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DATE: March 23, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Cibula, Moore) *S.M.C. DES*
Division of Competitive Markets & Enforcement (Watts) *Watts*

RE: Docket No. 060049-TL – Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. tariff provisions to rent and relocation obligations associated with BellSouth switching equipment building ("Maxihut") located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County's Aviation Department.

AGENDA: 04/04/06 – Regular Agenda – Decision on Declaratory Statement – Parties May Participate at Commission's Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Deason

CRITICAL DATES: 04/20/06 (By Statute, Order Must Be Issued By This Date)

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060049.RCM.DOC

Case Background

Pursuant to section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, the Board of County Commissioners of Broward County (Broward County) filed a Petition for Declaratory Statement on January 20, 2006. By its petition, Broward County seeks a determination from the Commission regarding the applicability of BellSouth Telecommunications, Inc.'s (BellSouth) tariff provisions to the rent and relocation obligations

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associated with a switching equipment building owned by BellSouth, known as the "Maxihut," located at the Fort-Lauderdale-Hollywood International Airport (Airport).

Notice was published in the February 3, 2006, edition of the Florida Administrative Weekly, informing interested persons of the petition. On February 14, 2006, BellSouth filed its Answer to Broward County's Petition for Declaratory Statement (BellSouth's Response).

Pursuant to section 120.565, Florida Statutes, an agency must issue a declaratory statement or deny the petition within 90 days after the filing of the petition. Thus, the Commission must issue an order on Broward County's Petition for Declaratory Statement by April 20, 2006.

The Commission has jurisdiction pursuant to section 120.565, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Broward County's Petition for Declaratory Statement?

Recommendation: The Commission should grant Broward County's Petition for Declaratory Statement to the extent that it raises issues appropriate for a declaratory statement. The Commission should declare that, based on the facts set forth in Broward County's petition, Broward County is not required under Section A2.3.9 of BellSouth's tariff to provide rent-free space for the Maxihut and Broward County is not obligated under Section A5.2.2.F.1.e of BellSouth's tariff to pay the costs for the relocation of the Maxihut. Broward County's Petition for Declaratory Statement should be denied to the extent that it improperly requests the Commission to direct BellSouth to take certain actions, that it requests an interpretation of statutory provisions, rules, and orders not specifically referenced in the petition, and/or that it requests an interpretation of the Lease Agreement. (Cibula, Moore, Watts)

Staff Analysis: Pursuant to Rule 28-105.003, Florida Administrative Code, an agency may rely on the statement of facts contained in the petition for declaratory statement without taking a position on the validity of the facts when making a determination on the petition. Moreover, Rule 28-105.002, Florida Administrative Code, states that the petitioner seeking a declaratory statement must provide the "[s]tatutory provision(s), agency rule(s), or agency order(s) on which the declaratory statement is sought." The following is a summary of the facts and legal provisions set forth in Broward County's petition, BellSouth's Response, and staff's analysis and recommendation.

I. Broward County's Petition for Declaratory Statement

A. Summary of the Facts

Broward County owns and operates the Fort Lauderdale-Hollywood International Airport (Airport). Broward County leases space to 178 separate tenants conducting business on the grounds of the Airport.

BellSouth provides telephone service to Broward County and to each of the 178 tenants at the Airport. Service is provided by BellSouth directly to Broward County and to each individual tenant under separate service agreements. BellSouth directly bills each customer and payment is made by the customer directly to BellSouth. The Airport tenants do not receive telephone service from Broward County, and the County does not provide service to the tenants as a shared tenant service provider.

In 1983, BellSouth's predecessor company, Southern Bell Telephone and Telegraph Company, and Broward County entered into a 10-year Lease Agreement for 0.06 acres of property on the Airport grounds on which Southern Bell was to construct an equipment building. The equipment building that was constructed on the site is referred to as the "Maxihut." The Lease Agreement contained an option to renew for an additional 10 years.

The Lease Agreement required the payment of rent. The rent payment for the use of the Airport property is also required by the United States Department of Transportation, Federal Aviation Administration.

