC as a Late-Filed Deposition Exhibit to Dorissa Redmond's deposition in Docket No. 960833-TP, in January, 1998. BellSouth asserts that staff did not indicate at that time that the FCC waivers were insufficient. BellSouth adds that it began preparing the waiver petitions as soon as it understood that waivers from the state commission were necessary.

Furthermore, BellSouth argues that the panel's decision will have a detrimental impact on competition. BellSouth asserts that ALECs will file complaints in order to ensure their place in line no matter how narrowly the Commission's order is construed. BellSouth further argues that the Order inappropriately singles out Supra for special treatment. BellSouth believes other ALECs will seek similar treatment.

For all these reasons, BellSouth believes the Commission should reconsider its decision in Order No. PSC-98-1417-PCO-TP.

Supra

Supra asserts that BellSouth has simply restated its previous arguments made at the September 22, 1998, oral argument. Supra argues that BellSouth's motion reiterates BellSouth's belief that the "first come, first served" rule should be strictly applied and that Supra was required to wait to raise its concerns about these central offices until BellSouth had filed waiver petitions with the Commission. Supra also asserts that BellSouth believes Supra's filing of its complaint should benefit all competing ALECs, even though other ALECs did not pursue the matter.

Supra further asserts that BellSouth apparently believes that BellSouth should be solely responsible for making the final determination of whether an ALEC is allowed to physically collocate in its central offices, and should also determine when it must request a waiver. Supra asserts that, essentially, BellSouth wants to deny ALECs the opportunity to seek relief from the Commission when BellSouth denies physical collocation space, unless an ALEC is first in line in a central office. Supra explains that this is problematic, because BellSouth does not identify which ALECs have requested physical collocation, and what the results of such requests have been. Thus, if the first ALEC to be denied space does not pursue the issue, subsequent ALECs would be bound by that decision and would be precluded from pursuing the issue by other

means. Supra argues that if a subsequent ALEC were to file a complaint to pursue physical collocation, that ALEC would be foolishly wasting its time, money, and other resources for the benefit of other companies that established their place in line simply by virtue of their original request for physical collocation. Supra asserts that this is exactly what BellSouth wants, because it effectively reduces or removes BellSouth's obligations to provide physical collocation.

Supra asserts that BellSouth has identified no basis for reconsideration by the full Commission of Order No. PSC-98-1417-PCO-TP, and has simply restated its prior arguments. Therefore, Supra argues BellSouth's Motion for Reconsideration should be denied.

Recommendation and Analysis

Staff does not believe that BellSouth has identified any facts that the Commission overlooked, or any point of law upon which the Commission made a mistake in rendering its decision in Order No. PSC-98-1417-PCO-TP. Staff also believes that the Motion should be addressed by the panel assigned to this case, instead of the full Commission as indicated by BellSouth.

BellSouth has requested reconsideration of Order No. PSC-98-1417-PCO-TP pursuant to Rule 25-22.060, Florida Administrative Code. Rule 25-22.060, Florida Administrative Code, sets forth the specific requirements applicable to a motion for reconsideration. That rule does not, however, require the full Commission to address a motion for reconsideration of a decision made by a panel. Such a requirement would lessen the validity of panel decisions and would conflict with Section 350.01(5), Florida Statutes, which states, in pertinent part, that "A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding." Staff also emphasizes that this is not a policy matter that must be addressed by the full Commission in accordance with Section 350.01(6), Florida Statutes, because the Commission has clearly limited the applicability of its determination in Order No. PSC-98-1417-PCO-TP to this case and to Supra's specific circumstances. Staff recommends, therefore, that the Motion for Reconsideration be addressed by the panel assigned to this case.

