

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. against BellSouth Telecommunications, Inc. regarding reciprocal compensation for traffic terminated to internet service providers.

DOCKET NO. 981008-TP  
ORDER NO. PSC-00-0245-FOF-TP  
ISSUED: February 7, 2000

The following Commissioners participated in the disposition of this matter:

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

ORDER DENYING MOTION FOR STAY PENDING APPEAL

BY THE COMMISSION:

I. CASE BACKGROUND

On August 6, 1998, American Communication Services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. (e.spire) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, e.spire requested enforcement of its interconnection agreement with BellSouth regarding reciprocal compensation for traffic terminated to Internet Service Providers. On August 31, 1998, BellSouth filed its Answer and Response to e.spire's Petition. We conducted an administrative hearing regarding this dispute on January 20, 1999.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

On April 5, 1999, we issued Order No. PSC-99-0658-FOF-TP resolving e.spire's complaint. Therein, we determined: the evidence did not indicate that the parties intended to exclude ISP traffic from the definition of "local traffic" in their Interconnection Agreement; the two million minute differential required by the Agreement was met in March, 1998; the "most favored nations" (MFN) portions of the agreement would be enforced in resolving the dispute over the applicable reciprocal compensation rate for local traffic; and attorney's fees were due to e.spire pursuant to Section XXV(A) of the Agreement. Order at pages 7, 13, 15, and 16, respectively. A portion of our Order was issued as Proposed Agency Action. In the Proposed Agency Action portion, we also required the parties to determine the number of minutes originated by e.spire and terminated on BellSouth's system using actual, available information, or using a proposed methodology if actual information is no longer available. Order at page 17.

On April 21, 1999, BellSouth timely filed a Motion for Reconsideration by the Full Commission of the Commission's Order. On April 26, 1999, BellSouth timely filed a Petition on the PAA portions of Order No. PSC-99-0658-FOF-TP. Subsequently, on May 24, 1999, the parties filed a Joint Motion to Modify Portions of Order No. PSC-99-0658-FOF-TP. By Order No. PSC-99-1453-FOF-TP, issued July 26, 1999, we denied BellSouth's Motion for Reconsideration and granted the Joint Motion to Modify Portions of the final Order.

On August 20, 1999, BellSouth filed a Motion for Stay of Order No. PSC-99-0658-FOF-TP Pending Appeal. e.spire timely responded to the motion on September 1, 1999. e.spire withdrew portions of its response the following day.

On September 28, 1999, e.spire filed a request for oral argument. On October 1, 1999, BellSouth filed its response to the request. At our January 18, 2000, Agenda Conference, e.spire orally withdrew its request for oral argument, thus, negating the necessity to rule on the request.

Herein, we address BellSouth's Motion for Stay Pending Appeal.

II. MOTION FOR STAY PENDING APPEAL  
A. BellSouth

BellSouth argues that it is entitled to a stay under Rule 25-22.061(2), Florida Administrative Code. BellSouth argues that while there is no legal test applicable to our decision to stay an

Order, we can consider the likelihood that an appeal will be successful, whether a party will suffer irreparable harm if the stay is not granted, and whether the stay will cause irreparable harm or is contrary to the public interest.

BellSouth asserts that it is likely to prevail on appeal, because our findings in our final order are contrary to the FCC's determinations in FCC Order 99-38. BellSouth also argues that it will suffer irreparable harm if the stay is not granted because it will have to pay e.spire substantial amounts that e.spire may not be able to refund to BellSouth if BellSouth wins on appeal. BellSouth emphasizes that it believes that e.spire's financial reflect net losses. BellSouth further explains that e.spire will not be harmed if the stay is granted because BellSouth will pay e.spire the appropriate amount if BellSouth's appeal is not successful. BellSouth adds that it should not be required to post a bond because the money at issue has already been escrowed pending the outcome of the appeal.

B. e.spire

e.spire argues that the stay should not be granted because BellSouth is not likely to prevail on appeal, BellSouth will not suffer irreparable harm if the stay is not granted, and e.spire will suffer irreparable harm if the stay is granted.

e.spire argues that BellSouth's only argument that it will win on appeal is that our decision is contrary to the FCC's ISP Order, FCC Order 99-38, issued February 26, 1999. e.spire emphasizes, however, that the FCC clearly indicated in that Order that it would not interfere with state commission findings on whether ISP traffic should be treated as local. Thus, e.spire asserts that BellSouth has not demonstrated a likelihood that it will prevail on appeal.

e.spire also argues that we should not grant the stay simply because BellSouth will otherwise have to pay e.spire. e.spire argues that BellSouth willingly entered into the agreement that serves as the basis for the amount due to e.spire, and, therefore, BellSouth should now have to pay in accordance with the agreement. e.spire further asserts that it will be harmed if BellSouth does not pay the amount that it owes e.spire. e.spire maintains that without the money, its ability to compete with BellSouth will be impaired.

In addition, e.spire asserts that if the stay is granted, BellSouth should be required to submit a report outlining the precise arrangements of the escrow and the amounts in the account that BellSouth refers to in its motion.

III. DETERMINATION

Rule 25-22.061(2), Florida Administrative Code, is applicable to this case. That rule provides:

Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:

- (a) Whether the petitioner is likely to prevail upon appeal;
- (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and
- (c) Whether the delay will cause substantial harm or be contrary to the public interest.

