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ORIGINAL



June 7, 2000

**BY HAND DELIVERY**

Blanca Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Re: Docket No. 981834-TP and No. 990321-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Rhythms Links Inc. are the original and fifteen copies of its Opposition to Motions for Reconsideration and Clarification.

By copy of this letter, this document has been furnished to the parties on the attached service list.

Very truly yours,

Richard D. Melson

RDM/mee
cc: Attached Service List

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

| | | |
|---|---|---|
| In Re: Petition of Competitive Carriers For Commission Action to Support Local In BellSouth Telecommunications, Inc.'s Service Territory | ) | Docket No. 981834-TP |
| In Re: Petition of ACI Corp. d/b/a Accelerated Connections Inc. for Generic Investigations to Ensure that BellSouth Telecommunications Inc, Sprint-Florida, Incorporated and GTE Florida comply with the Obligation to To Provide Alternative Local Exchange Carriers with Flexible, Timely, and Cost-Efficient Physical Collocation. | ) | Docket No. 990321-TP<br>Filed: June 7, 2000 |

**OPPOSITION OF RHYTHMS LINKS INC.**
**TO MOTIONS FOR RECONSIDERATION AND CLARIFICATION**

Rhythms Links Inc. ("Rhythms"), by its attorneys, herein files its response in opposition to the motions for reconsideration and clarification of the Commission's Order No. PSC-00-0941-FOF-TP ("Order"), of May 11, 2000 by BellSouth Telecommunications, Inc. ("BellSouth"), GTE Florida Incorporated ("GTE") and Sprint Florida Incorporated and Sprint Communications Company Limited Partnership ("Sprint") (jointly "Petitioners"). After much deliberation by the Commission in creating state-wide collocation standards in the Order, Petitioners attack the decision on meritless grounds. Accordingly, the Commission should reject Petitioners' challenge and implement the Order immediately.

**STANDARD OF REVIEW**

Petitioners all note that a motion for reconsideration highlights to a tribunal a point of fact or law that it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); see also BellSouth's Motion for Reconsideration and for Clarification at p. 3; GTE Petition for Reconsideration at p. 1;

Sprint's Motion for Reconsideration and Clarification of Order at p. 2. As the record reflects, the Commission did not overlook or fail to consider pertinent fact or law in its determination. Instead of demonstrating the relevance of any points of fact or law which render the Commission's decision insufficient, the Petitioners reiterate several facts already addressed in the proceeding and merely reference a recent decision of the United States Court of Appeals for the District of Columbia Circuit. Thus, the Commission should deny the motions for reconsideration.

## ARGUMENT AND CITATION OF AUTHORITY

### I. Introduction

On May 11, 2000, the Commission issued its final Order on Collocation Guidelines, Order No. PSC-00-0941-FOF-TP ("Order"). This docket dates back to 1998, when the Commission received the Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory. Order at p. 7. Two years, and a full evidentiary proceeding later, the Commission has come to a reasoned and well-determined decision based on the record presented by the parties. Petitioners now ask the Commission to disregard its hard work and reconsider arguments already presented in testimony because their desired outcome was not reached. Therefore, the Commission should deny Petitioners' motions for reconsideration, and commit to implementing the Order it took great pains to issue.

In support of their motions for reconsideration, Petitioners also erroneously argue that the District of Columbia Circuit's decision in GTE Services Corporation v. FCC, 205 F.3d 416 (D.C. Cir., March 17, 2000), actually reverses this Commission's Order. First, the D.C. Circuit's decision does not substantively effect the mandates of the Commission's Order.

Rather, the Commission's decision was made fully within the Commission's authority and based on a complete review of the record. Additionally, as the Commission has both independent state and federal authority to establish pro-competitive guidelines to ensure consumer choice in telecommunications services, this federal court decision has no direct effect on the Commission's Order. Still the Petitioners prompt the Commission to reverse the conclusions made in the Order. Such requests would only serve to require alternative local exchange carriers ("ALECs") to purchase new equipment, to wait the collocation provisioning interval to place the equipment in a different place in the central office, and to disrupt service to their existing customers in order to transition a virtual collocation space to a cageless collocation space. Also, the Petitioners would prefer to eliminate the convenience of ALECs cross-connecting in a central office. Without the requisite explanation of its relevance or effect on the Commission's Order, the Petitioners base these requests on the mere existence of the D.C. Circuit decision. The Commission, therefore, must merely acknowledge that the collocation guidelines set forth in its Order were properly based on the complete and accurate record presented over the past two years and legitimately formulated under both independent federal and state authority.

