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M E M O R A N D U M

September 29, 1998

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (B. KEATING) *AK MCB CF*  
DIVISION OF COMMUNICATIONS (STAVANJA, FAVORS) *[Signature]*

RE: DOCKET NO. 980800-TP - PETITION FOR EMERGENCY RELIEF BY  
SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS AGAINST  
BELLSOUTH TELECOMMUNICATIONS, INC., CONCERNING  
COLLOCATION AND INTERCONNECTION AGREEMENTS.

AGENDA: OCTOBER 6, 1998 - REGULAR AGENDA - PROCEDURAL ISSUE -  
EMERGENCY ORAL ARGUMENT HEARD SEPTEMBER 22, 1998 -  
PARTICIPATION LIMITED TO RESPONDING TO QUESTIONS FROM  
COMMISSIONERS - PARTICIPANTS AT SEPTEMBER 22, 1998,  
EMERGENCY ORAL ARGUMENT MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\980800S1.RCM

CASE BACKGROUND

On June 30, 1998, Supra Telecommunications & Information Systems (Supra) filed a Petition for Emergency Relief against BellSouth Telecommunications, Inc. (BellSouth). By its Petition, Supra asks that the Commission require BellSouth to permit Supra to physically collocate in BellSouth's North Dade Golden Glades and West Palm Beach Gardens central offices. On July 20, 1998, BellSouth filed its Answer and Response to Supra's Petition. This matter has been set for an administrative hearing on October 21, 1998.

Subsequent to Supra's Complaint, on August 7, 1998, BellSouth filed Petitions seeking waivers of the requirements of the

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Telecommunications Act of 1996 (Act), Section 251(c)(6), and paragraphs 602-607 of the Federal Communications Commission's First Report and Order to provide physical collocation. By its Petitions, BellSouth claims that it can no longer provide physical collocation in its West Palm Beach Gardens and North Dade Golden Glades central offices because it no longer has sufficient space.

BellSouth and Supra have a Commission-approved Collocation Agreement and Interconnection Agreement. The issues in the Complaint proceeding have been narrowly tailored to address Supra's complaint as it arises out of the parties' agreement. Nevertheless, a unique priority issue has arisen that affects other ALECs who have requested space in these offices, and staff believed that the issue needed to be addressed before Supra's complaint proceeds to hearing.

After reviewing the parties' direct testimony, and meeting with the parties to the Complaint docket, as well as intervenors in the waiver dockets, staff realized that Supra was not the first company to request physical collocation in these two central offices. Supra was, however, the first company to file a complaint when BellSouth informed them that space was not available. Physical collocation is unique from other interconnection issues because it involves a finite resource - space. Thus, if Supra is not the company that should have first priority for physical collocation in these central offices, staff believes that the waiver requests should be dealt with before the Complaint proceeding is resolved. If Supra is the company that should have first priority in these offices, staff believes that the Complaint proceeding should continue on its current track. Whether there is sufficient space for other companies would then be addressed through the waiver request dockets.

As the Commission has made very clear, contract complaint proceedings are limited to the parties to the contract. In this unique situation, however, it appeared appropriate to allow the ALECs who requested physical collocation in the central offices in question to participate for the limited purpose of addressing the issue of whether or not Supra has first priority for physical collocation in these offices.

In order to address this question, an oral argument was held September 22, 1998, before the Commission panel assigned to this case. The oral argument was limited to the following issue:

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In view of 47 C.F.R. § 51.323(f)(1), may Supra be considered to have first priority for physical collocation in BellSouth's Golden Glades and West Palm Beach Gardens central offices if the Commission determines, after hearing, that physical collocation is appropriate in these offices?

Participation in the oral argument did not constitute a grant of intervention in Docket No. 980800-TP.

This is staff's recommendation on the issue addressed at the September 22, 1998, oral argument.

**ISSUE 1:** In view of 47 C.F.R. § 51.323(f)(1), may Supra be considered to have first priority for physical collocation in BellSouth's Golden Glades and West Palm Beach Gardens central offices if the Commission determines, after hearing, that physical collocation is appropriate in these offices?

**RECOMMENDATION:** Yes. In this unique situation, Supra may be considered to have priority for physical collocation in BellSouth's North Dade Golden Glades and West Palm Beach Gardens central offices. Supra has priority in these offices only because Supra filed its complaint well before BellSouth had filed its waiver requests for these offices with the Commission, and before any other ALEC had complained. The first-come, first-served requirement of 47 C.F.R. § 51.323(f)(1) does not contemplate these specific circumstances.

