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February 27, 2002

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Docket No. 001305-TP – Supra's Motion For Oral Arguments on the Procedural Question Raised by the Commission Staff and the Wrongful Denial of Due Process

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Notice of Service of its Motion For Oral Arguments on the Procedural Question Raised by the Commission Staff and the Wrongful Denial of Due Process in the above captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

Brian Chaiken/ZHS

Brian Chaiken
General Counsel

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery and/or U.S. Mail this 27th day of February, 2002 to the following:

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By: Brian Chaiken/AHS
BRIAN CHAIKEN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications and Information Systems, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996	Docket No. 001305-TP Filed: February 27, 2002

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.'S MOTION FOR ORAL ARGUMENTS ON THE PROCEDURAL QUESTION RAISED BY THE COMMISSION STAFF AND THE WRONGFUL DENIAL OF DUE PROCESS

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel, hereby files this MOTION FOR ORAL ARGUMENTS pursuant to Rule 25-22.058, Florida Administrative Code, and in support thereof, Supra states as follows:

BRIEF INTRODUCTION

1. Rule 25-22.058(1), Florida Administrative Code, provides in part: "A request for oral argument shall be contained on a separate document and must accompany the pleading upon which the argument is requested." This request for oral argument is hereby being made in this separate document.

2. The pleading upon which oral argument is being requested is the Revised Staff Recommendation, Issue III, issued on February 25, 2002, in Docket No. 001305-TP.

3. The Revised Staff Recommendation is over 200 pages. Supra respectfully requests that the Commission take judicial notice of the voluminous nature of the

Recommendation and consider the Recommendation properly filed as if attached in its entirety hereto.

4. Rule 25-22.058(1), Florida Administrative Code, further states that a request for oral argument "shall state with particularity why oral argument would aid the Commission." In accordance with this express mandate, Supra shall state, in this document, with particularity why it was incorrect for the Revised Staff Recommendation to conclude that "Supra's Motion [for Rehearing] is procedurally improper." *See Revised Staff Recommendation, pg 24, top paragraph.*

5. Furthermore, and perhaps even more significant, is the fact that based on the current Agenda set for March 5, 2002, should the Commission deny Supra's Motion for Rehearing and immediately proceed to vote on the underlying issues in this Docket (Issues B through 67), this Commission will have wrongfully denied Supra its Constitutional due process rights.

PROCEDURAL SUMMARY

6. On February 13, 2002, Supra filed a Motion asking the Commission to allow the parties to file legal briefs with respect to the 11th Circuit's decision as well as a request for oral arguments.

7. On February 18, 2002, Supra filed a Motion for a new hearing based upon Commission precedent established in Commission Order No. PSC-02-0143-PCO-TP.

8. The law permits the Commission to rule upon Supra's Motion for a new hearing **before** rendering a decision in Docket No. 001305-TP. Supra did not address this

issue in either of its two previous filings. Staff, however, did address the procedural question, for the first time, in its Revised Staff Recommendation.

9. Supra files this Motion for Oral Argument on the procedural question regarding whether the Commission is empowered to rule on Supra's Motion for new hearing prior to rendering a decision in Docket No. 001305-TP.

Commission Authority to Grant a Rehearing

10. The FPSC Staff, in its Recommendation, concluded that Supra's Motion was "procedurally improper because it asks for rehearing **based on staff's post-hearing recommendation**, rather than rehearing of a Commission order." (Emphasis added) (See Recommendation at pg. 24.) The problem with Staff's assertion is that Supra, in its Motion, did not request for a rehearing based upon Staff's post-hearing recommendation. On the contrary, Supra moved for a new hearing based upon Commission precedent in Commission Order No. PSC-02-0143-PCO-TP as a result of the existence of an actual conflict of interest created by the improper communications that occurred between Ms. Kim Logue (PSC Staff supervisor) and Ms. Nancy Sims (BellSouth's Director of Regulatory Affairs) and the appearance of impropriety that existed because of BellSouth's decision to keep Ms. Logue's contacts a secret from both the Commission and Supra until after the close of the evidentiary hearing in Docket No. 001305-TP.