**A. The Commission's Determination in the Order Is Fully Supported by the Record**

In the Order, the Commission reached a well-reasoned decision regarding the state of collocation in Florida. Beginning in 1998, the Florida Competitive Carriers Association ("FCCA") filed a petition with the Commission to implement collocation requirements to promote local competition. Several months later, the Commission denied BellSouth's request to dismiss the FCCA's petition and on March 12, 1999, ACI Corp. d/b/a Accelerated

Connections Inc., now known as Rhythms, filed a Petition for a Generic Investigation into Terms and Conditions of Physical Collocation. After months of receiving pleadings from all parties, the Commission was able to resolve some issues in Order No. PSC-99-1744-PAA-TP, and subsequently held a full three-day evidentiary hearing for further clarification. The Commission then, after nearly two years of careful consideration, issued a final Order on May 11, 2000 encompassing the entirety of discussions and deliberations.

Now, after having reached resolution in the matter of collocation provisioning, Petitioners ask the Commission for reconsideration based purely on their dissatisfaction with the Order. Specifically, the Petitioners want substantially longer reservation intervals for central offices than the reasonable 18-month period ordered by the Commission. Further, the Petitioners want an ALEC, as a new market entrant, to bear the sole risk of unoccupied space that the Petitioners choose to build out in anticipation of physical collocation for future ALECs. Additionally, BellSouth in particular wants to continue to limit a digital subscriber line ("DSL") based ALEC's ability to collocate by requiring fiber entrance facilities, which today will not transmit the standard DSL signals. Petitioners now return to the Commission and rehash the same arguments they made on the record previously. The Commission should reject these attempts and reaffirm the findings in the original Order.

B. The Record Supports the Time Frame for Space Reservation Established in the Order as Reasonable

GTE and BellSouth allege that the Commission's determination of a reasonable timeframe for allowing an incumbent local exchange carrier ("ILEC") to reserve space in a central office is too short. After reaching a determination based upon the record, the Commission held that ILECs and ALECs could reserve space in a central office for a period of 18 months. Order at p. 56. In the Order, the Commission held that the "evidence is clear

that space within a central office is a limited resource, and that limiting the length of time space is allowed to be reserved will promote efficient use of central office space[.]" Id. As well, the Commission chose to apply this standard evenly to both ILECs and ALECs. Id. Therefore to ensure efficient use of the limited space in an ILEC premise, the Commission pointedly chose to limit space reservation to an 18-month period.

While the Commission felt that an 18-month period is sufficient, GTE asked for a substantially longer period of time, and in some instances felt that no interval is needed at all. Tr. at 435; GTE at p. 8. GTE argued that ILECs should be able to reserve space "based on the type of equipment" because "an inflexible timeframe for space reservation is not workable." Tr. at 435. The Commission disagreed with GTE's argument, and instead chose to apply a standard set interval. Tr. at 435; Order at p. 54.

BellSouth just simply embellishes again the period necessary for building additions to the central offices in another attempt to continue hoarding the collocation space available. BellSouth additionally accuses the Commission of "fail[ing] to consider that the completion time for [BellSouth to do] a building addition is approximately 24 months." BellSouth at p. 12. However, the Commission did take into consideration BellSouth's building concerns. Indeed, the Commission cited in its Order that "[a]lthough BellSouth reserves space on a two-year basis, we believe that this time period may be overstated somewhat[.]" Order at p. 55. In an effort to foster competition, the Commission recognized that 18 months was a reasonable timeframe that would allow more competitors to collocate in a central office.

