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REPORTING

February 4, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 980800-TP (Supra Collocation)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Stay Pending Appeal, which we asked that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White (ke)

Nancy B. White

ACK _____ NBW:jn
 AFA _____ Enclosure
 APP _____
 CAF _____ cc: All parties of record
 CAF _____ Marshall M. Criser III
 CMU _____ William J. Ellenberg II
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01466 FEB-4 99

FPSC-RECORDS/REPORTING

**CERTIFICATE OF SERVICE
Docket No. 980800-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by

* Facsimile and Federal Express this 4th day of February, 1999 to the following:

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Nancy B. White (KR)
Nancy B. White

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Supra Telecommunications) Docket No.: 980800-TP
 and Information Systems, Inc., Against)
 BellSouth Telecommunications, Inc.)
 _____) Filed: February 4, 1999

MOTION FOR STAY PENDING APPEAL

BellSouth Telecommunications, Inc. ("BellSouth") pursuant to Rule 25-22-.061, Florida Administrative Code, hereby moves the Florida Public Service Commission ("Commission") to stay its Order No. PSC-99-0047-FOF-TP (an order on reconsideration of Order No. PSC-98-1417 issued on October 22, 1998), dated January 5, 1999, ("the Priority Order") and Order No. PSC-99-0060-FOF-TP, issued on January 6, 1999, ("the Space Order") pending judicial review of The Priority Order to the United States District Court for the Northern District of Florida.

On this date, BellSouth has filed with the Commission a notice of its appeal of the Commission's Order with the United States District Court for the Northern District of Florida pursuant to 47 U.S.C. § 252(e)(6). BellSouth has requested a declaratory ruling on the existing controversy between BellSouth and Complaint relative to the application of 47 C.F.R. § 51.323(f)(1), the so-called first come-first served rule. A copy of BellSouth's Petition for Judicial Review and Complaint for Declaratory Judgment and Other Relief is attached hereto as Exhibit 1 (without exhibits). As such, BellSouth requests that the Commission enter a stay of the Priority Order and the Space Order pending appeal, as more fully set forth below.

DOCUMENT NUMBER-DATE

01466 FEB-4 99

FPSC-RECORDS/REPORTING

I. Background

1. In 1993 and 1994, BellSouth obtained exemptions for physical collocation in the North Dade Golden Glades and West Palm Beach Gardens central offices from the Federal Communications Commission on the basis that space was not available. See, FCC Order No. 93-658, released June 9, 1993 and FCC Order No. 94-143, released February 14, 1994. These two central offices have not changed in size since the exemptions were obtained.

2. On June 30, 1998, Supra Telecommunications and Information Systems ("Supra") filed a Petition against BellSouth seeking physical collocation in BellSouth's North Dade Golden Glades and West Palm Beach Gardens central offices. BellSouth had denied collocation on the basis that space was not available in these offices and on the basis of the FCC exemptions. This matter was heard by a panel on October 21, 1998.

3. Prior to the hearing, a priority issue arose concerning which ALEC would be allowed to physically collocate in these two offices in the event that the panel decided space was available. Other ALECs had requested space in these offices and been denied prior to Supra's request.

4. The Commission Staff decided to address this issue via oral argument on September 22, 1998 and Order No. PSC-98-1417-P CO-TP was rendered on October 22, 1998. The Order held that this is a unique situation in that Supra filed its Petition prior to BellSouth's obtaining an exemption from the Florida Public Service Commission for these offices. The

order held that because Supra did so, it should be allowed to leap frog other ALECs and become the first in line for these offices if the panel determined that space was available.

5. On November 6, 1998, BellSouth filed a Motion for Reconsideration on this issue. On January 5, 1999, the Commission issued the Priority Order denying reconsideration.

6. On January 6, 1999, the Commission issued the Space Order, holding that space was available for physical collocation in BellSouth's North Dade Golden Glades and West Palm Beach Gardens central offices. Pursuant to the Priority Order, the Space Order held that Supra should be allocated space in these central offices for physical collocation.

7. BellSouth filed for reconsideration of the Space Order on January 21, 1999.

8. Under the these Orders, BellSouth is required to provide Supra with space for physical collocation at the two central offices identified above despite the fact that other companies field an application for physical collocation at these offices prior to Supra's request.