As for BellSouth's assertion that the Commission should

reconsider its decision, because it misinterpreted FCC Rule 47 C.F.R. § 51.323(f)(1), staff recommends that the Commission should not reconsider its decision based upon these assertions. BellSouth's arguments on this point are the same ones that it raised at the September 22, 1998, oral argument. The Commission considered these arguments at page 3 of Order No. PSC-98-1417-PCO-TP. The Commission disagreed, however, with BellSouth's argument and determined that

> Our review of these provisions and consideration of the arguments presented confirms our belief that the situation that has arisen in this case is unique and one not contemplated by the FCC's Rule 47 C.F.R. §51.323(f)(1), the "first-come, first-served" rule.

Order at page 8. A disagreement over the interpretation and application of a rule does not constitute a mistake of law made by the Commission in rendering its decision.

BellSouth also believes the panel erred by determining that BellSouth must file a petition for waiver before it receives and denies a request for collocation. The Commission did not, however, determine that BellSouth must seek a waiver before it receives a request for collocation. Instead, the Commission determined that Supra deserved to have priority in these offices, because it had filed its complaint after it had been denied space, and "well before BellSouth had filed its waiver requests for these offices . . ., and before any other ALEC had complained." Order at p. 10. The Commission noted that BellSouth did not seek the waivers until August 7, 1998, but that it had been denying space in the offices at issue since April, 1998. It is apparent from the Commission's Order, that the Commission found that a significant amount of time had elapsed between BellSouth's denials of space and its petitions for waivers, and, thus, the Commission strongly encouraged BellSouth to reassess space in central offices after it has filled a collocation request. Order at p. 10.

The Commission did, however, state that, "Supra's complaint brought to our attention the fact that BellSouth had been denying physical collocation without a waiver from the state commission." Order at p. 10. Staff does not believe that this should be construed as requiring the filing of a petition for waiver prior to

receiving a request for physical collocation or before informing an ALEC that space is an issue in a central office. Staff believes that this statement is simply the Commission's acknowledgment that BellSouth had been denying requests for some time without seeking a waiver and that Supra brought this matter to the Commission's attention. Staff does, however, suggest that the Commission clarify this point to reflect that the Commission has not specifically required BellSouth to file petitions for waiver prior to informing a requesting ALEC that BellSouth believes that it has insufficient space to fill a request for physical collocation. While staff believes it would be preferable for BellSouth to file petitions for waiver before denying any requests for collocation, staff acknowledges that it may be difficult for BellSouth to do so, particularly in offices where BellSouth has received no previous requests. Staff suggests that BellSouth should, nevertheless, be prepared to file waiver petitions in significantly less than 4 - 5 months after informing an ALEC that BellSouth does not believe it has sufficient space to fill a request for collocation. Staff believes that only a few weeks should be necessary. Staff notes that this is a topic that will likely be explored further in the proceedings regarding BellSouth's pending Petitions for Waiver of the Physical Collocation requirements.

BellSouth also asserted that it believes the panel was incorrect in stating that BellSouth did not have valid waivers. At page 9 of the Order, the Commission stated that

> In view of the extent to which the FCC has addressed the matter of exemptions from the physical collocation requirements, we consider this is an indication that the FCC did not contemplate this situation in which a LEC denied physical collocation without a valid waiver. . . .

Staff agrees that use of the term "valid" may be somewhat misleading. Staff believes that the Commission only intended to indicate that the FCC waivers are no longer sufficient in view of the Act's requirements, not that the FCC's grant of a waiver to BellSouth prior to the Act had not been a valid act. Thus, staff suggests that the Commission clarify its Order to remove the phrase "a valid waiver" at page 9 of the Order, and replace it with the phrase "seeking a waiver from the state commission in accordance with the requirements of the Act. . . ."

