BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for emergency relief by Supra Telecommunications & Information Systems against BellSouth Telecommunications, Inc., concerning collocation and interconnection agreements.	DOCKET NO. 980800-TP ORDER NO. PSC-99-0047-FOF-TP ISSUED: January 5, 1999

The following Commissioners participated in the disposition of this matter:

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

ORDER ON MOTIONS FOR RECONSIDERATION

BY THE COMMISSION:

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

addressed by us before Supra's complaint proceeded to the October 21, 1998, hearing. After reviewing the parties' direct testimony, and meeting with the parties to the Complaint docket, as well as intervenors in the waiver dockets, our staff realized 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 petition with us 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, we 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 was not considered a grant of intervention in Docket No. 980800-TP. By Order No. PSC-98-1417-PCO-TP, issued October 22, 1998, we determined that Supra should have first priority in the North Dade Golden Glades and West Palm Beach Gardens central offices for purposes of pursuing its complaint in this Docket. We reasoned that Supra should have priority in this specific instance, because Supra filed its Complaint after BellSouth denied Supra physical 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 our attention. Order No. PSC-98-1417-PCO-TP 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. Our determination on the motions for reconsideration and FCCA's

Petition to Intervene are set forth herein. We note that we granted the requests for oral argument on the motions for reconsideration at our December 15, 1998, Agenda Conference.

FCCA's Petition to Intervene on a Limited Basis

FCCA filed its Petition to Intervene pursuant to Rule 28-106.205, Florida Administrative Code. This rule is not applicable, however, because we have obtained an exception from the Uniform Rules to retain our 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 argued that it should be allowed to intervene for the limited purpose of supporting the Petition for Reconsideration filed by NextLink and e.spire. FCCA argued that many of its members have ALEC certificates and will be affected if we do not reconsider our decision in Order No. PSC-98-1417-PCO-TP. FCCA argued that it should be allowed to intervene at this late date, because we have not yet had an evidentiary hearing on this issue and because the industry received insufficient notice that we were addressing this issue in this Docket. FCCA added that our decision violates Section 120.56, Florida Statutes, because it represents an unpromulgated rule. Thus, FCCA argued that it should be allowed to intervene.

In its Response, Supra argued that FCCA's Petition was not timely filed in accordance with Rule 25-22.039, Florida Administrative Code. Supra also argued that FCCA has failed to demonstrate that it has a substantial interest in this proceeding.

Supra disputed FCCA's assertion that our decision reflects a change in policy that will affect FCCA, because Order No. PSC-98-1417-PCO-TP states that our decision arises from the specific circumstances of this case. Furthermore, Supra explained that our 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 asked 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 we held oral argument on this issue, a month after we issued Order No. PSC-98-1417-PCO-TP, a month after we held the evidentiary hearing in this Docket, 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. As such, we believe that FCCA's Petition to Intervene is untimely.

FCCA argued that we have 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 we 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, must not be construed to achieve this absurd result.

We also find that sufficient notice was given that we 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, we believe that 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, it would be unduly burdensome to the parties to be required to respond to FCCA's "eleventh hour" petition.

In addition, our decision clearly does not represent an unpromulgated rule in violation of Section 120.56, Florida Statutes. As set forth in the Order, our decision was based upon the specific facts of this case. We note 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, we hereby deny FCCA's Petition to Intervene. We shall, however, acknowledge that FCCA supports e.spire's and NextLink's Joint Petition for Reconsideration.

BellSouth's Motion for Reconsideration of Order No. PSC-98-1417-PCO-TP

We have reviewed BellSouth's Motion for Reconsideration in order to determine whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, we acknowledge that 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 argued that the full Commission should reconsider the decision in Order No. PSC-98-1417-PCO-TP, because the panel assigned to this case 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 asserted 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 added that this error will initiate a race by ALECs to file a complaint for every central office in Florida. Finally, BellSouth asserted that we erred by stating that Supra brought this situation to our attention.

Specifically, BellSouth stated 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 noted that the FCC codified this requirement as Rule 47 C.F.R. §51.323. BellSouth argued that there are no exceptions to this rule, and further emphasized that the filing of a complaint would certainly not be considered an exception by the FCC. BellSouth added that the Act also provides for no exceptions to this requirement. Thus, BellSouth argued that we erred by establishing an exception to the "first come, first served" rule.