The Commission considered and rejected these arguments made by BellSouth and GTE. Order at pp. 51-54. Instead, "[u]pon consideration," the Commission found that an 18-month reservation period is appropriate for reserving space. Order at p. 56. Contrary to

the Petitioners' assertions, the Commission gave their positions due deliberation and instead opted for a more reasonable conclusion. In addressing BellSouth's and GTE's positions in the Order, the Commission specifically referenced their positions within the Order itself. Order at pp. 52, 54. Neither Petitioner explains how the Commission ignored either law or fact in making its determination. Consequently, the Commission's determination to set reservation periods at 18 months is correct and should stand.

C. The Commission Based its Determination regarding the Recovery for Site Preparation Costs on the Record Presented

Despite the Commission's creation of a plan that allocates costs on a nondiscriminatory basis, GTE again asks the Commission to return a determination that places any burden of costs entirely on the ALECs. GTE at p.10. After hearing from both ALECs and Petitioners, the Commission reached a plan for site preparation costs that includes attributing costs according to floor space occupied by the collocating party relative to the total cost for site preparation. Order at p. 85. The Commission established this cost regime in accordance with the framework in the Federal Communications Commission's ("FCC") Deployment of the Wireline Services Offering Advanced Telecommunications Capability First Report and Order, 14 FCC Rcd 4761 (rel. March 31, 1999) ("Advanced Services Order"). Additionally, the Commission properly took into consideration all collocating parties, past and present, in an attempt "to arrive at a method that neither favors nor discriminates against any carrier." Order at p. 85.

Prior to the Order, GTE argued that "the cost allocation requirements improperly prevent GTE from recovering its actual costs." Tr. at 423. After the Order denied its proposal, GTE again stated its concern that it would end up bearing "the entire financial risk" because the Commission's plan allows it to recover only a fraction of the preparation costs

from the first collocating party for the entire space within the central office prepared for collocation. GTE at p. 9. To the contrary, in the Order the Commission determined that it would not support a plan that results in all costs being absorbed by the ILEC. Order at p. 85. While the Commission was aware of GTE's proposal, as evidenced by the citation to GTE's initial request that "that the relevant costs over a period of time would be totalled (sic), then divided by the number of collocators[,]" it chose to follow its own course. Order at p. 80.

The D.C. Circuit's rejection of this *same* argument by GTE further validates the Commission's determination on cost allocation in the Order. GTE contended that the FCC's cost allocation rules, with which Florida's guidelines coincide, "fail to give them any reasonable mechanism to recover their costs for space that is not fully or permanently occupied." GTE Services, 205 F.3d at 427. The D.C. Circuit determined that GTE actually misread the Advanced Services Order, which "simply notes that state commissions are charged with the responsibility of determin[ing] the proper pricing methodology,' which undoubtedly *may* include recovery mechanisms for legitimate costs." Id. In the same vein, the Commission here determined an appropriate pricing methodology even though the ILECs bear some burden of risk of not recovering space built out, but not fully occupied. Thus, the Commission has no reason, nor has GTE given the Commission any reason, to revisit the determination on cost allocation made in the Order.

C. The Commission Properly Based the Requirement that ILECs Permit ALECs Access to Copper Entrance Facilities on the Record

Additionally, BellSouth seeks to impede competition, particularly in the budding advanced services market, by imposing a limitation on the ALECs ability to obtain access to copper entrance facilities in an effort to interconnect with the BellSouth network. BellSouth at p. 6. The Commission expressed, or intended, ***no*** limitation in its Order on the ability of

data ALECs to use copper entrance facilities to connect their DSLAMs to BellSouth's facilities in the BellSouth premises. BellSouth originally claimed that allowing ALECs access to copper entrance facilities "would accelerate the exhaust of entrance facilities in this situation at its central offices at an unacceptable rate, as compared to current technologies such as fiber optic cable." Tr. at 212. In the Order, the Commission determined "that requiring fiber optic entrance facilities could be a competitive obstacle for certain ALECs requesting collocation facilities and are persuaded that ALECs shall be allowed to use copper entrance cabling." Order at p. 24. Now BellSouth returns, again urging the Commission that ILECs should not "be required to accommodate requests for non-fiber optic facilities" due to space limitation concerns. BellSouth at p. 6. Despite BellSouth's claims, however, the Commission's Order is clear.