11. The Staff goes on to write:

> The rules governing administrative proceedings before the Commission do not provide for rehearing of staff recommendations prior to a Commission decision. *See page 24.*

Significantly, Staff cites to no authority standing for the proposition that a Rehearing may NOT be granted prior to the issuance of a Commission Order.

12. As set forth below, there is significant legal precedent which would allow the Commission to grant Supra's Motion for Rehearing, such legal precedent having been completely ignored by Staff.

13. The Commission is authorized to act as an arbitrator pursuant to 47 U.S.C. sec. 252. *MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, 112 F.Supp.2d 1286, 1297 (N.D. Fla. 2000).

14. When the Commission acts to resolve particular facts in dispute, as in an arbitration proceeding, the Commission acts in a quasi-judicial capacity. *See* Southern *Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 780, 783 (Fla. 1984) (finding that the Commission exercises quasi-judicial authority when adjudicating disputes arising out of interexchange service contracts); and *Cherry Communications, Inc. v. Deason*, 652 So.2d 803, 804 (Fla. 1995) (the court observed that the Florida Public Service Commission engages in a quasi-judicial function when it seeks to resolve particular facts in dispute). *See also Jennings v. Dade County* 589 So. 2d 1337, 1343, fn. 3 (3d DCA 1991) (An administrative body acts quasi-judicially when it adjudicates rights after a hearing which comports with due process requirements, and makes findings of fact and conclusions of law on the disputed issues).

15. In its quasi-judicial capacity, the Commission may order a new hearing, prior to rendering a decision in Docket No. 001305-TP. See *Ed Ricke and Sons, Inc. v. Green*, 468 So.2d 908, 911 (Fla. 1985) ("The judge may, at his discretion, order a

new trial immediately following the motion for a mistrial or reserve ruling on the motion until after the jury deliberations.")

16. Quasi-judicial bodies have a duty to safeguard against violations of procedural due process. The United States Supreme Court has stated that:

> "A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision maker **constitutionally unacceptable** but our system of law has always endeavored to prevent even the probability of unfairness." *Hithrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). (Emphasis added).

17. Florida has a plethora of case law also providing that a fair trial in a fair tribunal is a basic requirement of due process. *See Rucker v. City of Ocala*, 684 So.2d 836, 841 (1st DCA 1996) (It is well established that "[i]t is fundamental that the constitutional guarantee of [procedural] due process, . . . extends to every proceeding," also for an administrative hearing "[t]o qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive").

18. Administrative agencies sitting in a quasi-judicial capacity have a duty not to "shut its eyes to constitutional issues that arise in the course of administrative proceedings it conducts." *Communications Workers of America, Local 3170 v. City of Gainesville,* 697 So.2d 167, 169 (1st DCA 1997) (where the court stated that the "notion that the constitution stops at the boundary of an administrative agency's jurisdiction does not bear scrutiny," and that "[e]xecutive branch officers, like legislators and judges, are charged with upholding the constitutions under which they hold authority") *See* also *Jennings v. Dade County* 589 So. 2d

1337, 1340, (3d DCA 1991) ("Certain standards of basic fairness must be adhered to in order to afford due process"); *Miami-Dade County v. Reyes*, 772 So.2d 24, 29 (3d DCA 2000) ("Due process envisions a law that hears before its condemns, proceeds upon inquiry, and renders a judgment only after proper consideration of issues advanced by adversarial parties") (Emphasis added).

19. Florida case law outlining a quasi-judicial body's responsibility to guard against violations of procedural due process, dovetails with the Florida Supreme Court case, cited above, stating that Judges may order a new trial immediately following a motion for a new hearing. If quasi-judicial bodies did not have a responsibility for safeguarding against procedural due process, then arguably the Commission would be required to leave such matters for appellate review after rendering a decision in the underlying matter. This, however, is not the case here. And the Commission does have a duty to safeguard against such violations.