BellSouth also argued that we were incorrect that BellSouth did not have valid waivers and should have sought valid waivers prior to denying space to ALECs. BellSouth argued 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 noted 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 argued 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 contended that this requirement is unreasonable and would give rise to impossible situations. As an example, BellSouth stated that it could have requests filed within days of each other. BellSouth explained that in such cases it

would be impossible for BellSouth to reassess space after filling the first request. BellSouth further asserted 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 argued that our staff already knew that BellSouth was relying on the FCC waivers. BellSouth stated 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 asserted that our staff did not indicate at that time that the FCC waivers were insufficient. BellSouth added that it began preparing the waiver petitions as soon as it understood that waivers from the state commission were necessary.

Furthermore, BellSouth argued that our decision will have a detrimental impact on competition. BellSouth asserted that ALECs will file complaints in order to ensure their place in line no matter how narrowly our order is construed. BellSouth further argued that the Order inappropriately singles out Supra for special treatment. BellSouth alleged that other ALECs will seek similar treatment.

For all these reasons, BellSouth stated that we should reconsider our decision in Order No. PSC-98-1417-PCO-TP.

Supra

Supra asserted that BellSouth has simply restated its previous arguments made at the September 22, 1998, oral argument. Supra explained 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 asserted 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 asserted 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 asserted that, essentially, BellSouth wants to deny ALECs the opportunity to seek relief from us when BellSouth denies physical collocation space, unless an ALEC is

first in line in a central office. Supra explained 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 argued 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 asserted that this is exactly what BellSouth wants, because it effectively reduces or removes BellSouth's obligations to provide physical collocation.

Supra asserted 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 stated that BellSouth's Motion for Reconsideration should be denied.

Determination

BellSouth has not identified any facts that we overlooked, or any point of law upon which we made a mistake in rendering our decision in Order No. PSC-98-1417-PCO-TP. We also believe that it is appropriate for the Motion to be addressed by the panel assigned to this case, instead of by 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." We also emphasize 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 we clearly limited the applicability of our determination

in Order No. PSC-98-1417-PCO-TP to this case and to Supra's specific circumstances.

Furthermore, Order No. PSC-98-1417-PCO-TP is not a final, post hearing order. As such, Rule 25-22.0376, Florida Administrative Code, on reconsideration of non-final orders is applicable, instead of Rule 25-22.060, Florida Administrative Code. This Rule clearly states that a party adversely affected by any non-final Commission order may seek reconsideration by the panel assigned to the proceeding. Therefore, the Motion for Reconsideration shall be addressed by the panel assigned to this case.

As for BellSouth's assertion that we should reconsider our decision, because we misinterpreted FCC Rule 47 C.F.R. § 51.323(f)(1), we find that BellSouth's arguments on this point are the same ones that it raised at the September 22, 1998, oral argument. We considered these arguments at page 3 of Order No. PSC-98-1417-PCO-TP. We 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 PSC-98-1417-PCO-TP at page 8. BellSouth has not demonstrated that this construction is a mistake of law requiring reconsideration.

BellSouth also believes we erred by determining that BellSouth must file a petition for waiver before it receives and denies a request for collocation. We did not, however, determine that BellSouth must seek a waiver before it receives a request for collocation. We did 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 PSC-98-1417-PCO-TP at p. 10. In making this statement, we intended to simply acknowledge that BellSouth had been denying requests for some time without seeking a waiver and that Supra brought this matter to our attention. We did not intend for this statement to be construed as determining the timing and procedure for the handling of physical collocation requests and the filing of

petitions for waivers from the collocation requirements. We note that BellSouth currently has six petitions for waiver from the physical collocation requirements pending before this Commission. Any determination on the issue of whether BellSouth should be required to file a petition for waiver before it denies a request for physical collocation, and the appropriate procedure to be followed with respect to the timing of applications for waivers will be dealt with in BellSouth's pending waiver dockets.

BellSouth also asserted that it believes we were incorrect in stating that BellSouth did not have valid waivers. At page 9 of the Order, we 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. . . .

