

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of :  
Petition for emergency relief:  
by Supra Telecommunications &:  
Information Systems against :  
BellSouth Telecommunications :  
Inc., concerning collocation :  
and interconnection :  
agreements. :  
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DOCKET NO. 980800-TP



PROCEEDINGS: ORAL ARGUMENT

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

DATE: Tuesday, September 22, 1998

TIME: Commenced at 8:30 a.m.  
Concluded at 9:24 a.m.

PLACE: Betty Easley Conference Center  
Room 152  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: JOY KELLY, CSR, RPR  
Chief, Bureau of Reporting

DOCUMENT NUMBER-DATE  
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FLORIDA PUBLIC SERVICE COMMISSION

1     **APPEARANCES:**

2                   **SUZANNE F. SUMMERLIN**, 1311-B Paul Russell  
3     Road, Suite 201, Tallahassee, Florida 32301, appearing  
4     on behalf of **Supra Telecommunications and Information**  
5     **Systems, Inc.**

6                   **NANCY B. WHITE**, 150 South Monroe Street,  
7     Suite 400, Tallahassee, Florida 32301, appearing on  
8     behalf of **BellSouth Telecommunications, Inc.**

9                   **NORMAN H. HORTON, JR.**, Messer, Caparello & Smith,  
10    215 South Monroe Street, Tallahassee, Florida 32301, appearing  
11    on behalf of **e.spire and Northpoint Communications.**

12                   **LORENCE JON BIELBY**, Greenberg and Traurig, 101 East  
13    College Avenue, Tallahassee, Florida 32302, appearing on  
14    behalf of **Next Link.**

15                   **BETH KEATING**, Florida Public Service  
16    Commission, Division of Legal Services, 2540 Shumard  
17    Oak Boulevard, Tallahassee, Florida 32399-0850,  
18    appearing on behalf of the **Commission Staff.**

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1           **MS. KEATING:** Beth Keating appearing for  
2 Commission Staff.

3           **COMMISSIONER DEASON:** Ms. Keating, do you  
4 have some introductory comments?

5           **MS. KEATING:** Yes, Commissioner. I just  
6 wanted to make a brief explanation of why we're here  
7 today.

8           This matter has been noticed for limited  
9 oral argument on the issue of whether Supra may be  
10 considered to have first priority for physical  
11 collocation in BellSouth's North Dade Golden Glades  
12 and West Palm Beach Gardens central offices. In view  
13 of FCC Rule 51.323(F)(1), which requires the LECs to  
14 provide physical collocation on a  
15 first-come-first-serve basis.

16           Now, this issue has arisen because Supra's  
17 complaint in this docket was filed prior to  
18 BellSouth's petition for waiver of the 1996 Act's  
19 physical collocation requirements. There were,  
20 however, other ALECs that have also requested physical  
21 collocation in these offices and were denied.

22           Staff believes this is an unique  
23 circumstance which is unlikely to reoccur. This  
24 situation has, nevertheless, made it necessary for the  
25 issue of whether Supra has priority to be addressed as

1 expeditiously as possible, and before Supra's  
2 complaint proceeds to the October 21st hearing.

3 Staff notes that the notice of this oral  
4 argument did not indicate that the panel would make a  
5 bench decision. It's not clear whether such an  
6 indication would actually be necessary. So in an  
7 abundance of caution, Staff suggested that if the  
8 panel wishes to make a bench decision today, that the  
9 parties be given an opportunity to indicate their  
10 preference on the matter. If you decide not to make a  
11 decision today, Staff will prepare a recommendation to  
12 present to the panel at the October 6th agenda  
13 conference.

14 Another alternative you may consider would  
15 be to hear argument now, then reconvene after today's  
16 agenda conference to render your decision. Staff  
17 would be prepared to make a recommendation if you are  
18 so inclined to hear one.

19 **COMMISSIONER DEASON:** Do any of the parties  
20 have any preliminary comments? Ms. Summerlin.

21 **MS. SUMMERLIN:** Commissioners, I don't want  
22 to get into my argument at all. But I do think it's  
23 important, seeing as how this is Supra's complaint  
24 docket, to just put out a couple of sentences about  
25 why Supra is not raising Cain about having this

1 discussion at all.

2 In my view, Supra has voluntarily agreed to  
3 submit to this process of having an oral argument on  
4 this issue that is theoretically and appropriately an  
5 issue in the complaint docket that we have filed. It  
6 is only because the concerns of the Staff were raised  
7 to Supra about the importance across the industry of  
8 all of these issues and the fact there were other  
9 parties that had indicated they were concerned about  
10 who had a right to get into these particular central  
11 offices first, that Supra has voluntarily agreed to  
12 this very narrow oral argument. And also it's  
13 important to note that the Notice says that this does  
14 not constitute intervention in Supra's complaint  
15 proceeding.

16 And the reason I'm saying all of this is  
17 because if we were to construe this in any way beyond  
18 the very narrow issue that has been identified here,  
19 Supra would be objecting strenuously to intervention  
20 in its contract dispute and its complaint docket by  
21 parties that don't have standing to intervene.

22 And I'll just stop right there and let us go  
23 the way we were going to go.

24 **COMMISSIONER DEASON:** Okay. While you have  
25 the floor, so to speak, do you have a preference as to

1 whether the Commission entertains a bench decision or  
2 whether we postpone this until the October 6th agenda?

3 **MS. SUMMERLIN:** The only request that Supra  
4 would make is that the Commission carefully consider  
5 what decision it makes. And if it appears to be  
6 something that needs consideration, we have no problem  
7 waiting until -- you know, to give the Commission time  
8 to make the decision for the agenda that Ms. Keating  
9 referred to.