BellSouth also argues that the Commission staff was already aware that BellSouth was relying on the FCC waivers, because of a late-filed deposition exhibit in Docket No. 960833-TP. Staff disagrees. First, staff believes that the exhibit to which BellSouth is actually referring is Late-Filed Deposition Exhibit 1 to Ms. Redmond's deposition. This exhibit was titled "Update of BellSouth Physical Collocation Central Office Exemptions for Florida." Upon review of the deposition transcript, it is evident that this exhibit was requested as an update to an exhibit provided with Ms. Redmond's testimony in that Docket. The context in which the exhibit was offered would not have given staff any indication that BellSouth was continuing to rely on the FCC exemptions and did not plan to file waiver petitions with the Florida Commission. In fact, the witness stated that, "I believe that there are 31 offices in the region that have already been approved for an exemption with the individual states." (Emphasis added) January 15, 1998, Deposition Transcript at p. 10. The witness also stated that "[a]nd if it's determined that there is not space, then we have to apply for an exemption with the state- - I believe the PSC." Deposition Transcript at p. 11. The exhibit was requested within the context of a discussion regarding space in central offices, what limitations there may be, and why BellSouth might find it necessary to seek an exemption. The discussion did not address the legal specifics of whether BellSouth was continuing to rely on previously obtained FCC waivers in denying ALECs' requests for space in particular offices. Therefore, staff had no way of knowing that BellSouth was relying on its FCC waivers simply by reviewing Late-Filed Deposition Exhibit 1 to Dorissa Redmond's January 15, 1998, deposition in Docket No. 960833-TP. Furthermore, staff does not believe that this is pertinent to the specific procedural decision reached in Order No. PSC-98-1417-PCO-TP. Staff does not, therefore, believe that BellSouth has identified any point of fact overlooked by the Commission in rendering its decision.

Finally, BellSouth argues that the Commission's decision will adversely affect competition and will initiate a "race for the courthouse steps." The Commission addressed similar concerns at pages 10-11 of its Order. There, the Commission emphasized that the filing of a complaint should not be viewed as a means for preserving an ALEC's place in line in a central office in any other situation. The Commission stated:

Only the timing and circumstances at work in

> this case constitute a basis for avoiding strict application of the first-come, first-served rule, because without Supra's complaint, we might not even be addressing the issue of whether there is space for physical collocation in these offices.

Order at p. 10. Staff adds that if any ALECs find it necessary and appropriate to file complaints regarding physical collocation, the Commission should address such complaints on a case-by-case basis. Retaliatory pleadings with no basis other than to attempt to improve an ALEC's place in line in a central office should not be tolerated by the Commission. Staff suggests that it would be more appropriate to address any additional concerns regarding implementation of the "first come, first served" rule within BellSouth's pending waiver dockets.

For the foregoing reasons, staff recommends that BellSouth's Motion for Reconsideration should be denied. BellSouth has failed to identify any point of fact that the Commission overlooked, or any conclusion of law upon which the Commission made a mistake in rendering its decision in Order No. PSC-98-1417-PCO-TP. The Commission should clarify that BellSouth is encouraged, but not required, to file petitions for waiver prior to denying space for physical collocation in a central office. The Commission should also clarify that the waivers obtained by BellSouth from the FCC prior to the enactment of the Telecommunications Act of 1996 are no longer sufficient. Furthermore, the decision on the Motion should be made by the panel assigned to this case, not by the full Commission.

**ISSUE 4**: Should the Commission grant the Joint Petition for Reconsideration of Order No. PSC-98-1417-PCO-TP filed by e.spire, and NextLink?

**RECOMMENDATION**: No. NextLink and e.spire have failed to identify any fact that the Commission overlooked, or any mistake of law made by the Commission in rendering its decision in Order No. PSC-98-1417-PCO-TP. The Joint Petition for Reconsideration should, therefore, be denied. Staff also believes that the Motion should be addressed by the panel assigned to this case, instead of the full Commission as indicated by the Joint Petitioners.

**STAFF ANALYSIS**: The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the 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 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).

NextLink and e.spire

The Joint Petitioners request that the full Commission review the panel's decision in Order No. PSC-98-1417-PCO-TP. The Joint Petitioners argue that they have been penalized by the Commission panel's decision for simply following the waiver procedure identified in the Act and for not filing a complaint. The Joint Petitioners assert that they had no notice that a complaint petition would have been the appropriate means to seek relief when BellSouth denied their requests for space. The Joint Petitioners also argue that the Order inaccurately states that NextLink and e.spire did not actively pursue their rights under the Act.