II. Argument

9. BellSouth seeks a stay of both the Priority and the Space Orders pending judicial review in accordance with Rule 25-22.061(2), Florida Administrative Code. In determining whether to grant a stay under Rule 25-22.061(2), the Commission may consider whether BellSouth is likely to prevail on appeal; whether BellSouth has demonstrated that it is likely to suffer irreparable

harm if the stay is not granted; and whether the delay will cause substantial harm or is contrary to the public interest.

10. There are serious and substantial issues concerning the Commission's application of the first come-first served rule in the instant matter. As noted above, BellSouth has sought review of the Priority Order from the United States District Court and sought reconsideration of the Space Order by the Commission. If the District Court concludes the Commission erred in the Priority Order, then an ALEC other than Supra would be entitled to any physical collocation space available in the offices identified above. Conversely, if the Space Order is not stayed pending reconsideration and possible appeal, then Supra will claim space that may appropriately be due another ALEC. If the Space Order is reversed on reconsideration or appeal, then the substance of the Priority Order is moot.

11. BellSouth submits that the resolution by the District Court on the Priority Order and the resolution by the Commission on the Space Order is critical to the ultimate determination of this case.

12. BellSouth believes it will prevail on the appeal of the Priority Order. In the FCC's First Report and Order (Docket 96-98) released in August of 1996, the FCC referenced its Expanded Interconnection proceeding for the requirement that LECs must provide space for physical collocation to requesting carriers on a first come-first served basis. BellSouth obtained its exemptions for these offices from the FCC pursuant to the FCC's Expanded Interconnection requirements. The FCC adopted this requirement in the First Report and Order,

creating Section 51.323(f)(l) of the Code of Federal Regulations which states that "an incumbent LEC shall make space available to requesting telecommunications carriers on a first come-first served basis."

13. There are no exceptions to this rule. The FCC did not allow for any exceptions, much less one that says the filing of a complaint instantly gives an ALEC priority in line. The Telecommunications Act of 1996 (the "Act") also does not provide for any exceptions. Therefore, the panel erred in binding such an exception.

14. Additionally, BellSouth will be irreparably harmed should the Commission Order not be stayed pending judicial review. If Supra takes the space and the District Court reverses the Priority Order, BellSouth may be forced to conjure space out of thin air for the ALECs who were in line prior to Supra. If Supra takes the space and this Commission or the District Court reverse the Space Order, then BellSouth will be faced with trying to remove a physically collocated ALEC. In either scenario, BellSouth is faced with an untenable position. BellSouth seeks to preserve the status quo pending appeal.

15. The delay will not cause substantial harm to Supra or be contrary to the public interest. Supra's applications for the offices at issue are not at the firm order stage inasmuch as Supra is still determining the vendor to be used and the specific equipment to be placed. Moreover, to BellSouth's knowledge, Supra is still operating as a reseller at the current time and will be able to continue providing competitive local exchange service. The harm to Supra and

the public if a stay is granted will be inconsequential in contrast to the harm to BellSouth if a stay is not granted.

16. Rule 25-22.061(1)(a) and Rule 25-22.061(2), Florida Administrative Code, permit the Commission to require BellSouth to post or issue some other corporate undertaking as a condition of the stay. BellSouth recommends that the bond should be set at zero. No bond is necessary because granting the stay will not prejudice Supra or the general public.

For all of the reasons discussed herein, BellSouth requests the Commission issue a stay of Order No. PSC-99-0047-FOF-TP (as well as Order No. PSC-98-1417-PCO-TP) pending appeal and Order No. PSC-99-0060-FOF-TP pending reconsideration and possible judicial review.

Respectfully submitted this 4th day of February 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

BellSouth Telecommunications,
Inc.,

Plaintiff,

v.

Civil Action No. _____

Supra Telecommunications &
Information Systems, Inc.,
the Florida Public Service
Commission, the Honorable J.
Terry Deason, in his official
capacity as a Commissioner of
the Florida Public Service
Commission, the Honorable
Susan F. Clark, in her
official capacity as a
Commissioner of the Florida
Public Service Commission,
and the Honorable E. Leon
Jacobs, Jr., in his official
capacity as a Commissioner of
the Florida Public Service
Commission,

Defendants.