10 **COMMISSIONER DEASON:** Let me ask the other  
11 parties, is there any preference one way or the other  
12 concerning the possibility of a bench decision?

13 **MS. WHITE:** BellSouth would prefer a bench  
14 decision only from the standpoint that the hearing in  
15 this matter is scheduled for the 21st of October. I  
16 know that the decision the Commission makes in this --  
17 on this oral argument may have some bearing on whether  
18 that hearing goes forward. So to the extent we would  
19 have to continue getting ready for the hearing,  
20 BellSouth would desire a quicker resolution rather  
21 than a later one.

22 **COMMISSIONER DEASON:** Mr. Horton.

23 **MR. HORTON:** We would prefer an earlier  
24 decision, but I don't really think it makes a  
25 difference should you decide to take it up at the

1 agenda.

2 COMMISSIONER DEASON: Mr. Bielby.

3 MR. BIELBY: As soon as possible, please.

4 COMMISSIONER DEASON: Okay. Do any of the  
5 parties have any other preliminary matters?

6 Okay. I think we're prepared to proceed.

7 Ms. White, are you going to go first?

8 MS. WHITE: Yes, sir.

9 COMMISSIONER DEASON: Okay. Now, I  
10 understand that this oral argument is going to be  
11 structured such that Mr. Horton, Ms. White and  
12 Mr. Bielby will be sharing time, and then  
13 Ms. Summerlin will be allotted an allotment of time  
14 for her purposes. And I'm going to set that time  
15 limit at 15 minutes per side. So you need to be aware  
16 that that is per side. And you may proceed when you  
17 are ready.

18 MS. WHITE: Thank you. As Ms. Keating  
19 mentioned, the issue in this case is we have a  
20 complaint filed against BellSouth from Supra. Supra  
21 wants to physically collocate in two central offices,  
22 the West Dade Golden Glades and West Palm Beach  
23 Gardens central offices. BellSouth believes that  
24 there's insufficient space in both of these offices  
25 for physical collocation.

1           The issue is if after hearing on Supra's  
2 complaint this Commission decided that space did exist  
3 for physical collocation, then which ALEC has the pick  
4 of the space?

5           One ALEC asked for space in the Gardens  
6 office prior to Supra's complaint, and in the Golden  
7 Glades' office two ALECs asked for space prior to  
8 Supra's complaint, and two ALECs asked for space  
9 subsequent to Supra's complaint.

10           And the reason I mention that is that  
11 Supra's argument is that they have priority -- if the  
12 Commission finds space, they have priority for that  
13 space because they filed a Commission complaint and no  
14 other ALEC did. And BellSouth doesn't believe there's  
15 any support for this argument.

16           In the FCC's First Report and Order they  
17 clearly said that the incumbent local exchange  
18 companies must provide space for physical collocation  
19 to requesting carriers on a first-come-first-serve  
20 basis. That was adopted in Section 51.323(F)(1) of  
21 the Code of Federal Regulations, which states that,  
22 quote, "An incumbent LEC shall make space available to  
23 requesting telecommunications carriers on a  
24 first-come-first-serve basis." This rule was upheld  
25 on appeal. There's no discussion in the FCC orders

1 that the filing of a complaint instantly gives an ALEC  
2 priority with regard to physical collocation. There's  
3 no rationale for that, nor should there be. If the  
4 Commission accepts Supra's argument, then it opens the  
5 floodgate for complaints that are filed simply for the  
6 sake of ensuring that an ALEC is first at the  
7 courthouse steps. Nothing in the Act indicates that  
8 such an outcome is warranted or necessary.

9 "First-come-first-served" means exactly what it says.

10 The most reasonable and rational approach is  
11 that if this Commission find there's space in these  
12 offices for physical collocation, then BellSouth  
13 should start with the first request for space  
14 received. If that ALEC does not want the space,  
15 BellSouth should then move on to the next request in  
16 time, and so on, until either all ALECs have been  
17 asked or the space is exhausted.

18 This appears to be the only fair approach  
19 and the only approach that comports with the intent of  
20 the FCC and the Act.

21 **COMMISSIONER DEASON:** Do you have adequate  
22 documentation as to what constitutes the queue as to  
23 who asked first?

24 **MS. WHITE:** Yes, sir, we believe we do.

25 **COMMISSIONER JACOBS:** What was the status of

1 those other applications at the time Supra's was  
2 filed? In other words, have they been disposed of?  
3 Were they pending?

4 **MS. WHITE:** No. In the Golden Glades office  
5 two ALECs have been denied space. It's my  
6 understanding -- before Supra's complaint. It's my  
7 understanding that they opted for virtual collocation,  
8 which is what -- if there is no space, then BellSouth  
9 is required to offer the ALEC virtual collocation.  
10 It's my understanding that those two opted for virtual  
11 collocation. But, again, in the event that this  
12 Commission says space was available, those ALECs might  
13 decide "Well, we want to the change our virtual to  
14 physical." Then there were two ALECs subsequent to  
15 Supra's complaint, and I apologize, I don't have the  
16 information on what they have done.

17 **COMMISSIONER CLARK:** Are those two  
18 applicants, the two that are here, e.spire and  
19 Nextel (sic), are those the ones that are next in  
20 line, or in line ahead of Supra?

21 **MS. WHITE:** Yes, Next Link.

22 **COMMISSIONER CLARK:** Next Link. Okay. I  
23 read in one of the -- I'm under the impression that  
24 before you could deny physical collocation you should  
25 have asked for a waiver from us. Am I incorrect in

1 that?