20. Consistent with the principal and standards outlined above, stands Chairman Jaber's Order No. PSC-02-0143-PCO-TP – in which she ruled that the "mere appearance of impropriety" is sufficient to grant a new hearing.

21. Consistent with the notion that the granting of a new hearing is within the discretion of the Commission is Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending has the authority to issue an order to effectuate and promote the just determination of all aspects of a case. *See* Commission Order No. PSC-02-0143-PCO-TP.

22. In short, Supra's Motion for a new hearing **is procedurally proper**.

Request is for a New Hearing

23. A request for a "rehearing" is precisely that: a request that the hearing process begin anew. Despite Staff's conclusion, Supra did not use the term "reconsideration," nor did it seek reconsideration, in its Motion. Nor did Supra at any time, in its Motion, address the merits of Staff's recommendation. It is unclear as to why the Staff would seek to characterize Supra's Motion as a motion for reconsideration.

24. The Revised Staff Recommendation was entirely correct when it concluded that: "It is entirely improper to seek reconsideration of the staff recommendation . . ." *See pg 24.* The problem with the Staff recommendation, as stated, is that Supra's Motion for a new hearing is not a motion for reconsideration. Supra does not seek reconsideration of the Staff's recommendation. On the contrary, Supra moved for a new hearing based upon Commission precedent in Commission Order No. PSC-02-0143-PCO-TP.

Standard is "appearance of impropriety"

25. It is also unclear why the Staff would imply that Supra is improperly asking the Commission to "reconsider" Chairman Jaber's Order in granting a new hearing in Docket No. 001097-TP.

26. The Staff writes: "Supra asks the Commission to ignore this finding [of no prejudice] and replace it with a finding that there was prejudice to Supra in that docket [001097-TP]." (Underlined added for emphasis). The problem with this assertion is that Supra never made such a request in its February 18, 2002, Motion for Rehearing.

27. Supra believes that the standard set out by Chairman Jaber in Order No. PSC-02-0143-PCO-TP is the correct standard for evaluating whether a new hearing should be granted:

> "Although the inquiry has failed to disclose any prejudice to either party, **the Commission is sensitive to the mere appearance of impropriety. Accordingly, in order to remove any possible appearance of prejudice**, I find this matter should be afforded a rehearing." (Emphasis added).

28. Supra said as much in paragraph 37, of its Motion for Rehearing (also known as new hearing) which states: ". . . Chairman Jaber reached the correct conclusion that the "appearance of impropriety" was sufficient to order a rehearing in Docket No. 001097-TP."

29. In other words, Chairman Jaber has made clear that the finding of prejudice is not necessary for the Commission to conclude that a rehearing is in order.

30. In defiance of the Chairman's standard, the Staff attempts to change the Chairman's standard by stating that the "mere speculation of prejudice, absent any evidence or allegation of a specific improper act in this docket [001305-TP], is not a proper basis for the Commission to require a rehearing." *See pg. 25.* The Staff's new standard is completely opposite of the standard employed in Docket No. 001097-TP. Accordingly, it would be fundamentally unfair for a different standard to be applied to Docket No. 001305-TP, than the standard applied in Docket No. 001097-TP.

Staff Ignores the Impropriety of its Colleague, Ms. Logue

31. Notwithstanding the standard to be applied, there is no dispute that Staff member, Kim Logue, had improper communications with BellSouth employee Nancy

Sims. An issue never addressed by Staff is why were the communications between Ms. Logue and Ms. Sims kept a secret from Supra until after the evidentiary hearing in Docket No. 001305-TP.

