

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Competitive Carriers for Commission action to support local competition 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 investigation to ensure that BellSouth Telecommunications, Inc., Sprint-Florida, Incorporated, and GTE Florida Incorporated comply with obligation to provide alternative local exchange carriers with flexible, timely, and cost-efficient physical collocation.

DOCKET NO. 990321-TP
ORDER NO. PSC-03-0856-PCO-TP
ISSUED: July 22, 2003

ORDER DENYING MOTION TO STRIKE

I. Background

By Proposed Agency Action Order No. PSC-99-1744-PAA-TP, issued September 7, 1999, we adopted a set of procedures and guidelines for collocation, focused largely on those situations in which an incumbent local exchange company (ILEC) believes there is no space for physical collocation. Thereafter, we conducted a hearing to further address collocation guidelines. By Order No. PSC-00-2190-PCO-TP, issued November 17, 2000, various motions for reconsideration and/or clarification of our post-hearing decision regarding collocation guidelines were addressed by the Commission. By that Order, this Docket was left open to address remaining issues associated with collocation, including pricing.

By Order No. PSC-02-1513-PCO-TP, issued November 4, 2002, the procedural schedule and hearing dates were established for this phase of this proceeding in which we will address the remaining technical and pricing issues regarding collocation. On February 7,

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2003, the Commission Staff filed a Motion to Revise Order Establishing Procedure.

By Order No. PSC-03-288-PCO-TP, issued March, 4 2003, Staff's Motion to Revise Order Establishing Procedure was granted. On May 15, 2003, pursuant to Rules 1.160 and 1.280 of the Florida Rules of Civil Procedure and Rule 28-106.204, Florida Administrative Code, Verizon and Sprint (Joint Movants) filed an Emergency Joint Motion to Strike, or in the Alternative for an Extension of Time (Joint Motion). By Order No. PSC-03-0702-FOF-TP, issued June 11, 2003, we approved the agreement reached between the parties and our staff to resolve the Joint Motion to Strike, or in the Alternative Grant an Extension of Time. By Order No. PSC-03-0776-PCO-TP, issued July 1, 2003, the procedural schedule was modified to reflect the agreement reached between the parties and our staff.

In accordance with the procedural schedule, AT&T filed the Rebuttal Testimony of Steven E. Turner on April 18, 2003. Thereafter, on June 9, 2003, AT&T filed Revised Rebuttal Testimony for Witness Turner and on June 18, 2003, filed the Surrebuttal Testimony of Jeffrey A. King. On June 25, 2003, Verizon Florida, Inc. and Sprint-Florida, Incorporated filed a Joint Motion to Strike Revised Rebuttal Testimony of Steven E. Turner and Surrebuttal Testimony of Jeffrey A. King. BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc. filed their responses on July 2, 2003. On July 8, 2003, AT&T responded to statements in BellSouth's Response to the Motion.

II. Arguments

At the outset, it should be noted that at the July 14, 2003, Prehearing Conference, Commission staff stated that it had withdrawn the portions of the testimony of staff's witness Curry to which AT&T's witness King's Surrebuttal is purported to respond. Counsel for AT&T then stated that the surrebuttal testimony of witness King would be withdrawn. Thus, the portion of the Joint Motion to Strike pertaining to witness King's surrebuttal testimony is rendered moot. However, there remains the question of the revised rebuttal testimony of witness Turner.

Verizon/Sprint contend that the revised testimony represents a complete and inexplicable change in AT&T's position regarding the use of the List 1 Drain as the basis for billing for DC power. They contend that they will be prejudiced if witness Turner's revisions are allowed to remain in, because they will not have time to "properly investigate" and conduct discovery prior to hearing in August. Furthermore, they contend that the matter of metering power is very complex, and as such, they would require additional testimony to fully respond to AT&T's altered position. Finally, at the prehearing conference, counsel for Verizon argued that even with the withdrawal of witness King's surrebuttal testimony, the concerns raised by the Motion to Strike are not abated, because the matter of AT&T's apparent midstream change of heart regarding the use of the List 1 Drain remains at issue in witness Turner's revised rebuttal testimony and in AT&T's prehearing statement of its position on Issue 6(b).