2 **MS. WHITE:** Well -- and that's a good  
3 question. The problem is, is that we had waivers from  
4 the FCC on these two offices --

5 **COMMISSIONER CLARK:** Okay.

6 **MS. WHITE:** -- that had been obtained back  
7 when the FCC issued their expanded interconnection  
8 order, which I think was in '93 or '94. It wasn't at  
9 all clear to us that the Act intended that we had to  
10 go ask again for a waiver on these offices.

11 When Supra filed their complaint, in  
12 conversation with the Staff, it became apparent -- the  
13 Staff believed we needed to ask the state commission,  
14 the Florida Commission, for exemptions. And so we  
15 immediately started gathering the material to file the  
16 exemptions.

17 **COMMISSIONER CLARK:** But you had exemptions  
18 from these offices from the FCC and there had been no  
19 change in the size of the office since 1993.

20 **MS. WHITE:** That's correct. No change in  
21 the -- I mean, the building remained the same. There  
22 were no additions to the building.

23 **COMMISSIONER CLARK:** Okay.

24 **COMMISSIONER DEASON:** Mr. Horton or  
25 Mr. Bielby, whoever prefers to go next.

1           MR. HORTON: Yes, sir. On behalf of e.spire  
2 and Northpoint our comments are very brief.

3           In response to the issue as it's worded in  
4 the Notice, our position is no, that Supra does not --  
5 should not be considered to a priority for physical  
6 collocation in two offices. And if the Commission  
7 determines that there is space available, then the  
8 appropriate way to allocate that space is on a  
9 priority established when the applications were filed.  
10 47 CFR 51.323 says that space shall be made available  
11 to requesting carriers on a first-come-first-serve  
12 basis. Its a very simple process.

13           The first application that's filed is first  
14 in line. Once an application is filed with the LEC,  
15 that's what established the priority. There's no  
16 requirement to do anything else after that. There's  
17 no requirement to file a complaint; there's no other  
18 criteria. There's no other requirement imposed on the  
19 applicant for the space, nor is there any method for  
20 improving your standing in line. If a carrier is told  
21 that space is not available, that carrier or that  
22 provider does not lose his position in line just  
23 because another carrier complains and says it needs  
24 space.

25           Collocation is a critical issue to all of

1 the providers. We want space just as much as Supra  
2 does and any other carrier, so it's critical to all of  
3 us. We can understand why the complaint was filed.  
4 But that those not improve Supra's position in this  
5 instance.

6 If the complaint is to now become the  
7 standard for establishing the position in line, then I  
8 would submit that we're going to be seeing a lot more  
9 complaints. Anytime anybody is told no or anytime  
10 there's a denial, there's going to be an awful lot of  
11 complaints just to maintain your position in line. I  
12 don't think that was intended. I don't think that's  
13 the purpose. And it just is not a criteria or not a  
14 requirement that's there.

15 Moreover, if you're looking at multiple  
16 parties up here. If we had all filed complaints, how  
17 would you dispose of those complaints? Would you take  
18 them as they are date-stamped? Would you take them as  
19 we walk in the door, which is a first-come-first-serve  
20 basis. That's already the criteria for the  
21 applications. That's the way the LEC fills the  
22 applications. And we think that that's the way that  
23 it continues to be. First in, first out. First come,  
24 first serve.

25 The FCC has said that LECs have to make the

1 space available on the basis of first come, first  
2 serve, and that's with reference to the application.  
3 And there is no other criteria, and we would suggest  
4 that you should decide that issue accordingly. Thank  
5 you.

6 COMMISSIONER DEASON: Mr. Bielby.

7 MR. BIELBY: I appear here representing Next  
8 Link.

9 We believe we were the first applicant for  
10 physical collocation in BellSouth's North Dade  
11 Golden Glades central office facility ahead of Supra.  
12 Next Link made its application as early as April 12,  
13 '98. According to the face of the petitioner here,  
14 Supra's application wasn't made until May 2 of 1998.  
15 We appear here today to make three points.

16 The first and foremost is that the CFR  
17 provision is very clear, that if space within an  
18 incumbent LEC's facility exist, then that space is  
19 made available on a first-come-first-serve basis.

20 CFR Section 51.323(F)(1) has been read into  
21 the record by BellSouth. We agree that that is a very  
22 plain provision on its face. If it is determined that  
23 there is sufficient space in BellSouth's Golden Glades  
24 facility, Next Link made the first application and is,  
25 therefore, legally entitled to such space on a

1 first-come-first-serve basis.

2           Second, there is a companion docket pending  
3 where BellSouth has filed an application with this  
4 Commission for a waiver of the physical collocation  
5 requirements regarding BellSouth's North Dade  
6 Golden Glades facility. That is Docket No. 981012  
7 filed August 7th, 1998. That docket is the correct  
8 determination, correct forum for determination before  
9 you today. Supra is engaging in duplicative dockets  
10 in an attempt to jump to the head of the line  
11 regarding collocation and to avoid the  
12 first-come-first-serve plain language in the CFR  
13 provision.

14           Third. If there is an accusation, and  
15 apparently this issue has surfaced, that Next Link or  
16 any of the other ALECs who made application either  
17 before, or ahead or after Supra, that we have somehow  
18 waived our right to be first in line, or somehow have  
19 sat back and chosen not to contest BellSouth's denial  
20 of their application. That's simply not the case.