The Joint Petitioners also argue that the decision contradicts the Act's requirements and the FCC Rules on physical collocation. They argue that the Commission misinterpreted those rules in allowing Supra to improve its position for collocation by filing a complaint. They add that the FCC's Rule 47 C.F.R. §51.323(f)(1) requires the LECs to make space available on a "first come, first served" basis. Thus, the Joint Petitioners argue that the panel's decision directly conflicts with the "first come, first served" rule, Rule 47 C.F.R. § 51.323(f)(1).

The Joint Petitioners further explain that the panel's decision conflicts with past Commission decisions supporting the "first come, first served" requirement. They note that in Order No. PSC-95-0034-FOF-TP, issued January 9, 1995, in Docket No. 921074-TP, Petition for expanded interconnection for alternate access vendors within local exchange company central offices by Intermedia Communications of Florida, Inc., the Commission specifically determined that the "first come, first served" rule was applicable in Florida. The Joint Petitioners assert that this policy has not been changed; therefore, the decision to allow Supra to improve its position in line represents a departure from past Commission policy. The Joint Petitioners add that the decision also conflicts with the Commission encouragement to the parties in Docket No. 960786-TP to seek resolution of problems instead of filing complaints.

In addition, the Joint Petitioners argue that the Commission did not consider that the Commission does not have jurisdiction to render the decision that it did. The Joint Petitioners argue that the sequence of requests is the only criteria for establishing priority in a central office. They emphasize that the waiver process has been established if the LEC believes that no space is available. They explain that the avenue for ALECs to express concerns or objections is through the waiver process, not through a complaint.

For all of these reasons, the Joint Petitioners assert that the full Commission should reconsider the decision rendered in Order No. PSC-98-1417-PCO-TP.

Supra

Supra argues that the Joint Petitions have simply restated the arguments raised in their arguments presented at the September 22,

1998, oral argument. Supra emphasizes that these arguments were fully considered and addressed by the Commission in its Order No. PSC-98-1417-PCO-TP.

Specifically, Supra argues that the Joint Petitioners believe that Supra was required to wait to raise its concerns about these central offices until BellSouth had filed waiver petitions with the Commission. Supra also asserts that the Joint Petitioners believe Supra's filing of its complaint should benefit all competing ALECs, even though other ALECs did not pursue the matter.

Supra further asserts that it appears that the Joint Petitioners believe that BellSouth should make the final and only determination of whether an ALEC is allowed to physically collocate in its central offices, and should also determine when it is must request a waiver. Supra asserts that if the Commission adopts the Joint Petitioners' view, ALECs, other than the one that is first in line, would be denied the opportunity to seek a relief from the Commission when BellSouth denies physical collocation space. Supra explains that this is problematic, because BellSouth does not identify which ALECs have requested physical collocation, and what the results of such requests have been. Thus, if the first ALEC to be denied space does not pursue the issue, subsequent ALECs would be bound by that decision and would be precluded from pursuing the issue by other means. Supra argues that if a subsequent ALEC were to file a complaint to pursue physical collocation, that ALEC would be foolishly wasting its time, money, and other resources for the benefit of other companies that established their place in line simply by virtue of their original request for physical collocation. Supra asserts that the Joint Petitioners are not concerned by this prospect, because of their competitive interest in the outcome of this case.

Supra asserts that the Joint Petitioners have identified no basis for reconsideration by the full Commission of Order No. PSC-98-1417-PCO-TP, and have simply restated their prior arguments. Therefore, Supra argues that the Joint Petition for Reconsideration should be denied.