**STAFF ANALYSIS:**

**BellSouth**

In its oral argument, BellSouth asserted that one ALEC requested space in the West Palm Beach Gardens central office prior to Supra, and two ALECs requested space in the North Dade Golden Glades central office before Supra requested space. BellSouth stated that it had denied physical collocation to these ALECs because it believes that there is no room available in these offices. BellSouth also indicated that it had obtained waivers from the physical collocation requirements from the FCC prior to the enactment of the Act. BellSouth added that these offices have not changed in size since it obtained the FCC waivers. BellSouth

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indicated that it believed that the ALECs that had been denied physical collocation in these offices had agreed to accept virtual collocation.

BellSouth asserted that Supra should not have priority over these other ALECs in either office. BellSouth stated that the FCC's First Report and Order clearly states that an incumbent local exchange company must provide space for physical collocation on a first-come, first-served basis. This requirement has been codified at 47 C.F.R. § 51.323(f)(1). BellSouth acknowledged that there is no discussion in the FCC's Order or Rules regarding the filing of a complaint and whether such a complaint would alter the first-come, first-served rule. BellSouth argued, however, that to allow such an outcome would open the "floodgate for complaints that are filed simply for the sake of ensuring that an ALEC is first at the courthouse steps." (TR 10). BellSouth further argued that the more rational approach would be to require BellSouth to allocate space starting with the first request received, if the Commission determines that space is available. BellSouth stated that ". . . this appears to be the only fair approach and the only approach that comports with the FCC and the Act." (TR 10).

#### Northpoint and e.spire

Northpoint and e.spire agreed with BellSouth. They argued that if the Commission determines that space is available in the North Dade Golden Glades and West Palm Beach Gardens central offices, then the space should be filled based upon ". . . the priority established when the applications were filed." (TR 13). They contended that it is the application itself that establishes priority. According to Northpoint and e.spire, once an application has been filed, there is no further requirement for holding or improving your place in line. They added that if a carrier is told there is no space available, that carrier does not lose its place if the next carrier chooses to complain.

Northpoint and e.spire further asserted that if complaints become the standard for preserving an ALEC's place in line, then the Commission will certainly see many more complaints in the future regarding physical collocation. He also questioned how the Commission would handle multiple complaints filed regarding the same central office. Counsel stated that the Commission should apply the FCC's first-come, first-served rule in this and all instances.

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**Next Link**

Next Link asserted that it was the first applicant for physical collocation in the North Dade Golden Glades central office and that it should have priority for space ahead of Supra. Next Link argued that 47 C.F.R. § 51.323(f)(1) is very clear how space must be allocated in the incumbent LEC's central offices. Next Link also argued that the proper forums for determinations regarding physical collocation in BellSouth's central offices are the waiver dockets, which have been opened to address BellSouth's petitions for waiver. Next Link asserted that Supra's complaint docket is duplicative and was filed in an attempt to bypass the first-come, first-served rule.

In addition, Next Link argued that neither it, nor any other ALEC that requested physical collocation ahead of Supra had waived their rights to physical collocation simply by not contesting BellSouth's denial of their application. Next Link stated that the FCC rules require that BellSouth submit floor plans in order to demonstrate to the state commission that physical collocation is not feasible. Next Link noted that BellSouth has done so, and the proper forum for any further discussion of this matter is in the waiver dockets.

**Supra**

Supra stated that it does not contest what FCC Rule 47 C.F.R. § 51.323(f)(1) says. Supra argued, however, that by not pursuing the issue of physical collocation, the other ALECs forfeited their place in line. Supra argued that "The meaning of any provision of law in a statute or a rule is nothing if there is no opportunity for any person aggrieved under that statute to move to enforce that statute, and to go to the agency or entity that is responsible for enforcing it." (TR 20). Supra agreed that other ALECs had sought physical collocation in these central offices prior to Supra. Supra emphasized, however, that these ALECs did not recognize that Section 251(c)(6) of the Act required BellSouth to demonstrate to the state commission its basis for denying physical collocation.

Supra further asserted that if it had not filed its complaint, BellSouth may never have sought waivers for these offices from the Commission. Supra argued that it has taken the time and expended the resources necessary to pursue physical collocation, rather than just accepting BellSouth's assertions that space is not available.

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Supra stated that no one else had assumed that task. Supra emphasized that the Commission would not even have the issue of whether there is space available in these offices before it were it not for Supra's efforts. Supra argued that other ALECs had the same opportunity to assert their rights, but did not. Supra added that if the Commission decides that Supra does not have priority, no other company will ever contest whether there is space in an office, because no company is ". . . going to apply its efforts and resources and money and blood, sweat and tears trying to get other companies into a central office." (TR 22). Supra further noted that the incumbent LEC would simply be able to deny physical collocation in a central office without being required to fully demonstrate the basis for the denial. Supra stated that if BellSouth is going to deny physical collocation, it should be prepared to support that denial in litigation.