21           The applicable code provision, 47 CFR  
22 Section 51.321(F) requires for BellSouth as the  
23 incumbent LEC to submit to the PSC its detailed floor  
24 plans or diagrams to prove that physical collocation  
25 is not practical. That's a requirement. And

1 BellSouth apparently has done that by opening this  
2 second docket on August 7th, of '98. I've not  
3 reviewed it but that appears to be what they are  
4 attempting on their face.

5 **COMMISSIONER JACOBS:** Excuse me. Let me  
6 make sure. Did your client choose the virtual  
7 collocation option? Did Next Link chose the virtual  
8 collocation when you originally applied and were told  
9 there was no space available?

10 **MR. BIELBY:** I'm not aware if we got to  
11 that. We were an applicant for a physical  
12 collocation.

13 **COMMISSIONER JACOBS:** Next Link was not one  
14 of the ones that chose virtual.

15 **MR. BIELBY:** I don't know if we got to the  
16 virtual stage.

17 **MS. WHITE:** It's my understanding that they  
18 are, based on the information I have. But I don't  
19 know what the status of that is. I don't know how far  
20 along the process is.

21 **COMMISSIONER JACOBS:** Okay. Then my  
22 question was, was such proof offered at that time?  
23 Was there some determination at that time that floor  
24 plans were inadequate, and, therefore, that was a  
25 basis upon which that decision was made. Or was

1 simply asserted and was resolved by the virtual  
2 collocation agreement. Do you know how that worked  
3 out?

4 **MS. WHITE:** Well, it was my understanding --

5 **COMMISSIONER JACOBS:** Since it was  
6 Mr. Bielby's time, let me allow him first. I'm sorry.

7 **MR. BIELBY:** I do know that Next Link was  
8 told and -- verbally and in writing -- by BellSouth  
9 that there was an inadequate physical space. Now, as  
10 far as the virtual, I'm not aware of that.

11 **MS. WHITE:** It was my understanding that  
12 when space was denied, the ALECs were told that  
13 BellSouth had an exemption or waiver from the FCC for  
14 physical collocation.

15 **MR. BIELBY:** To conclude, it is our position  
16 that the BellSouth docket has not as yet been  
17 published in the FAW. It's not a requirement that the  
18 ALECs make a challenge, such as what Supra is doing  
19 here today, but is a requirement that BellSouth come  
20 in and publish its floor plan to prove there is  
21 insufficient space. So, therefore, to allow Supra to  
22 jump to the head of the line here would simply  
23 encourage litigation. It would encourage people to  
24 come forward and make such applications and such  
25 petitions in front of this Commission, and it would,

1 therefore, result in untenable process. We believe  
2 the first-come-first-served CFR provision is very  
3 plain, and we encourage this Commission to deny the  
4 application by Supra.

5 **COMMISSIONER DEASON:** Ms. Summerlin.

6 **MS. SUMMERLIN:** Commissioners, this is a  
7 very, very simple discussion this morning. The bottom  
8 line is there is a provision in the CFR, in the Code  
9 of Federal Regulations, that says the incumbent LEC is  
10 supposed to provide physical collocation on the basis  
11 of a first-come-first-served scenario. And Supra  
12 doesn't contest that that's in the CFR. The problem  
13 is, if you are a telecommunications carrier and you go  
14 to an incumbent LEC's central office and you say, "We  
15 want to have physical collocation in this central  
16 office." And the LEC says to you that they don't have  
17 space. And then you sit back and you say, "Okay.  
18 We're denied. I guess we'll just have to accept  
19 virtual or we'll just have to figure out something  
20 else to do." Then, you know, according to the  
21 scenario that's been presented to you by all three of  
22 these fine attorneys, we would be sitting here until  
23 Gabriel blows his horn to get into these central  
24 offices.

25 The meaning of any provision of law in a

1 statute or a rule is nothing if there is not the  
2 opportunity for any person aggrieved under that  
3 statute to move to enforce that statute, and to go to  
4 the agency or entity that is responsible for enforcing  
5 it.

6 e.spire and Next Link apparently, you know,  
7 made their own business decision about what they ought  
8 to do. They went to BellSouth. BellSouth said  
9 there's no space. They did not sit back and think  
10 about this and recognize that the Telecommunications  
11 Act says that if the -- let me just see here if we can  
12 read that really quickly now -- the duty to provide --  
13 this is the collocation -- it's a very short little  
14 paragraph. "The duty to provide on rates, terms and  
15 conditions that are just, reasonable and  
16 nondiscriminatory for physical collocation of  
17 equipment necessary for interconnection or access to  
18 unbundled network elements at the premises of the  
19 local exchange carrier, except that the carrier may  
20 provide for virtual collocation if the local exchange  
21 carrier demonstrates to the state commission that  
22 physical collocation is not practical for technical  
23 reasons or because of space limitations."

24 BellSouth would most likely never have filed  
25 a petition for waiver if somebody else had not

1 prompted them to by filing a complaint with the  
2 Commission because everybody was just accepting their  
3 statement. And why everybody did that, I don't know.  
4 The simple fact of the matter is that Supra did not  
5 accept the statement.

6 Now, it remains to be seen whether Supra can  
7 make an adequate case that there is space. But the  
8 point is Supra has taken the risk and put its  
9 resources and efforts behind forcing BellSouth to  
10 comply with this provision of the Telecommunications  
11 Act and to present the proof that there's not adequate  
12 space. Nobody else has done that.

13 This idea that the rule says first come,  
14 first serve is very well and good, and I think that if  
15 everyone were similarly situated, that is exactly the  
16 way the Commission should figure out who goes in  
17 first.