Recommendation and Analysis

Staff does not believe that the Joint Petitioners have identified any facts that the Commission overlooked, or any point of law upon which the Commission made a mistake in rendering its

decision in Order No. PSC-98-1417-PCO-TP. Staff recommends, therefore, that the Petition for Reconsideration be denied. Staff also believes that the Petition should be addressed by the panel assigned to this case, instead of the full Commission as indicated by the Joint Petitioners.

NextLink and e.spire have requested reconsideration of Order No. PSC-98-1417-PCO-TP pursuant to Rule 25-22.060, Florida Administrative Code. Rule 25-22.060, Florida Administrative Code, sets forth the specific requirements applicable to a motion for reconsideration. That rule does not, however, require the full Commission to address a motion for reconsideration of a decision made by a panel. Such a requirement would lessen the validity of panel decisions and would conflict with Section 350.01(5), Florida Statutes, which states, in pertinent part, that "A petition for reconsideration shall be voted upon by those commissioners participating in the final disposition of the proceeding." Staff also emphasizes that this is not a policy matter that must be addressed by the full Commission in accordance with Section 350.01(6), Florida Statutes, because the Commission has clearly limited the applicability of its determination in Order No. PSC-98-1417-PCO-TP to this case and to Supra's specific circumstances. Staff recommends, therefore, that the Petition for Reconsideration be addressed by the panel assigned to this case.

The Joint Petitioners argue that they have been penalized by the Commission's decision even though they pursued their rights in the manner that they believed was appropriate under the Act. Staff emphasizes that the Commission's decision was not intended as a punitive action against the Joint Petitioners. The Commission did, however, explain that

> The other ALECs that were denied physical collocation in these offices had the same rights under the Act as Supra and the same opportunity to seek relief when BellSouth denied their requests for physical collocation.

Order at p. 9. The Commission then determined that Supra should be allowed to have priority in these central offices for purposes of this complaint proceeding, because it would be unfair to allow other ALECs to benefit, in this specific circumstance, from Commission consideration of a matter brought to the Commission's

attention by Supra. The Joint Petitioners have not identified anything in this decision that the Commission overlooked or any mistake made by the Commission in applying the law.

As for the Joint Petitioners' assertions that the Commission should reconsider its decision, because it misinterpreted FCC Rule 47 C.F.R. § 51.323(f)(1), staff recommends that the Commission should not reconsider its decision based upon these assertions. The Joint Petitioners' arguments on this point are the same ones that they raised at the September 22, 1998, oral argument. The Commission considered these arguments at pages 4 and 5 of Order No. PSC-98-1417-PCO-TP. The Commission disagreed, however, with NextLink's and e.spire's arguments and determined that

> Our review of these provisions and consideration of the arguments presented confirms our belief that the situation that has arisen in this case is unique and one not contemplated by the FCC's Rule 47 C.F.R. §51.323(f)(1), the "first-come, first-served" rule.

Order at page 8. A disagreement over the interpretation and application of a rule does not constitute a mistake of law made by the Commission in rendering its decision.

The Joint Petitioners also argue that the Commission's decision conflicts with past Commission policy as set forth in Order No. PSC-95-0034-FOF-TP, issued January, 1995. Staff disagrees. In Order No. PSC-98-1417-PCO-TP, the Commission clearly explains that it based its decision on circumstances that it believed the FCC did not contemplate. While this may represent a variance from Commission policy expressed previously, it is not in direct conflict.

In addition, Order No. PSC-95-0034-FOF-TP was issued prior to the Act when the telecommunications industry was under a different regulatory scheme. In Order No. PSC-95-0034-FOF-TP, the Commission addressed issues regarding expanded interconnection for Private Line and Special Access in a proceeding referred to as Phase II Expanded Interconnection. At page 36 of that Order, the Commission noted that the FCC had determined that:

> if a LEC offers both interstate and intrastate

> expanded interconnection, it should do so in a manner that satisfies both federal and state requirements to the extent possible, . . . .