When the lease and renewal period expired in 2003, BellSouth and Broward County entered into negotiations for continued use of the property by BellSouth. Several months into the negotiations, Broward County determined that the space needs of the Airport would require relocation of the Maxihut. BellSouth subsequently advised Broward County that it was entitled to occupy the property without permission from or compensation to Broward County.

On August 23, 2005, BellSouth and Broward County entered into an amendment to the lease, extending its term until November 2005. Pursuant to the amendment, BellSouth's obligation to pay rent was suspended pending Broward County's investigation of the propriety of charging rent for the leased premises. To complete the investigation, BellSouth and Broward County extended the Lease Agreement a third time, until May 31, 2006, and retained the rent suspension provision of the amendment.

The Maxihut houses distributed network switching and multiplexing equipment which multiplexes digital signals into individual circuits. The individual circuits (copper wire pairs or fiber optic cable) exit the Maxihut and are routed throughout the Airport property to each BellSouth customer's demarcation point. BellSouth is solely responsible for the maintenance and upkeep of all the wiring that enters and exits the Maxihut and for all the equipment inside the Maxihut.

Each individual BellSouth customer at the Airport, including Broward County, provides an individual point-of-presence, i.e., the network interface device or cross connect block located in each customer's telephone or equipment closet. The telephone or equipment closets are provided rent free to BellSouth.

B. Statutory Provisions, Agency Rules, and Agency Orders on Which the Declaratory Statement is Sought

Broward County cites to a number of BellSouth tariff provisions and Rule 25-4.0345(3), Florida Administrative Code, in its Petition for Declaratory Statement. Once the Commission accepts a tariff, the tariff has the force and effect of law. BellSouth Telecommunications, Inc. v. Jacobs, 834 So. 2d 855, 859 (Fla. 2002). Thus, the Commission may issue a declaratory statement interpreting tariff provisions.

The following are the BellSouth tariff provisions cited by Broward County on which the declaratory statement is sought.

Section A1 - Customer Premises

The discrete real property owned, leased or controlled by a customer for the customer's own business or residential purposes.

Section A1 - Subscriber

Any person, firm, partnership, corporation, municipality, cooperative organization or governmental agency furnished communication service by the Company under the provisions and regulations of its tariff.

Section A1 - Demarcation Point

The point of physical interconnection (connecting block, terminal strip, jack, protector or remote isolation device) between the telephone network and the customer's premises wiring. This point is part of the telephone network, provided and maintained by the Company under tariff. The location of this point is:

- a. Single Line/Single Customer Building – Either at the point of physical entry to the building or a junction point as close as practicable to the point of entry.
- b. Single Line/Multi Customer Building – Within the customer's premises at a point easily accessed by the customer.
- c. Multi Line System – At a point within the same room and within 25 feet of the FCC registered terminal equipment.

Section A2.3.9 – Floor Space, Electric Power and Operating at the Subscriber's Premises

A. The subscriber is responsible for the provision and maintenance, at his expense, of all suitable space and floor arrangements required on his premises for communications facilities provided by the Company in connection with services furnished to the subscriber by the Company. Suitable power outlets and commercial power required for the operation of such facilities shall be provided by, and at the expense of, the subscriber.

B. All operating equipment required for the use of communications facilities provided by the Company at the subscriber's premises will be performed at the expense of the subscriber, and must conform with the operating practices and procedures of the Company to maintain a proper standard of service.

Section A5.2.2 – Liabilities, Charges and Payments for Special Construction

A. General

1. The various charges and payments that apply when the Company provides special construction of facilities in accordance with the customer's specific request are described as follows. The customer must provide the Company with written approval of all liabilities and charges prior to the start of construction. If more than one condition requiring special construction is involved, charges for each condition apply.

Section A5.2.2.F.1.e – Rearrangement and/or Removal Charges

When the Company is requested to move, change, rearrange or remove existing plant, for which no specific charge is quoted in this Tariff, the person/company at whose request such move or change is made will be required to bear the costs incurred. Where by statute, ordinance or other legal requirement, existing aerial facilities are required to be relocated underground, the Company will charge the net cost attributable to such relocation to the local exchange subscribers located within the political subdivision or area affected by such statute, or ordinance or other legal requirement. This nonrecurring charge, developed by dividing the total rearrangement and/or removed cost by the total number of subscribers affected by the ordinance, would be billed as a one time charge via the customer's bill. All customers would have the option of paying the full cost upfront or spreading the cost over a specified agreed-to time period via monthly payments.