BellSouth agrees with Verizon/Sprint that the testimony should be stricken, contending that AT&T's filings are procedurally improper. BellSouth sees the revisions to witness Turner's testimony as an attempt by AT&T to have witness Turner testify at the August hearings to address Issues 6(a) and (b), when the parties had understood Mr. Turner to only be testifying in November regarding the pricing issues. BellSouth emphasizes that AT&T did not seek leave to file the revisions and stated no justification for doing so. Thus, BellSouth contends that the testimony should not only be stricken, but that AT&T should be admonished to follow Commission Orders and procedure in this case.

AT&T responds that it would have been able to make such revisions when its witness took the stand at the hearing in August, but that it felt it should file the revisions early so as to avoid surprise for all participants. AT&T contends that to strike the testimony now would be an unjustly severe sanction, particularly when no one has been prejudiced by its actions. Furthermore, AT&T maintains that its revisions do not represent a true change in its position, but rather an attempt to clarify testimony it believed could be potentially confusing. AT&T also contends that the subject of the Motion pertains to the weight that should be given to the testimony in deliberations by the Commission, not to the admissibility of it. AT&T emphasizes that this is a fact-finding

proceeding, and that its revisions represent information necessary for the development of a full and accurate record.

Finally, AT&T contends that Verizon/Sprint have not demonstrated that they will be prejudiced by allowing the testimony to remain. At the Prehearing Conference, counsel for AT&T emphasized that the revised testimony of its witness Turner was filed on June 6, 2003. Counsel noted that Verizon/Sprint could have conducted discovery since that filing date, but instead have chosen to pursue only the Motion to Strike. Thus, AT&T does not believe that Verizon/Sprint have been prejudiced, because they could have conducted discovery regarding the revised testimony, and they will continue to have that opportunity up until the discovery cut-off date for this proceeding. Furthermore, they will have the opportunity to conduct cross-examination at hearing. As such, AT&T asks that the Joint Motion to Strike be denied. AT&T also notes in its July 8, 2003, response to BellSouth's response to the Motion that it believes that BellSouth's response is improper in that it really joins in the Motion to Strike and suggests additional sanctions.

III. Decision

Upon consideration, AT&T's revisions to Turner's testimony shall be accepted. Such revisions are of the type that may be made by the witness upon taking the stand at hearing. AT&T chose, however, to prefile the revised testimony. There is no prohibition against making such a filing, and such filings are not uncommon at the Commission. See Order No. PSC-02-0504-PCO-TP, issued April 11, 2002, in Docket No. 990649B-TP. Furthermore, it does not appear that any prejudice will result. Witness Turner has been identified by AT&T as a witness only for the November hearing. Nevertheless, Verizon's counsel argued at the Prehearing Conference that they are also prejudiced by AT&T's change in its position as it relates to the issues to be addressed at the August hearing. There is, however, still time before the August hearing for discovery to be conducted as necessary, and ample time to do so before the November hearing. Thus, it does not appear that Verizon will be unduly prejudiced in any way, either by the revisions to witness Turner's rebuttal testimony or by AT&T's statement of its position on Issues 6(a) and (b). For these reasons, the Joint Motion to Strike Revised Rebuttal Testimony of Steven E. Turner and


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Surrebuttal Testimony of Jeffrey A. King filed by Verizon Florida, Inc. and Sprint-Florida, Incorporated, as it relates to the revised Rebuttal Testimony of Steven E. Turner is hereby denied.

It is therefore

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that the Joint Motion to Strike Revised Rebuttal Testimony of Steven E. Turner and Surrebuttal Testimony of Jeffrey A. King filed by Verizon Florida, Inc. and Sprint-Florida, Incorporated, as it relates to the revised Rebuttal Testimony of Steven E. Turner is hereby denied. It is further

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 22nd Day of July, 2003.



J. TERRY DEASON
Commissioner and Prehearing Officer

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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.

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Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.