We agree with BellSouth that our use of the term "valid" may be somewhat misleading. Our only intent was 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, we shall clarify our 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 further argued that our staff was already aware that BellSouth was relying on the FCC waivers, because of a late-filed deposition exhibit in Docket No. 960833-TP. BellSouth's allegations are not supported by the facts. First, we note that the exhibit to which BellSouth is actually referring is Late-Filed Deposition Exhibit 1 to witness 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 our staff any indication that BellSouth was continuing to rely on the FCC exemptions and did not plan to file waiver petitions with us. 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." 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, we do not believe that our staff had any 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, we do not believe that this is pertinent to the specific procedural decision reached in Order No. PSC-98-1417-PCO-TP. BellSouth has not identified any point of fact overlooked by us in rendering our decision.

Finally, BellSouth argued that our decision will adversely affect competition and will initiate a "race for the courthouse steps." We addressed similar concerns at pages 10-11 of our Order. We 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 No. PSC-98-1417-PCO-TP at p. 10. If any ALECs find it necessary and appropriate to file complaints regarding physical collocation, we shall 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 will not be condoned. In addition, we believe 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, BellSouth's Motion for Reconsideration is denied. BellSouth has failed to identify any point of fact that we overlooked, or any conclusion of law upon which we made a mistake in rendering our decision in Order No. PSC-98-1417-PCO-TP. We 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, Order No. PSC-98-1417-PCO-TP is amended 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, as the panel assigned to this case, we find it appropriate for us to render this decision on the Motion for Reconsideration of Order No. PSC-98-1417-PCO-TP.

NextLink's and e.spire's Joint Petition for Reconsideration

As with BellSouth's Motion, we have considered the Joint Petition in order to determine if it identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, 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 requested that the full Commission review this panel's decision in Order No. PSC-98-1417-PCO-TP. The Joint Petitioners argued 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 asserted 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 argued that the Order inaccurately states that NextLink and e.spire did not actively pursue their rights under the Act.

The Joint Petitioners further argued that our decision contradicts the Act's requirements and the FCC Rules on physical collocation. They argued that we misinterpreted those rules in allowing Supra to improve its position for collocation by filing a complaint. They added 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 argued that the panel's decision directly conflicts with the "first come, first served" rule, Rule 47 C.F.R. § 51.323(f)(1).

In addition, the Joint Petitioners explained that the panel's decision conflicts with past Commission decisions supporting the "first come, first served" requirement. They noted 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., we specifically determined that the "first come, first served" rule was applicable in Florida. The Joint Petitioners asserted 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 added that the decision also conflicts with our encouragement to the parties in Docket No. 960786-TP to seek resolution of problems instead of filing complaints.

Furthermore, the Joint Petitioners argued that we did not consider that we do not have jurisdiction to render the decision that we did. The Joint Petitioners argued that the sequence of requests is the only criteria for establishing priority in a central office. They emphasized that the waiver process has been established if the LEC believes that no space is available. They explained 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 asserted that the full Commission should reconsider the decision rendered in Order No. PSC-98-1417-PCO-TP.

Supra

Supra argued that the Joint Petitioners have simply restated the arguments raised in their arguments presented at the September 22, 1998, oral argument. Supra emphasized that these arguments were

fully considered and addressed by us in our Order No. PSC-98-1417-PCO-TP.

Specifically, Supra argued 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 us. Supra also asserted 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 asserted 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 must request a waiver. Supra asserted that if we adopt the Joint Petitioners' view, ALECs, other than the one that is first in line, would be denied the opportunity to seek relief from us when BellSouth denies physical collocation space. Supra explained 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 argued 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 asserted that the Joint Petitioners are not concerned by this prospect, because the Joint Petitioners have a competitive interest in the outcome of this case.

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

Determination

We do not believe that the Joint Petitioners have identified any facts that we overlooked, or any point of law upon which we made a mistake in rendering our decision in Order No. PSC-98-1417-PCO-TP. The Joint Petition for Reconsideration is, therefore, denied. As we have explained above in making our determination on BellSouth's Motion, we believe that it is appropriate for the

Motion to be addressed by the panel assigned to this case, instead of by the full Commission as indicated by the Joint Petitioners.