18 The only difference here is that you have an  
19 entity that came forth and filed a complaint. And  
20 unless you had an entity that filed a complaint, you  
21 wouldn't be here this morning. There's a concern  
22 about the fact, from Supra's point of view, that each  
23 of these companies had the exact same opportunity to  
24 come to this Commission and ask that the Commission  
25 determine this issue. BellSouth had an opportunity to

1 file its petition for waiver long before Supra filed a  
2 complaint. You wouldn't be here if BellSouth had  
3 chosen to do that. We would have been here on  
4 somebody's complaint, probably, if it hadn't been for  
5 Supra doing this. But the bottom line is, if you make  
6 a decision that the company who makes the complaint  
7 for a particular central office is only going to be  
8 philanthropically helping the people who happened to  
9 have filed earlier and sat back and did nothing to get  
10 into these offices, then you are mortally wounding  
11 this Act and the law here. Because you will not have  
12 anyone, no company is going to apply its efforts and  
13 resources and money and blood, sweat and tears trying  
14 to get other companies into a central office. And  
15 you're going to have a situation where the local  
16 exchange company can just simply tell people there's  
17 no space. And if they don't decide to go forth, then  
18 basically nobody gets in there.

19 **COMMISSIONER CLARK:** Let me ask you a  
20 question, Ms. White, based on what Ms. Summerlin has  
21 said.

22 Does it seem to you -- there's some merit in  
23 what she says. If there are companies who've come to  
24 you and asked and you've said no, you had a waiver,  
25 whether it was valid or not, and they chose to live

1 with that waiver and pursued virtual collocation, does  
2 it make sense to you that they have opted out of  
3 requesting physical collocation, and then the next in  
4 line comes up, and in this case it's Supra?

5 MS. WHITE: Well, I don't agree, only from  
6 the standpoint that --

7 COMMISSIONER CLARK: Well, how does anyone  
8 ever challenge your accessibility?

9 MS. WHITE: Well, they do. And once  
10 BellSouth realized that the FCC waivers were not  
11 sufficient, we started filing waivers at this  
12 Commission. I think there are presently five waivers  
13 for five different offices pending. Three other than  
14 these two.

15 But, for example, say that there's a waiver.  
16 That the FCC and this Commission has said, "Okay,  
17 there's no space in office X." And down the road  
18 BellSouth decides to build a second floor to that  
19 office, or a third floor to that office. Then under  
20 the rules it would be incumbent on us to go back to  
21 those people who had requested physical collocation  
22 and we said there was no space, to say, "We've built a  
23 second floor. We now have some space for you. Do you  
24 want to come in?"

25 Again, I think that -- and I can't speak for

1 the ALECs, but to some extent I think that physical  
2 collocation is more desirable to them than virtual.  
3 And even though they have a virtual, you know, that we  
4 have to go back and offer that company the opportunity  
5 to turn that into physical if they wish, because they  
6 were first in line. So I see it as that analogy, I  
7 guess.

8 **COMMISSIONER CLARK:** Mr. Chairman, I  
9 apologize. I probably shouldn't have asked Ms. White  
10 the question while Ms. Summerlin was still in the  
11 midst of her argument, but thank you.

12 **MS. SUMMERLIN:** Commissioners, I think that  
13 one issue that's important is to recognize that  
14 BellSouth is probably legitimately concerned that if  
15 Supra is given priority in line, that there are other  
16 entities -- some represented here today -- that may  
17 get unhappy about that and decide to do something  
18 about that with BellSouth.

19 The bottom line is when BellSouth decides to  
20 tell somebody that they don't have space in their  
21 offices, they need to be prepared to back that up in  
22 litigation, if that's what occurs. Certainly I am not  
23 suggesting that litigation is the most productive way  
24 to do anything, and I don't think anybody in the room  
25 would say that that's true. But the simple fact of

1 the matter is you have parties here who are adversary  
2 in their relationship. You have one entity that has  
3 the space; other entities want to get in there. And  
4 if the incumbent LEC takes the position that there is  
5 no space, and an entity that has asked for that space  
6 decides they want to hold their feet to the fire and  
7 have them prove the case that there's no space, then  
8 BellSouth needs to be prepared to support that. And  
9 if other companies decide they are unhappy because  
10 someone else has got into the office because they  
11 filed a complaint, BellSouth may well be facing some  
12 problems from those companies. But that's BellSouth's  
13 problem.

14 **COMMISSIONER JACOBS:** How would you respond  
15 to the idea, I think I just heard, that virtual  
16 collocation is not really first come, first serve.  
17 That the only real completion of that term is physical  
18 collocation? Because what I'm hearing is that if you  
19 actually accepted that virtual collocation, you  
20 weren't, indeed, served, you're still in the queue, so  
21 whenever the space comes up, the queue is always the  
22 same. How do you respond to that?

23 **MS. SUMMERLIN:** Commissioner, I can't tell  
24 you right this minute that I think that that's  
25 necessarily correct. I don't think you have to reach

1 that issue this morning. What I think BellSouth, what  
2 Ms. White is trying to say, is that BellSouth may have  
3 an ongoing obligation -- and I think that's something  
4 you could certainly consider, that they might possibly  
5 have a ongoing obligation at some later point. If the  
6 Commission were to find that there's no office space  
7 right now in these offices, and at a later point  
8 BellSouth did some kind of expansion, I think it might  
9 be true -- I'm not conceding one way or the other --  
10 but it might be true that BellSouth would need to go  
11 back and consider entities that had asked for physical  
12 collocation at an earlier point. I don't think that  
13 that's contradictory so what Supra's position is here  
14 today.