The Commission also adopted the following standards, terms, and conditions contained in FCC Docket No. 91-141, FCC Report and Order, Released July 25, 1994, for intrastate filings:

1. Equipment Designations;

2. Virtual Collocation Through Generally Available Tariffs;

3. Installation, Maintenance and Repair Standards:

4. Cross-connect element must be tariffed at study-area-wide average rate for both physical and virtual collocation (Must only tariff physical if LEC chooses to offer physical);

5. Virtual collocation arrangements do not involve the reservation of segregated central office space for the use of interconnectors;

6. First-come, first-served space allocation for voluntary physical collocation;

7. If space is exhausted under voluntary physical collocation, virtual collocation must be offered;

8. Charges for central office space, power, environmental conditioning, and labor and materials for installing voluntary physical collocation must be uniform for all interconnectors in each individual central office; and

9. There are no liability insurance requirements for virtual collocation, unless LECs make a compelling case otherwise.

Order PSC-95-0034-FOF-TP at p. 36-37. In Order No. PSC-95-0034-FOF-TP, the Commission did not contemplate the specific applications of the "first come, first served" rule. Instead, the Commission adopted standards implemented by the FCC for purposes of state expanded interconnection tariff filings. Since the passage of the Act, regulation of the telecommunications industry has changed somewhat, as has the Commission's regulatory role. In view of these changes, staff does not believe that the Commission's

decision in Order No. PSC-98-1417-PCO-TP should be considered to be in conflict with its adoption of the "first come, first served" policy in Order No. PSC-95-0034-FOF-TP. If anything, the Commission's decision reflects additional consideration of the application of the rule in view of a specific circumstance arising in a new regulatory environment. The Joint Petitioners have not, however, exposed a mistake of fact or law made by the Commission in rendering its decision.

Finally, the Joint Petitioners assert that the Commission did not consider that it did not have jurisdiction to render the decision set forth in Order No. PSC-98-1417-PCO-TP. Staff agrees that the Commission did not expressly consider its jurisdiction in rendering Order No. PSC-98-1417-PCO-TP. Jurisdiction was not, however, an argument raised prior to reconsideration. Nevertheless, staff believes that the Commission's jurisdiction to render the decision set forth in Order No. PSC-98-1417-PCO-TP is clear. Pursuant to Section 251(c)(6), BellSouth is required to petition the Commission for waivers of the physical collocation requirements. There is nothing in the Act or the FCC rules explaining what will happen if petitions for waiver are not timely filed. Thus, it seems appropriate for the Commission to make that determination, because it is the entity with whom such a petition must be filed. Also, this issue arises out of a dispute regarding implementation of an agreement approved by the Commission in accordance with Section 252(e) of the Act. The Commission has jurisdiction over the agreement, the dispute, and issues arising out of the particularities of the dispute. See Iowa Utilities Board v. FCC, 120 F.2d 753, 804(8th Cir. 1997)(authority extends to enforcing provisions of agreements approved by the state commission). Staff further notes that the Eighth Circuit Court stated that

> Significantly, nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of section 251 and 252. The only grant of any review of enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act.

Id. Based on these provisions, staff believes that the Commission has acted within its authority. The Joint Petitioners have not identified a mistake of law made by the Commission.

For the foregoing reasons, staff recommends that the Joint Petition for Reconsideration of Order No. PSC-98-1417-PCO-TP should be denied. The Joint Petitioners have failed to identify any fact overlooked by the Commission or any mistake of law made by the Commission in rendering its decision.

**ISSUE 5**: Should this Docket be closed?

**RECOMMENDATION**: This Docket should remain open pending the issuance of the Commission's final, post-hearing Order resolving the substantive issues in this Docket.

**STAFF ANALYSIS**: This Docket should remain open pending the issuance of the Commission's final, post-hearing Order resolving the substantive issues in this Docket. Staff notes that its post-hearing recommendation is scheduled to be addressed at the same Commission Agenda Conference as this recommendation regarding reconsideration of Order No. PSC-98-1417-PCO-TP.