#### Discussion and Conclusion

As explained in the Case Background, staff believes that this is a unique issue arising out of specific circumstances. This is the situation before the Commission now. BellSouth did not seek an exemption from the physical collocation requirements from the state commission when it denied requests for physical collocation. Some ALECs that were denied physical collocation relied upon BellSouth's assertions that there was no space and that it had waivers from the FCC. The ALECs that did not pursue the matter accepted virtual collocation as a substitute for physical collocation in these central offices. Supra was one of several ALECs denied physical collocation by BellSouth. Unlike the other ALECs that were denied physical collocation in these offices, Supra complained to the Commission based upon the Act's requirements, and its own belief that space may be available in these offices. Supra actively pursued this issue in an effort to preserve any rights that it may have if space is later determined to be available.

The question that arises out of these facts is whether the FCC's first-come, first-served rule should be strictly applied in this instance, or whether Supra has priority in these offices because it complained. Staff believes that there are several provisions in the Act and the FCC's rules that have a bearing on this issue.

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Section 251 of the Act imposes a number of duties and obligations upon incumbent LECs. Among those duties is the duty to provide for collocation. Section 251(c)(6) states

COLLOCATION.- The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

The FCC has promulgated a number of rules implementing Section 251(c)(6) of the Act. Among them is FCC Rule 47 C.F.R. § 51.323(a), which states

An incumbent LEC shall provide physical collocation to requesting telecommunications carriers.

FCC Rule 47 C.F.R. § 51.323(f)(1) also implements Section 251(c)(6). It states that

(f) An incumbent LEC shall allocate space for the collocation of the equipment identified in paragraph (b) of this section in accordance with the following requirements:

(1) an incumbent LEC shall make space available within or on its premises to requesting telecommunications carriers on a first-come, first-served basis, provided, however, that the incumbent LEC shall not be required to lease or construct additional space to provide for physical collocation when existing space has been exhausted.

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In addition, FCC Rule 47 C.F.R. § 51.321 (d-f) states

(d) An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible.

(e) An incumbent LEC shall not be required to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the incumbent LEC's premises if it demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations. In such cases, the incumbent LEC shall be required to provide virtual collocation, except at points where the incumbent LEC proves to the state commission that virtual collocation is not technically feasible. If virtual collocation is not technically feasible, the incumbent LEC shall provide other methods of interconnection and access to unbundled network elements to the extent technically feasible.

(f) An incumbent LEC shall submit to the state commission detailed floor plans or diagrams of any premises where the incumbent LEC claims that physical collocation is not practical because of space limitations.

Staff has reviewed these provisions carefully. Staff has also reviewed the collocation provisions of the FCC's *First Report and Order*, Order 96-325, and the FCC's *Memorandum Opinion and Order on Expanded Interconnection*, Order 94-190. Staff believes that the situation that has arisen in this case is unique and one not contemplated by the FCC's Rule 47 C.F.R. § 51.323(f)(1), the "first-come, first-served" rule.

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As set forth in Paragraph 72 of FCC Order 94-190, the FCC has determined that ". . . a first-come, first-served process appears to be the most equitable manner to allocate space." The FCC has advocated this policy for some time. As set forth at Paragraph 67 of FCC Order 94-190,

Orders/Background. Our existing rules require the LECs to offer space for physical collocation on a first-come, first-served basis, and to provide virtual collocation in central offices in which space for physical collocation is unavailable or becomes exhausted.

The FCC has been clear that when a LEC is no longer able to allocate any space for physical collocation, the LEC must seek an exemption or waiver of the physical collocation requirements. If the exemption is granted, the LEC must provide virtual collocation. The FCC has further indicated that when the LECs petition for exemptions due to space limitations, they should provide detailed information regarding central office space availability, in many cases including floor plans and statements regarding future plans. FCC Order 94-190 at ¶ 71. The FCC noted that it found that this process worked well. Id. The passage of the 1996 Act did not change the FCC's stance on first-come, first-served for physical collocation, and it still clearly contemplates that the LECs will seek a waiver if physical collocation is no longer feasible. See FCC Order 96-325 at ¶585, Rules 47 C.F.R. § 51.321(d) and § 51.321 (f).

In addition, the FCC has recognized the state commission's role in the reviewing whether physical collocation is feasible, in accordance with the Act. In particular, Rule 47 C.F.R. § 51.321(d) clearly states that when a LEC denies a request for any method of interconnection or access to unbundled network elements, the LEC must demonstrate to the state commission that the method is not feasible. See also FCC Order 96-325 at ¶ 585.