15 The point is that Supra is the first company  
16 that has pushed this issue and has filed a complaint  
17 and put its effort and resources to this issue.

18 Once the petitions for waiver were filed by  
19 BellSouth for these various offices, you then have a  
20 vehicle by which all of the entities asking for space  
21 can participate and can shake this thing out and  
22 figure out if there's space and everybody will be  
23 lined up based on when they ask for space. This is  
24 kind of unusual because Supra filed a complaint before  
25 BellSouth filed its petition for waiver. I think

1 that's one legitimate reason that is a unique  
2 scenario. But I don't agree with those who say that  
3 "Oh, you're going to encourage complaints." I don't  
4 think you're going to have to encourage complaints.  
5 If companies ask for space in central offices and they  
6 are denied that and there is no existing waiver  
7 petition from the state Commission, then the only  
8 opportunity that company is going to have, you know,  
9 other than accepting what is being told to them by  
10 that incumbent LEC, is to file a complaint with your  
11 Commission here. This is the only way to enforce what  
12 these rules provide.

13           And I think that this is a fairly unique  
14 scenario. I don't know that you won't have other  
15 complaints filed later on. If BellSouth has not filed  
16 a petition for waiver for a particular office, and  
17 various companies want to get in there and they are  
18 being denied access to a particular central office and  
19 they think that they can make a case that there is  
20 space there, you may have complaints filed later on.  
21 I don't know that you can avoid that kind of scenario.  
22 But I think BellSouth can avoid it by filing a  
23 petition for waiver if they believe that there's going  
24 to be a situation where they are going to have to deny  
25 people because they believe they don't have enough

1 space. I think they will have every opportunity to  
2 file a petition for waiver with this Commission and  
3 then all of the parties who are interested in that  
4 particular office come in here and participate to  
5 whatever extent they chose to as a business entity.

6 **COMMISSIONER CLARK:** Why shouldn't we do  
7 that now? They have indicated they thought their  
8 waivers with the FCC were sufficient. If they are not  
9 sufficient, require them to come in, file for waivers  
10 and we litigate it in the waiver.

11 **MS. SUMMERLIN:** I think that for later  
12 offices, that may be a perfectly appropriate thing to  
13 do. The problem here is that the Commission, I do not  
14 believe, cannot sit back and say, "Well, you know,  
15 it's too bad you filed a complaint on this day because  
16 a month later, or two months later, we thought about  
17 this and we think it's a lot better to handle it this  
18 other way and we're going to institute a proceeding on  
19 our own motion, or we're going to accept a later filed  
20 petition for waiver from the incumbent LEC, and we're  
21 going to handle it that way."

22 I think that one of the fundamental aspects  
23 of this situation is that when one entity comes to the  
24 Commission first and asks for a certain type of  
25 relief, what you have here is a contract dispute

1 between two parties under the Telecommunications Act.  
2 We are coming here on the basis that we have a  
3 collocation agreement with BellSouth that we believe  
4 has not been honored. And I believe that Supra has  
5 every right to file that complaint and to have it  
6 disposed of by the Commission in the time frame that  
7 is reasonable to allow an incumbent LEC to come in  
8 after a company has filed a petition, or a complaint  
9 based on the contract agreement that that particular  
10 company has with the ILEC, would be to basically put  
11 all control over these matters in the hands of the  
12 LEC.

13 **COMMISSIONER CLARK:** They indicated they had  
14 waivers for all of the offices. And because it's now  
15 been interpreted that they need waivers for us they  
16 are coming in. So it seems to me that what we do is  
17 handle them all as waivers, and you become part of  
18 that waiver because you're third in line.

19 **MS. SUMMERLIN:** Well, Commissioner, I would  
20 respectfully disagree. That it is very, very plain in  
21 this Act that the incumbent LEC has to come to the  
22 state commission before --

23 **COMMISSIONER CLARK:** Okay.

24 **MS. SUMMERLIN:** -- it makes a denial of  
25 space to any company.

1           **COMMISSIONER CLARK:** But what you're  
2 suggesting is because they haven't done that, you, in  
3 effect, leapfrogged the other two people.

4           **MS. SUMMERLIN:** Commissioner, what has  
5 happened is not we're leapfrogging, it's that we are  
6 acting to enforce this law.

7           **COMMISSIONER CLARK:** Oh, okay.

8           **MS. SUMMERLIN:** The other companies have sat  
9 back and decided to accept what they were told.

10           **COMMISSIONER CLARK:** So they have waived  
11 their rights to be first in line.

12           **MS. SUMMERLIN:** To be first in line. But  
13 they are not waiving their rights in whatever queue  
14 they may be in in this unique set of circumstances. I  
15 think that from now on it will probably be a little  
16 different. I think you're going to have a situation  
17 where before BellSouth denies space, they will have  
18 been in here asking for a waiver from the state  
19 commission because it's very plain that's what they  
20 are supposed to be doing. But in this scenario the  
21 bottom line is Supra filed first.

22           **COMMISSIONER JACOBS:** The only way I can get  
23 to there is if we go back to my earlier question. If,  
24 indeed, the queue was never changed, and if you accept  
25 that argument, then they have -- even if we resolve

1 your complaint favorably, and it is determined that  
2 there is space, unless we can find some way of  
3 changing that queue, I can't understand how we get you  
4 into the stop -- to the front of the line. The only  
5 way that I can see that is if some way, some informed  
6 fashion -- and what I hear you arguing, I think, is  
7 that they accepted a remedy. They were served. And  
8 so that rule was complied with from that standpoint.  
9 And now because you didn't accept that you weren't  
10 served. And so now your remedy still is outstanding.  
11 I can't get there in any other way.