COMPLAINT

Nature of the Action

1. BellSouth Telecommunications, Inc. ("BellSouth") brings this action to seek review of a decision of the Florida Public Service Commission (the "PSC") under the federal Telecommunications

EXHIBIT I

Act of 1996 (the "1996 Act"). The PSC decision at issue grants Supra Telecommunications and Information Systems, Inc. ("Supra") priority over all other telecommunications carriers to engage in "physical collocation" - that is, connection to BellSouth's network by placing Supra-owned equipment on BellSouth's property - in two BellSouth central offices. That decision is unlawful because it conflicts with a clear and binding Federal Communications Commission ("FCC") regulation mandating that collocation space be apportioned on a first-come, first-served basis. It is also arbitrary and capricious and results from a failure to engage in reasoned decision-making. It should be declared unlawful, and the parties to this case, and anyone acting in concert with them, should be enjoined from enforcing it against BellSouth.

Parties, Jurisdiction, and Venue

2. Plaintiff BellSouth is a Georgia Corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida.

3. Defendant Supra is a Florida corporation with its principal place of business in Florida. Supra also provides local telephone service in Florida. Supra may be served at 2620 S.W. 27th Ave., Miami, FL 33133.

4. Defendant PSC is an agency of the State of Florida. The PSC is a "State commission" within the meaning of 47 U.S.C. §§ 153(41), 251, and 252.

5. Defendant J. Terry Deason is a Commissioner of the PSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

6. Defendant Susan F. Clark is a Commissioner of the PSC. Commissioner Clark is sued in her official capacity for declaratory and injunctive relief only.

7. Defendant E. Leon Jacobs, Jr. is a Commissioner of the PSC. Commissioner Jacobs is sued in his official capacity for declaratory and injunctive relief only.

8. This Court has subject matter jurisdiction over the action pursuant to both 28 U.S.C. § 1331 and the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6).

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391. Venue is proper under § 1391(b)(1) because the Commissioner Defendants reside in this District. Venue is proper under § 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the PSC sits.

The 1996 Act

10. Prior to this decade, local telephone service was generally provided in Florida and in other States by a single, heavily regulated company such as BellSouth that held an exclusive franchise to provide such service. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. See 47 U.S.C. §§ 251-253.

11. As Congress explained, the 1996 Act creates a "pro-competitive, de-regulatory" framework for the provision of telecommunications services. S. Conf. Rep. 230, 104th Cong., 2d Sess. 113 (1996) (Conference Report). To achieve that goal, Congress not only preempted all State and local exclusive franchise arrangements (47 U.S.C. § 253), but also placed certain affirmative duties on incumbent local exchange carriers (incumbents) such as BellSouth to assist new entrants in the local market.

12. Several of those duties are relevant here. Under 47 U.S.C. § 251(c)(2), BellSouth must allow new entrants to "interconnect" their networks with BellSouth's network, so that the entrants' customers can make calls to, and receive calls from, BellSouth's network. Under 47 U.S.C. § 251(c)(3), BellSouth must sell to new entrants pieces of its network ("unbundled network elements"), so that new entrants can use these features to provide their own competing services.

13. Most important here, under 47 U.S.C. § 251(c)(6), BellSouth must provide to new entrants physical collocation of equipment necessary for interconnection or access to unbundled elements, unless BellSouth demonstrates that physical collocation is not practical because of technical capabilities or space limitations. If physical collocation is not practical, BellSouth must provide "virtual collocation," a means of connecting to BellSouth's network that uses only BellSouth's own property. *Id.*

14. The FCC has adopted rules to allocate the finite space available for physical collocation fairly and nondiscriminatorily.

Specifically, the FCC has ruled that incumbents must "make space available within or on its premises to requesting telecommunications carriers on a first-come, first-served, basis." 47 C.F.R. § 51.323 (f)(1) (emphasis added). Moreover, incumbents "shall not be required to lease or construct additional space for physical collocation when existing space has been exhausted." Id.

15. The precise terms under which BellSouth must provide physical collocation (as well as meet its other obligations under the 1996 Act) are determined in the first instance through voluntary negotiation between BellSouth and potential local entrants such as Supra. See 47 U.S.C. § 252(a).