As with all of the determinations set forth in the collocation guidelines of the Order, the Commission reviewed the complete record in this proceeding, based its conclusion on a thorough analysis of the record, and clearly stated its intent to offer ALECs access to copper entrance facilities to connect their DSLAMs to the ILECs facilities in their central office. BellSouth has presented no basis for the Commission to reconsider its Order on this matter.

## II. The D.C. Circuit Decision Does Not Require The Commission to Reconsider its Determination in the Order

Petitioners now seek to undo large portions of the Commission's Order by mere mention of the D.C. Circuit's decision. Specifically, Petitioners focus upon the effect that their understanding of the D.C. Circuit's decision would have on the conversion of virtual arrangements to cageless collocation arrangements. Also, Petitioners' question whether, in light of the D.C. Circuit's decision, the Order can still permit ALECs to cross-connect with other ALECs at the ILEC premises. The answer to all of Petitioners questions is that the

D.C. Circuit's decision does not affect the collocation guidelines established by the Commission in its Order.

In the D.C. Circuit's decision regarding the FCC's Advanced Services Order, the court made a limited holding regarding the FCC's interpretations of "necessary" and "physical collocation." GTE Services, 205 F.3d 416. The D.C. Circuit vacated certain portions of the FCC's Advanced Services Order, which were remanded to the FCC for further consideration. Petitioners gravely misunderstand and misstate the implications of this ruling. While the D.C. Circuit's decision undoubtedly impacts the FCC's interpretation of the ILECs' collocation obligations under the 1996 Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. ("1996 Act"), the Florida Commission has independent federal and state authority to establish guidelines that direct the ILECs' appropriate provisioning of collocation on a nondiscriminatory basis.

The Commission has strong federal authority to carry out the mandate of the 1996 Telecommunications Act, and, in particular, the provisions of Section 251 on collocation of equipment. In the 1996 Act, Section 251 recognizes that the ILECs have a "duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment[.]" 47 U.S.C. § 251(c)(6). In providing guidelines for the implementation of Section 251 requirements, Congress acknowledged the authority of state commissions to make regulations, orders, or policies that establish obligations of local exchange carriers consistent with the requirements of the Section 251(c)(6), as long as such actions do not substantially prevent implementation of the requirements or purposes of Section 251. 47 U.S.C. § 251(d)(3)(A)-(C). As well, Section 706 of the 1996 Act charges each state commission with taking whatever actions are necessary for encouraging the

deployment of advanced services. The FCC also recognized this independent authority of the state commissions in the Advanced Services Order by noting the "crucial role" that the state commissions play in ensuring that collocation is available in a timely manner and on reasonable terms and conditions. Advanced Services Order at ¶ 23. Thus, the Commission should be — and indeed has been through this proceeding — actively involved in defining the appropriate collocation requirements under the 1996 Act with authority independent of the FCC or its orders.

The Commission similarly has independent state authority to take measures which encourage telecommunications competition in the state of Florida. The Florida legislature granted the Commission such authority because "the competitive provision of telecommunications services . . . will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure," not to mention that "the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition." Section 364.01(3), Florida Statutes. Specifically, the Commission has been tasked with "encourag[ing] all providers of telecommunications services to introduce new or experimental telecommunications services[,]" and "ensur[ing] that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior[.]" Section 364.01(4)(g), Florida Statutes. In its review of the record in this proceeding, the Commission repeatedly recognized throughout the Order that the current practices of the Petitioners in their provisioning of collocation were detrimentally affecting competition, thereby clearly establishing the need for collocation

guidelines. The Commission issued the Order establishing guidelines for the provision of nondiscriminatory collocation in an effort to encourage telecommunications and ensure fair competition in accordance of the Florida statutes.