12 **MS. SUMMERLIN:** Commissioner, let me suggest  
13 you may have some companies that would have asked for  
14 physical collocation, and I'm not sure about the facts  
15 of these particular companies. But you could have a  
16 company that asked for physical collocation and be  
17 denied physical collocation and not want virtual  
18 collocation, and they may go off and do something  
19 else.

20 I think the issue here is if you asked for  
21 physical collocation and you were denied physical  
22 collocation, then unless there's some reason for a  
23 company to be ahead of you, then you would fall under  
24 the "first come, first serve." The only kind of  
25 circumstance where somebody might be considered to

1 have higher priority is because they filed a complaint  
2 when they were denied as opposed to waiting and  
3 sitting back.

4           Let's just look at this. If what the  
5 Commission is saying is that every company that goes  
6 to a particular central office, or to an ILEC about a  
7 particular central office, goes to go that ILEC and is  
8 told, "No there's not enough space." And a year goes  
9 by and they have done nothing. They didn't come to  
10 you. They didn't say a word. They just accepted it.  
11 And then a year later another company comes along and  
12 does not agree that they should just accept it. And  
13 they say, "Hey, we think we need to get into this  
14 office and we want you to prove what you're supposed  
15 to prove under the Telecommunications Act." And then  
16 they put in a tremendous amount of effort, money and  
17 resources into a proceeding at this Commission, or at  
18 any federal court or wherever they go -- but obviously  
19 in this situation you're going to be at the  
20 Commission -- they put all of that in to try and  
21 enforce the law.

22           Is the Commission then going to penalize  
23 that company and say, "Oh, it was very good of you to  
24 come in and help us figure this out. It's too bad  
25 you're 10th, 15th or 20th in line."

1                   **COMMISSIONER CLARK:** Is one way to solve  
2 that to say that once the complaint is filed, that  
3 they have to intervene if they want to preserve their  
4 space in line?

5                   **MS. SUMMERLIN:** Commissioner, I think that  
6 it is completely inappropriate to allow other parties  
7 to intervene in this kind of a contract dispute. The  
8 Commission has continually --

9                   **COMMISSIONER CLARK:** You say it's a contract  
10 dispute but we're relying on what the FCC says as far  
11 as the waiver.

12                   **MS. SUMMERLIN:** There's no -- well, let me  
13 just say, this is a contract dispute. BellSouth will  
14 tell you this is a contract dispute. We worded the  
15 issues in this case so plainly because BellSouth  
16 wanted it limited to that kind of a dispute. And that  
17 is what it is, it's a contract dispute. It is not  
18 appropriate for intervention by any other parties.

19                   The way you solve this problem is if  
20 somebody believes they were inappropriately denied  
21 physical collocation, they had the same exact right to  
22 file a complaint that Supra had. No one has said to  
23 them they could not file a complaint. For whatever  
24 business reason they had, they didn't choose to do  
25 that. They just simply accepted the response that

1 they got.

2           **COMMISSIONER DEASON:** Ms. Summerlin, you  
3 need to wrap it up.

4           **MS. SUMMERLIN:** That's pretty much all I can  
5 say.

6           **COMMISSIONER DEASON:** Thank you. Staff.

7           **MS. KEATING:** Commissioners, this is a very  
8 difficult and close question in our mind.

9           The FCC's Rule is eminently clear that the  
10 LECs should allocate space in their central offices to  
11 requesting ALECs on a first-come-first-serve basis.  
12 However, the Act is also clear that LECs must seek a  
13 waiver from the state commission if physical  
14 collocation may no longer be accommodated due to space  
15 or technical limitations.

16           BellSouth had ceased to allocate space for  
17 physical collocation in these offices, but had not  
18 made a demonstration to this Commission that physical  
19 collocation was not practical.

20           Supra was one of several ALECs that was  
21 denied physical collocation by BellSouth. In reliance  
22 upon the Act's requirements and based upon its own  
23 belief that space may be available in these offices,  
24 Supra brought its complaint.

25           Supra has actively and vigilantly pursued

1 this issue in an effort to preserve any rights that it  
2 may have should space actually be available. None of  
3 the other ALECs that requested space in these offices  
4 did so. Were it not for Supra's complaint, the  
5 Commission would not be scheduled to consider the  
6 issue of whether there is space available in these  
7 offices as soon as it is currently scheduled to do so.  
8 Staff will not speculate as to whether or not the  
9 matter would have eventually been brought to the  
10 floor, either via waiver petitions or through another  
11 complaint. It suffices to say that Supra brought it  
12 to the Commission's attention first.

13 Staff believes this is a situation not  
14 contemplated by the FCC's rule. And with that in  
15 mind, Staff believes it would contradict fundamental  
16 principles of fairness to subjugate Supra's right, if  
17 any, to physical collocation in BellSouth's central  
18 offices, to the rights of other ALECs that did not  
19 actively pursue the issue.

20 I think it's important to note that Staff  
21 does not wish to encourage races to the courthouse or  
22 litigious behavior. Because of the specific  
23 circumstances of this matter, Staff does not believe  
24 that that would be the result if the Commission  
25 decides that Supra has first priority.

1           **COMMISSIONER DEASON:** And why would that not  
2 be the result?

3           **MS. KEATING:** Because we believe that this  
4 is a very unique circumstance and has only risen  
5 because of the timing of the waivers as related to  
6 Supra's complaint. And in view of the fact that it  
7 has been identified that BellSouth does need to seek  
8 waivers from the state commission, we hope they will  
9 actively seek waivers in situations where space is  
10 limited or not available in other central offices.