As mentioned above, Broward County also refers to Rule 25-4.0345(3), Florida Administrative Code, in its Petition for Declaratory Statement. Rule 25-4.0345(3) states that “[n]etwork facilities up to and including the demarcation point are part of the telephone network, provided and maintained by the telecommunications company under tariff.”

II. BellSouth's Response

It appears that BellSouth is not opposing the factual allegations set forth in Broward County's petition. Whether BellSouth disputes the facts, however, is not important. Pursuant to Rule 28-105.003, Florida Administrative Code, an agency may rely on the statement of facts contained in the petition for declaratory statement without taking a position on the validity of the facts when making a determination on the petition. Thus, if the facts set forth in Broward County's petition are inaccurate, the declaratory statement would not be controlling.

It appears from BellSouth's response that there is disagreement as to the interpretation of BellSouth's tariffs. BellSouth asserts that the Maxihut is a communications facility necessary to provide service to the subscriber. BellSouth indicates that, as such, the space should be provided rent-free to BellSouth pursuant to Section A2.3.9 of BellSouth's tariff. Furthermore, it states that the relocation of the Maxihut would be at Broward County's expense pursuant to Section A5.2.2.F.1.e. of BellSouth's tariff.

III. Staff's Analysis and Recommendation

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

Broward County states that it is "substantially affected by a construction of the BellSouth Subscriber Services Tariff that would require Broward County to provide Airport property to BellSouth for its switching equipment building at no cost, or require Broward County to pay to relocate the switching equipment building when required to implement Airport improvements or to enforce the expiration and surrender provisions of the BellSouth lease." Broward County requests that the Commission declare that:

A. BellSouth is not entitled, by virtue of any provision of its Tariff, or by any statute, rule, or order of the Commission, to use Broward County property for its switching equipment building (the "Maxihut" or any other such equipment structure) without Broward County's permission and, if such permission is granted, without paying compensation for such use;

B. BellSouth is not entitled, by virtue of any provision of its Tariff, or by any statute, rule, or order of the Commission, to exact payment or relocation costs from Broward County for vacating its leased premises in accordance with the terms of its valid Lease Agreement with Broward County or to otherwise relocate the switching equipment building as may be required by the Lease Agreement;

C. Nothing in the Tariff serves to abrogate the terms and conditions of the Lease Agreement entered between BellSouth and Broward County, including amendments thereto, that require the payment of rent to Broward County for the use of its property for the term and amount called for in the Lease Agreement, and that BellSouth is therefore required to pay rent for its leasehold; and

D. Nothing in the Tariff serves to abrogate the terms and conditions of the Lease Agreement entered between BellSouth and Broward County, including amendments thereto, that govern the termination of the Lease Agreement and the surrender of the premises upon termination in the manner called for in the Lease Agreement.

Rule 28-105.001, Florida Administrative Code, specifically states that "a declaratory statement is not the appropriate means for determining the conduct of another person." Broward County's request, as set forth in Points A through D above, does not conform to Rule 28-105.001, Florida Administrative Code, in that it is asking the Commission to state that BellSouth is not entitled to take certain actions.

Moreover, the declarations that Broward County is requesting in Points A through D above appear to be overly broad. Section 120.565(2), Florida Statutes, and Rule 28-105.002(4), Florida Administrative Code, specifically places the responsibility on Broward County to identify any statutory provisions, rules, or orders upon which the declaratory statement is sought. Broward County identifies certain BellSouth tariff provisions and a Commission rule in its petition. However, in Points A through D, Broward County asks the Commission to make a

general statement that there are no existing tariff provisions, statutes, rules, or Commission orders applicable to the circumstances set forth in Broward County's petition.

Furthermore, in Points B through D above, Broward County seems to ask the Commission to make findings on its Lease Agreement. Rule 28-105.001, Florida Administrative Code, specifically states that "[a] declaratory statement is a means for resolving a controversy or answering questions or doubts concerning the applicability of statutory provisions, rules, or orders *over which the agency has authority.*" (emphasis added) The Lease Agreement addresses the use of property, not telecommunications service or rates.