There are, however, no statements in the FCC's First Report and Order or the FCC's Rules regarding remedies or consequences if a LEC does not seek an exemption. In view of the extent to which the FCC has addressed the matter of exemptions from the physical collocation requirements, staff believes that this is an indication that the FCC did not contemplate this situation in which a LEC

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denied physical collocation without a valid waiver, the first ALECs denied space did not complain, but a subsequent applicant did complain. Since it does not appear that the FCC contemplated this particular situation, staff believes that strict application of the FCC's first-come, first-served rule would be unreasonable.

Staff will not speculate as to when BellSouth would have sought waivers for the North Dade Golden Glades and West Palm Beach Gardens central offices if Supra had not complained. It is, however, noteworthy that Next Link indicated that it had been denied physical collocation in April, 1998. Supra's complaint was filed June 30, 1998. BellSouth did not file its petitions for waivers for these offices until August 7, 1998. It is sufficient that Supra brought this situation to the Commission's attention first. The other ALECs that were denied physical collocation in these offices had the same rights under the Act as Supra and the same opportunity to seek relief from the Commission when BellSouth denied their requests for physical collocation. They did not pursue the issue and entered into negotiations for virtual collocation.

Based upon these specific circumstances, staff believes that it would contradict fundamental principles of fairness to subjugate Supra's right, if any, to physical collocation in BellSouth's central offices to the rights of other ALECs that did not actively pursue the issue. While staff does not wish to encourage "races to the courthouse" or litigious behavior, as some ALECs have suggested, we do believe that it is important for problems to be brought to the Commission's attention in a timely manner.

Supra's complaint brought to the Commission's attention the fact that BellSouth had been denying physical collocation without a waiver from the state commission. Now that BellSouth has recognized that it must seek waivers from this Commission, staff believes that this particular situation will not arise in the future. If it does, it would certainly be appropriate to address it through a complaint proceeding, if necessary. Staff emphasizes, however, that filing a complaint should not be viewed as a means for an ALEC to preserve its place in line in other situations. Only the timing and circumstances at work in this case constitute a basis for avoiding strict application of the first-come, first-served rule, because without Supra's complaint, the Commission might not even be addressing the issue of whether there is space for physical collocation in these offices.

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On a going-forward basis, staff expects that space and technical feasibility issues related to physical collocation will be addressed in waiver proceedings. Staff strongly suggests that BellSouth reassess the space in a central office after it has filled a request for physical collocation. If there is not room for further physical collocation, BellSouth should petition the Commission for a waiver from the physical collocation requirements before it receives any more requests for physical collocation in that office.

Finally, staff notes that a concern was raised regarding what impact a Commission decision giving Supra priority in these offices would have in a situation in which BellSouth had a valid waiver for a central office, but due to technical advancements or building additions, space became available at a later date. Again, staff emphasizes that we believe that the FCC did not contemplate the specific facts of this case, and, therefore, the deviation from the FCC's first-come, first-served rule that staff recommends in this case is warranted. The FCC has, however, considered situations in which a LEC renovates its facilities. The FCC states, in part, that

Consistent with the requirements and findings of the *Expanded Interconnection* proceeding, we conclude that incumbent LECs should be required to take collocator demand into account when renovating existing facilities and constructing or leasing new facilities, just as they consider demand for other services when undertaking such projects. We find that this requirement is necessary in order to ensure that sufficient collocation space will be available in the future. We decline, however, to adopt a general rule requiring LECs to file reports on the status and planned increase and use of space. State commissions will determine whether sufficient space is available for physical collocation, and we conclude that they have authority under the 1996 Act to require incumbent LECs to file such reports. We expect individual state commissions to determine whether the filing of such reports is warranted.

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FCC Order 96-325 at ¶ 585. Staff suggests that this issue may be further addressed in the proceedings to address BellSouth's waiver petitions.

**ISSUE 2:** Should this Docket be closed?

**RECOMMENDATION:** No. Whether the Commission approves or denies staff's recommendation in Issue 1, this Docket should remain open to address the issues arising out of Supra's complaint. If the Commission denies staff's recommendation in Issue 1, staff recommends that the proceedings in Docket No. 980800-TP be stayed until Dockets Nos. 981011-TP and 981012-TP have been resolved.

**STAFF ANALYSIS:** Whether the Commission approves or denies staff's recommendation in Issue 1, this Docket should remain open to address the issues arising out of Supra's complaint. If the Commission denies staff's recommendation in Issue 1, staff does, however, recommend that further proceedings in this docket be stayed until BellSouth's Petitions for Waivers of the physical collocation requirements for the North Dade Golden Glades and West Palm Beach Gardens central offices, Dockets Nos. 981011-TP and 981012-TP have been addressed.