Equally important, the D.C. Circuit's decision does not set different standards for collocation, rather it merely compels the FCC to further justify some of its determinations because the standard used "appears to be impermissibly broad." GTE Services, 205 F.3d 416. In an effort to implement the ILECs' obligations under the Act to provision collocation in a nondiscriminatory manner, the FCC took two years to issue the Advanced Services Order. It is unknown what affect the FCC's re-determination will have upon the minimum requirements that the ILECs must adhere to in the nondiscriminatory provisioning of collocation.[1] Regardless, any action at present to reconsider the issues raised by the ILECs would be premature in light of the D.C. Circuit's decision to remand issues to the FCC for further consideration regarding segregation of collocation, and regarding cross-connects between ALECs by ALECs.

A. The Record Alone Supports the Commission's Findings on the Conversion of Virtual to Cageless Collocation Arrangements In Place.

BellSouth and GTE attempt to further hinder the ALEC's ability to collocate by arguing that the D.C. Circuit's decision precludes the Commission from holding that an ALECs' equipment in a virtual arrangement must be converted in place to cageless collocation upon request by the ALEC. BellSouth at p. 7-11; GTE at p. 2-4. There is nothing in the 1996 Act that prohibits an ALEC's equipment from remaining in an ILEC's equipment line-up when converting from virtual to physical collocation.

[1] In anticipation of upcoming action by the FCC in response to the D.C. Circuit opinion, Rhythms reserves the right to supplement its Opposition to Petitions for Reconsideration and Clarification.

BellSouth states that the Commission's decision "flies in the face of the Court's Order." BellSouth at p. 8. This is hardly the case. The fact remains that neither relocation of the virtual collocation equipment nor placement of new equipment in a separate physical collocation space is necessary, much less required by law. The Commission's basis for reaching its conclusion that virtual equipment can remain in place when there is a conversion to cageless physical collocation — namely concerns regarding service interruption, security measures, time delays, unnecessary costs, technical issues and reasonableness — must all survive Petitioners' D.C. Circuit claims because they are based on the record in this case. Order at p. 29-30.

As the Commission has an entirely independent basis for reaching its inevitable conclusion, Petitioners motions should be denied.

B. The Record Also Supports the Commission's Decision on Collocator to Collocator Cross-Connects.

BellSouth and GTE would also prefer to monopolize the provision of cross-connects at their premises by prohibiting the ALECs from cross-connecting with one other while at the ILEC's premises. BellSouth at p. 11; GTE at p. 4-6. The Commission however made a completely independent determination that the record supports allowing collocators to cross-connect with one another. Order at p. 39. The Commission actually went so far as to "also find that the record supports that when ALECs cross-connect with each other in contiguous collocation spaces, no application fees are necessary because the ALECs can establish their own cabling." Id. For this reason, the Commission should reaffirm its previous determination and reject Petitioner's motion for reconsideration at this time.

## III. The Florida Commission Should Affirm the Order's Implementation Date as the Date of Issuance

BellSouth complains that the Commission has not set forth a specific date by which the ILECs were to have the Order implemented. BellSouth at p. 13. The implementation date of the Order, as with any Commission order if not otherwise specified, is the date of its issuance, May 11, 2000. Furthermore, Rule 25-22.060, Florida Administrative Code, provides in paragraph (c) that "[a] final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve automatically to stay the effectiveness of any such final order." Thus, the Order has remained in effect despite Petitioners' motions for reconsideration.

Somehow, BellSouth has the further audacity to argue that because of the heavy burdens that implementation of this Order will have upon the company, that it should have until June 11, 2000 to execute the Commission's mandate. BellSouth at p. 14. The Commission, however, has not indicated any intention of establishing a separate implementation date or postponing the Order's implementation. Accordingly, the Commission should decline BellSouth's request to clarify the implementation date of the Order.

## CONCLUSION

Petitioners have failed to meet the standard required for reconsideration. The Commission has full discretion to reach the issues on the merits, and must only reconsider if it is shown that the Commission's Order overlooks or fails to consider relevant facts or law. For the reasons stated herein, the Commission should reject BellSouth's Motion for Reconsideration and for Clarification, GTE's Petition for Reconsideration, and Sprint's Motion for Reconsideration and Clarification of Order.

RESPECTFULLY SUBMITTED this 7th day of June, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by U.S. Mail or Hand Delivery (*) this 7thd day of June, 2000.

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