

BEFORE THE 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-04-0107-PCO-TP

ISSUED: January 30, 2004

ORDER DENYING MOTION TO ALLOW TAKING DEPOSITION

BY THE COMMISSION:

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, these Dockets were left open to address the remaining issues associated with collocation, including pricing.

By Order No. PSC-03-1358-FOF-TP, issued November 26, 2003, we resolved a number of outstanding technical and policy issues regarding collocation. We are currently scheduled for hearing January 28-30, 2004, on the remaining pricing issues.

AT&T Communications of the Southern States, LLC (AT&T) filed a notice of taking deposition duces tecum of BellSouth employee Steve Martin on December 23, 2003. On January 6, 2004, staff filed a notice of taking deposition of Bellsouth witness Bernard Shell for January 21, 2004. That same day BellSouth filed Objections to the AT&T notice. Subsequently on January 20, 2004, staff informed all parties it was canceling the deposition of Bernard Shell.

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On January 22, 2004, AT&T filed a Motion to Allow Taking Deposition of BellSouth Telecommunications, Inc. (BellSouth) witness Bernard Shell. BellSouth filed its response the next day, January 23, 2004.

II. Arguments

A. AT&T

AT&T asserts in its motion that it had opted to participate in the witness Shell deposition noticed by Commission staff, in lieu of pursuing the deposition of Mr. Martin or taking other steps to seek discovery from witness Shell. AT&T contends it contacted counsel for BellSouth on January 21, 2004, the day after the Shell deposition was canceled, but notice issues precluded the deposition from going forward at its previously scheduled time. AT&T states that BellSouth counsel agreed to check the availability of witness Shell prior to the hearing. On January 22, 2004, BellSouth indicated to AT&T that witness Shell would be unavailable prior to the hearing.

AT&T acknowledges in its motion that the discovery deadline has passed, but argues for the efficient conduct of this proceeding, as well as in the interests of a full and fair consideration of the issues by this Commission, AT&T should be allowed to take the deposition of witness Shell. Further, AT&T asserts it should not be prejudiced due to its reliance on a Commission staff noticed deposition.

B. BellSouth

In its response, BellSouth asserts that AT&T finds itself in this situation as a result of its own neglect. BellSouth contends that on January 21, 2004, the date the deposition had been scheduled to take place, it offered to contact witness Shell and determine if he was still available to be deposed that afternoon. BellSouth asserts further that it indicated to counsel for AT&T that it would be necessary for AT&T to contact all parties to ensure there were no objections to the deposition proceeding that day. AT&T declined to proceed with the deposition on that day.

BellSouth argues that AT&T could have taken a number of procedural steps, both formal and informal, to avoid the instant situation. BellSouth contends AT&T failed to cross-notice the deposition or make any attempt to immediately notify parties upon cancellation that it would like the deposition to proceed as noticed. BellSouth asserts further that AT&T's attempt to schedule a deposition past the discovery cut-off date and two days before the hearing is burdensome and as BellSouth's only witness, may compromise witness Shell's ability to prepare for the hearing.

III. Decision

Witness Shell's direct testimony in this proceeding was filed on February 4, 2003, and his surrebuttal testimony was filed on September 26, 2003. Clearly, AT&T has had sufficient time

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to conduct extensive discovery on the testimony and positions taken by witness Shell. Thus, I find AT&T's claim of prejudice lacking. Furthermore, it appears AT&T could have taken several actions to assure it would have an opportunity to depose witness Shell and failed to do so. I also note, although not the appropriate forum for discovery, AT&T will have an opportunity to conduct cross-examination of witness Shell at hearing.

Accordingly, I find it appropriate to deny AT&T's Motion to Allow Taking Deposition of BellSouth witness Bernard Shell.

Based on the foregoing, it is therefore

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that AT&T Communications of the Southern States, LLC's Motion to Allow Taking Deposition of BellSouth Telecommunications, Inc. witness Bernard Shell is hereby denied.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 30th day of January, 2004.


J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

AJT

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

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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.

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.