The Joint Petitioners argued that they have been penalized by our decision even though they pursued their rights in the manner that they believed was appropriate under the Act. We emphasize that our decision was not intended as a punitive action against the Joint Petitioners. As we explained, however, in our Order:

> 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 No. PSC-98-1417-PCO-TP at p. 9. We then determined that Supra should be allowed to have priority in these central offices for purposes of this complaint proceeding, because Supra brought to our attention the fact that BellSouth had been denying requests for physical collocation without seeking waivers from the state commission as required by the Act. The Joint Petitioners have not identified anything in this decision that we overlooked or any mistake made by us in applying the law.

As for the Joint Petitioners' assertions that we should reconsider our decision, because we misinterpreted FCC Rule 47 C.F.R. § 51.323(f)(1), we find that the Joint Petitioners' arguments on this point are the same ones that they raised at the September 22, 1998, oral argument. We fully considered these arguments at pages 4 and 5 of Order No. PSC-98-1417-PCO-TP. We 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 No. PSC-98-1417-PCO-TP at page 8. The Joint Petitioners have not demonstrated that this construction is a mistake of law requiring reconsideration of our decision.

The Joint Petitioners also argued that our decision conflicts with our past policy as set forth in Order No. PSC-95-0034-FOF-TP, issued January, 1995. We disagree. In Order No. PSC-98-1417-PCO-TP, we clearly explained that we based our decision on circumstances that we believed the FCC did not contemplate. While this may represent a variance from our policy expressed previously, it is not in direct conflict.

In addition, Order No. PSC-95-0034-FOF-TP was issued prior to the Telecommunications Act of 1996 (Act). In Order No. PSC-95-0034-FOF-TP, we 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, we 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, ...

We 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 No. PSC-95-0034-FOF-TP at p. 36-37. In Order No. PSC-95-0034-FOF-TP, we did not contemplate the specific applications of the "first come, first served" rule. Instead, we adopted standards implemented by the FCC for purposes of state expanded interconnection tariff filings. The passage of the Act has, however, brought about a number of regulatory changes. In view of these changes, we do not believe that our decision in Order No. PSC-98-1417-PCO-TP should be considered to be in conflict with our adoption of the "first come, first served" policy in Order No. PSC-95-0034-FOF-TP. If anything, our decision in Order No. PSC-98-1417-PCO-TP 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 exposed a mistake of fact or law made by us in rendering our decision.

Finally, the Joint Petitioners asserted that we did not consider that we did not have jurisdiction to render the decision set forth in Order No. PSC-98-1417-PCO-TP. The Joint Petitioners are correct that we did not expressly consider our jurisdiction in rendering Order No. PSC-98-1417-PCO-TP. Jurisdiction was not, however, an argument raised prior to reconsideration. Nevertheless, we believe that our 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 us 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 us to make that determination, because the waiver petitions must be filed with us. Also, this issue arises out of a dispute regarding implementation of an agreement approved by us in accordance with Section 252(e) of the Act. We have 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). We further note 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 or 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, we believe that we have acted within our authority. The Joint Petitioners have not identified a mistake of law made by us.

For the foregoing reasons, the Joint Petition for Reconsideration of Order No. PSC-98-1417-PCO-TP filed by e.spire and NextLink is denied. The Joint Petitioners have failed to identify any fact overlooked by us or any mistake of law made by us in rendering our decision.

Based on the foregoing, it is therefore

ORDERED by the Florida Public Service Commission that the Florida Competitive Carriers Association's Petition to Intervene on a Limited Basis is denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Reconsideration of Order No. PSC-98-1417-PCO-TP is denied. It is further

ORDERED that the Joint Petition for Reconsideration of Order No. PSC-98-1417-PCO-TP filed by e.spire Communications, Inc. and NextLink Communications, Inc. is denied. It is further

ORDERED that Order No. PSC-98-1417-PCO-TP is clarified as set forth in the body of this Order. It is further

ORDERED that Order No. PSC-98-1417-PCO-TP is reaffirmed in all other aspects. It is further

ORDERED that this Docket shall remain open pending our final, post hearing, determination in this Docket.

By ORDER of the Florida Public Service Commission this 5th day of January, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.