16. In the event that BellSouth cannot reach agreement with an entrant on that issue (or any other question arising under the 1996 Act), either party may petition the appropriate State commission to arbitrate the issue in accordance with the terms of the 1996 Act. See id. § 252(b)(1). Additionally, after the parties have reached a full agreement — as a result of either negotiation or arbitration — the State commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. Id. § 252(e).

17. Any party aggrieved by a State commission determination has a statutory right to bring suit in a federal district court. Id. § 252(e)(6).

Prior Proceedings and the PSC Decision at Issue Here

18. In 1997, BellSouth and defendant Supra reached three agreements regarding the terms under which Supra could obtain

access to BellSouth's network, including an agreement on collocation. These agreements were approved by the PSC.

19. The collocation agreement provides a specific mechanism for Supra to request collocation. In order to request collocation under the agreement, Supra must submit an application and inquiry document and a bona fide firm order.

20. In the spring of 1998, several companies, including Supra, requested physical collocation in BellSouth's North Dade Golden Glades and West Palm Beach Gardens central offices. Supra was the third company to request collocation in the North Dade Golden Glades central office and the second to request collocation in the West Palm Beach Gardens central office.

21. BellSouth denied these requests for physical collocation because space was not available in these offices. Indeed, BellSouth had obtained, in 1993 and 1994, FCC exemptions from the FCC's pre-1996 Act physical collocation requirements on the basis of insufficient space. These central offices have not changed in size since the exemptions were granted.

22. On June 30, 1998, Supra filed with the PSC a Petition for Emergency Relief against BellSouth seeking to require BellSouth to provide it physical collocation in the North Dade Golden Glades and West Palm Beach Gardens central offices.

23. After filing its Answer and Response, on August 7, 1998, BellSouth filed with the PSC Petitions seeking waivers of the 1996 Act's physical collocation requirements for these central offices due to lack of space.

24. The PSC elected to separate the proceedings into two stages. It would first determine whether Supra has priority over other carriers for collocation space, and then, depending on that determination, would decide the remaining issues in the context of either Supra's complaint or BellSouth's waiver adjudication.

25. The PSC heard argument concerning the priority question on September 22, 1998. In addition to Supra and BellSouth, other carriers that had requested collocation in the same central offices before Supra made its collocation request participated in the argument in order to protect their rights.

26. On October 22, 1998, the PSC issued an order holding that Supra is entitled to priority over all other carriers for any available collocation space in the North Dade Golden Glades and West Palm Beach Gardens central offices. Although acknowledging that Supra was not the first carrier to request physical collocation for either of these locations, the PSC held that a "deviation from the FCC's first come, first served rule in this case is warranted" because Supra was the first carrier to file a complaint with the PSC. October 22, 1998 Order at 10.

27. BellSouth believed that the PSC's ruling on this issue was substantively inconsistent with the requirements placed on BellSouth by the 1996 Act, as interpreted by the FCC. In particular, the relevant FCC regulation authorized no "deviations" from the first-come, first-served requirement. Accordingly, BellSouth sought reconsideration before the PSC.

28. In an order issued on January 5, 1999, the PSC denied BellSouth's reconsideration motion.

Claim for Relief

29. Paragraphs 1 through 28 are incorporated by reference as if set forth fully herein.

30. The PSC's decision to grant Supra priority over other carriers that requested collocation in a particular BellSouth central office before Supra made such a request is inconsistent with the 1996 Act as implemented by FCC regulations. These regulations explicitly require BellSouth to provide physical collocation on a "first-come, first-served, basis," 47 C.F.R. § 51.323 (f) (1), and allow for no exceptions.

31. The PSC's decision is also arbitrary and capricious and results from a failure to engage in reasoned decision-making.

RELIEF REQUESTED

WHEREFORE, as relief for the harms alleged herein, BellSouth as an aggrieved party requests that this Court:

a. declare that the PSC's and Commissioner Defendants' orders are invalid for the reasons discussed above.

b. grant BellSouth declaratory and preliminary and permanent injunctive relief to prevent all defendants and anyone acting in concert with them from enforcing or attempting to enforce the PSC's orders to the extent that they require BellSouth to give Supra priority over other carriers that requested physical collocation before Supra did.

c. grant such other relief as may be sought by BellSouth in further pleadings and as may be appropriate in this case.

Signed on this the 3d day of February, 1999.

ADORNO & ZEDER, P.A.



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