Staff believes that any declaratory statement issued by the Commission should pertain to Broward County, not BellSouth; should only address the tariff provisions and rules specifically referenced in Broward County's petition; and should only interpret the telecommunications provisions within the Commission's purview. With this in mind, staff believes that Broward County's Petition for Declaratory Statement raises the following issues: 1) whether Broward County is required to provide space for BellSouth's Maxihut rent-free; and 2) whether Broward County is obligated to pay for the relocation of the Maxihut if Broward County requires the relocation of the Maxihut.

The first issue is whether Broward County must provide space for the Maxihut rent-free. Section A2.3.9 states that the subscriber is responsible for the provision and maintenance, at subscriber's expense, of all suitable space and floor arrangements required on the subscriber's premises for communications facilities provided by BellSouth in connection with services furnished to the subscriber by BellSouth.

Each individual BellSouth customer in the Airport, including Broward County, provides an individual point-of-presence, i.e., the network interface device or cross connect block located in each customer's telephone or equipment closet. The telephone or equipment closets are provided rent free to BellSouth.

BellSouth does not contest that Broward County's telephone closet is the "demarcation point" defined in A1 of its tariff and Rule 25-4.0345. Rule 25-4.0345(3) states that "[n]etwork facilities up to and including the demarcation point are part of the telephone network, provided and maintained by the telecommunications company under tariff." The Maxihut is not on Broward County's side of the demarcation point. Moreover, BellSouth is solely responsible for the maintenance and upkeep of all the wiring that enters and exits the Maxihut, as well as for all the equipment inside the Maxihut.

This issue seems to boil down to whether Broward County is responsible under Section A2.3.9 for providing rent-free space to BellSouth for equipment that is located on BellSouth's side of the demarcation point. Staff believes that Broward County has no such responsibility. Staff believes that the "suitable floor space" requirement contemplated by Section A2.3.9. is met by Broward County providing telephone closets rent-free to BellSouth. This interpretation is bolstered by the fact that the equipment housed in the Maxihut is used by BellSouth not only to provide service to Broward County, but also to the 178 tenants at the Airport who are separate BellSouth customers. Broward County is but one of a number of subscribers at the Airport.

The second issue is whether Broward County is obligated to pay for the relocation of the Maxihut if Broward County requires that the Maxihut be moved. Like the prior issue, staff believes this issue hinges on whether Broward County has some sort of responsibility for telecommunications equipment located on BellSouth's side of the "demarcation point."

Section A5.2.2.F.1.e. states that the entity requesting the relocation of existing plant must bear the costs of such relocation. Section A5.2.2.F.1.e. is contained within Section A5.2.2. of BellSouth's tariff. Section A5.2.2. applies to special construction undertaken by BellSouth at the customer's specific request.

Staff believes that Broward County is not obligated under Section A5.2.2.F.1.e. to pay the costs for the relocation of the Maxihut because the Maxihut is not "special construction" under Section A5.2.2. The Maxihut was constructed by BellSouth, and the construction was not undertaken at Broward County's request. As stated above, the Maxihut houses equipment used by BellSouth to provide service not only to the County, but also to the 178 tenants at the Airport who are separate BellSouth customers.

Staff recommends that the Commission grant Broward County's Petition for Declaratory Statement to the extent that it raises issues appropriate for a declaratory statement. Staff recommends that the Commission declare that, based on the facts set forth in Broward County's petition, Broward County is not required under Section A2.3.9 of BellSouth's tariff to provide rent-free space for the Maxihut and Broward County is not obligated under Section A5.2.2.F.1.e of BellSouth's tariff to pay the costs for the relocation of the Maxihut. Staff recommends that Broward County's Petition for Declaratory Statement be denied to the extent that it improperly requests the Commission to direct BellSouth to take certain actions, that it requests an interpretation of statutory provisions, rules, and orders not specifically referenced in the petition, and/or that it requests an interpretation of the Lease Agreement.

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Issue 2: Should this docket be closed?

Recommendation: Yes. (Cibula, Moore)

Staff Analysis: If the Commission answers the petition, a final order can be issued and the docket closed.