11           **COMMISSIONER JACOBS:** But don't we then make  
12 a statement about the fact that they relied on those  
13 waivers and accepted other remedies by doing that?

14           **MS. KEATING:** I don't know that we make a  
15 statement about their accepting other remedies. But I  
16 think that other ALECs have as much availability to  
17 read the statements in the Act as did Supra. Supra  
18 read it as to create an issue as to BellSouth was  
19 required to seek waivers from the Commission and  
20 brought that issue to our attention. Other ALECs  
21 didn't seek any remedy under the Act.

22           **COMMISSIONER CLARK:** Mr. Chairman, I'm not  
23 comfortable making a bench decision about this.  
24 Because while I'm in agreement with the notion that I  
25 guess there has to be -- in this situation Supra was

1 the first to bring it to our attention, the others  
2 chose not to. I mean the question of waiver comes up.  
3 But I disagree with the idea that even if they have a  
4 waiver, there might not be a situation where that  
5 waiver is subsequently challenged. It may be that  
6 those switchers become smaller and smaller, and the  
7 central office space that's needed to accommodate  
8 physical collocation changes. And there may be a  
9 point at which you have a valid waiver, but there's a  
10 company that says, "You know, I still think there's  
11 room and I want to challenge it." And then they find  
12 out there's five more people ahead of them who asked  
13 for it and settled for virtual collocation, and we may  
14 never get to the issue because they would see it as  
15 not to their benefit.

16 So I'm not sure that this is an unique  
17 situation, and somehow I think we need to think about  
18 how we are going to make it fair to those who request  
19 it. But don't set up a situation where it is never  
20 challenged when it would be appropriate to challenge  
21 it.

22 **COMMISSIONER DEASON:** When do you want to  
23 take this matter up?

24 **COMMISSIONER CLARK:** I think we should take  
25 it up at the next agenda.

1           **COMMISSIONER DEASON:** When is this scheduled  
2 to go to hearing?

3           **MS. KEATING:** October 21st.

4           **COMMISSIONER CLARK:** The next agenda is the  
5 6th.

6           **COMMISSIONER JACOBS:** I concur. I think I  
7 would be uncomfortable making a bench decision today.

8           **COMMISSIONER DEASON:** Okay. Very well.

9           **COMMISSIONER CLARK:** I think one thing you  
10 might think about is even once the waivers are in,  
11 that we might want to do a rule that says, you know,  
12 once the waivers are in, if somebody chooses to  
13 challenge that, they may change where they are in the  
14 queue. That has with it the notion of encouraging  
15 litigation. So I'd like some thought to be given to  
16 that. Because I don't think our decision here today  
17 is going to be we can limit it to the facts of this  
18 case and never have to face it again.

19           **COMMISSIONER JACOBS:** There's an underlying  
20 thing here I want to make sure we're clear on. There  
21 is an existing federal rule, procedures that are in  
22 place, by which an issue such as this is to be  
23 resolved. And I think we want, and I concur with  
24 Commissioner Clark's comment, we want to be clear  
25 about how we're complying with that. We don't want to

1 run into a problem. But we may get preempted because  
2 we didn't comply with this process. At the same time  
3 I think there is some flexibility here as to how we  
4 can resolve the complaint that comes before us.  
5 Because that clearly is allowed for. It clearly says  
6 that that's the process we should undergo to resolve  
7 that process.

8           It begins -- I guess I'm most uncomfortable  
9 saying that -- and I want to hear more about this --  
10 that that idea that because a complaint is filed with  
11 us -- which, quite frankly, I agree is an effort to  
12 enforce these revisions -- is not expressly -- is not  
13 expressly set out in this rule that one of the  
14 complaining parties would enforce this. It says the  
15 party who wants to get the waiver must comply with  
16 this. And there are a whole bunch of things that can  
17 be said about when that party doesn't do that; whether  
18 or not they have the right to come in and assert those  
19 rights continually.

20           In other words, what we're saying about this  
21 rule, if the incumbent LEC didn't pursue this process  
22 and now comes in after another party wishes to  
23 proceed, we're setting up a whole new train of  
24 litigation here, which I don't know if this rule was  
25 anticipated to address. Do you understand what I'm

1 saying? And we need to understand what we want to say  
2 about that, is all I'm saying. When we proceed, let's  
3 be clear about what we, as a state commission, are  
4 saying about that, so we escape any possibilities of  
5 preemption in those sorts of issues that might come  
6 out of that.

7 **COMMISSIONER DEASON:** Any further questions  
8 or comments? This oral argument is adjourned. Thank  
9 you all.

10 (Thereupon, the hearing concluded at 9:24  
11 a.m.)

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1 STATE OF FLORIDA)  
2 : CERTIFICATE OF REPORTER  
3 COUNTY OF LEON )

4 I, JOY KELLY, CSR, RPR, Chief, Bureau of  
5 Reporting, Official Commission Reporter,

6 DO HEREBY CERTIFY that the Oral Argument in  
7 Docket No. 980800-TP was heard by the Florida Public  
8 Service Commission at the time and place herein  
9 stated; it is further

10 CERTIFIED that I stenographically reported  
11 the said proceedings; that the same has been  
12 transcribed by me; and that this transcript,  
13 consisting of 40 pages, constitutes a true  
14 transcription of my notes of said proceedings.

15 DATED this 22nd day of September, 1998.

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JOY KELLY, CSR, RPR  
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