BellSouth claims that it is likely to prevail on appeal, and therefore, we should grant the stay. BellSouth maintains that our analysis of the parties' agreement is flawed, not only as to the intent of the parties, but the underlying law and facts, as well.

In our Order, however, denying BellSouth's Motion for Reconsideration of our final decision in this case, Order No. PSC-99-1453-FOF-TP, issued July 26, 1999, we addressed BellSouth's claims that we had failed to properly apply the law and that the FCC's Order 99-38 clearly indicates that the FCC categorizes traffic to ISPs as interstate traffic. Therein, we stated that:

First, we disagree with BellSouth's assertion that FCC Order 99-38 indicates that the FCC has always believed that traffic to ISPs should be treated as jurisdictionally interstate traffic. In FCC Order 99-38, the FCC actually stated that ". . . ISP-bound traffic is jurisdictionally mixed. . . ." FCC Order 99-38 at ¶ 19.

Order at p. 12. We also noted that the FCC further stated that they:

. . . find no reason to interfere with state commission findings as to whether reciprocal compensations of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

Order at p. 13, citing FCC Order 99-38 at ¶ 21. Furthermore, we emphasized that the FCC clearly stated that in instances where parties have included this traffic in their interconnection agreements, the parties will be bound by those agreements, as interpreted and enforced by the state commissions. Order at p. 13, citing FCC Order 99-38 at ¶ 21. We believe that these statements by the FCC in its Order 99-38 clearly indicate that our interpretation of the parties' intent when they entered into this agreement is likely to survive on appeal.

BellSouth also claims that it will suffer irreparable harm if it must comply with our order, but that there will be no harm to the public interest if the stay is granted. The 7th Circuit Court of Appeals addressed a similar argument when it denied Ameritech's motion for stay in Illinois Bell:

In this case the cost of false negatives ("irreparable injury," to use the traditional term) are negligible. Ameritech can easily recover the money if it prevails on appeal. All of the other carriers are solvent, and Ameritech can recoup by setoff in the ongoing reciprocal-compensation program. . . . Even if Ameritech pays the market cost of capital during the period of delay, so that the other carriers are indifferent between money now and

money later, delay impedes the ability of the Illinois Commerce Commission to implement a policy of reciprocal compensation. Delay effectively moves regulatory power from the state commission to the federal court (or to Ameritech, which can determine when orders take effect). Although such transfers may be of little moment one case at a time they are disruptive when repeated over many cases - and the struggle in the communications business between the Baby Bells and their rivals is a repeat-play game in markets, agencies, and courts alike.

Illinois Bell Telephone Company v. WorldCom Technologies, 157 F.3d 500, 503. The same rationale is applicable in this case. The public interest in maintaining the robust development of competition would be harmed if we were to grant BellSouth's request for a stay.

We note that this rationale is consistent with our decision in another case involving the issue of reciprocal compensation for traffic to ISPs. By Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Dockets Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP, we denied BellSouth's request for a stay of our Order and directed BellSouth to pay reciprocal compensation to WorldCom, Teleport, Intermedia, and MCI.

Upon consideration of the foregoing, BellSouth's Motion for Stay Pending Appeal is denied.

#### IV. DISPOSITION OF MONIES PENDING OUTCOME OF FEDERAL PROCEEDING

We shall not require e.spire to provide any security for monies paid by BellSouth pursuant to Order No. PSC-99-0658-FOF-TP as a condition of denying the stay. To do otherwise would be inconsistent with our past decision on this same subject, wherein we did not require the non-moving parties to post any security for monies due pursuant to our post-hearing order. See Order No. PSC-99-0758-FOF-TP, issued April 20, 1999, in Dockets Nos. 971478-TP, 980184-TP, 980495-TP, and 980499-TP.

Furthermore, we believe that requiring security from a smaller company like e.spire in this situation would send an undesirable message that we are willing to impose additional financial

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requirements on smaller companies that we would not otherwise impose on larger companies in the identical situation. This would be particularly troubling in this instance since it is BellSouth that has challenged our post-hearing order, not e.spire.

For these reasons, BellSouth shall be required pay e.spire the amount owed in accordance with Order No. PSC-99-0658-FOF-TP. e.spire shall not be required to escrow or otherwise secure the amount received in any way.

V. CONCLUSION

Based on the foregoing, BellSouth's Motion for Stay Pending Appeal is denied. BellSouth has failed to demonstrate any likelihood that it will prevail on appeal and has not shown that it will suffer irreparable harm if it must comply with our Order. Therefore, BellSouth has not demonstrated that a stay pending appeal is warranted. The greater harm will likely result if the stay is granted, because e.spire's ability to compete will be impaired. Furthermore, we shall not require e.spire to secure the amount due to it under Order No. PSC-99-0658-FOF-TP as a condition of denying BellSouth's request for a stay.

It is therefore

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Stay Pending Appeal is denied. It is further

ORDERED that this Docket shall remain open pending resolution of BellSouth Telecommunications, Inc.'s appeal of Order No. PSC-99-0658-FOF-TP and our resolution of the protest of the proposed agency action portions of that Order.

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By ORDER of the Florida Public Service Commission this 7th  
day of February, 2000.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

BK

Dissent

I respectfully dissent from the majority's decision not to require e.s.pire to secure the monies paid to it by BellSouth pending the outcome of BellSouth's appeal.

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,



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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.