32. The issue was briefly mentioned in the Internal Investigation and Report submitted to Harold McLean, Commission General Counsel, on January 3, 2002, in Docket No. 001097-TP. The Staff writes: "This Report will, however, leave to BellSouth any response to the suggestion that it should have informed the Commission about the receipt of Ms. Logue's e-mail." To Supra's knowledge, BellSouth has never formally responded.

33. To its credit, the Internal Investigation and Report does state that: no one associated with the Commission would claim that e-mailing draft cross-examination questions to one party and not the other is correct or reasonable. Notwithstanding this acknowledgement, Staff asserts in its Revised Staff Recommendation that "advisory staff simply had no conflict of interest – none in the complaint docket [001097] and none in this docket."

34. By making this assertion, Staff can only be indicating that there is nothing improper with sending one litigant cross-examination questions prior to a hearing. Apparently, Staff disagrees with the Commission's Internal Investigation Report, and condones this one-sided favoritism. Supra contends, and case law supports, that such an action does create an actual conflict of interest and is highly improper and prejudicial. *See Jennings v. Dade County*, 589 So.2d 1337, 1341 (3d DCA 1991) (where the court found that ex parte communications are inherently improper and are anathema to quasi-judicial proceedings).

35. It must also be noted that the Internal Investigation and Report was premised on the belief that the single e-mail to Ms. Sims was the only contact with BellSouth.

36. BellSouth has now admitted, through the affidavit of Ms. Sims, that there was at least one facsimile transmission and at least two telephone calls.

37. Also, the Affidavit states unequivocally that after conferring with counsel Ms. Sims informed Ms. Logue of the following: "I agreed to let Ms. Logue know which of the BellSouth witnesses could answer the questions for BellSouth." *See par 5 of Affidavit.*

38. It is important to note that the Staff Recommendation is the equivalent of a Recommended Order submitted by an administrative law judge pursuant to Chapter 120, Florida Statutes. The Staff Recommendation contains findings of fact and conclusion of law and a recommended disposition of the case.

39. The fact is that Ms. Logue was not only assigned to Docket No. 001305-TP, but also participated in the preparation for the evidentiary hearing. The function of the technical Staff at the hearing is to assist Staff legal counsel in cross-examining witnesses and developing the record upon which the Commission Staff will subsequently rely upon in drafting its Recommendation to the Commission. *See Cherry Communications, Inc. v. Deason*, 652 So.2d 803 (Fla. 1995).

40. Accordingly, if the underlying record is tainted, then it cannot be said that the adjudicatory process was unbiased. *Id.*

41. According to the standard set out by Chairman Jaber, Supra need **not** show that the underlying record in Docket No. 001305-TP was, in fact, tainted. Supra need

only demonstrate that there was an "opportunity" for Ms. Logue to continue with the same misconduct.

42. The evidence is persuasive. BellSouth admits, through Ms. Sims' Affidavit, to informing Ms. Logue, after confering with BellSouth legal counsel, that it was appropriate for Ms. Logue to provide Ms. Sims with the cross-examination questions. It is extremely reasonable to conclude that Ms. Logue provided Ms. Sims with additional information in Docket No. 001305-TP (involving **identical** parties as in Docket No. 001097-TP) – especially after being informed by Ms. Sims that BellSouth legal counsel finds no impropriety in Ms. Logue providing such questions.

43. But for the purposes of having a new hearing in Docket No. 001305-TP, Supra need not provide any evidence of a specific improper act in that docket – contrary to Staff's assertions. The appearance of impropriety is all that is needed.

Supra is Being Denied Due Process

44. Presently, Staff has set the Agenda for March 5, 2002 to include both (1) a vote on Supra's Motion for Rehearing (Issues I through IV) and (2) should that Motion be denied, a vote on the underlying issues (Issues B through 67).

45. If Supra's Motion for Rehearing were denied, Supra would be entitled to Move for Reconsideration of that Written Order.

46. Supra can only file a Motion for Reconsideration on a written order.

47. Rule 25-22.060, Florida Administrative Code, provides in part that "any party to a proceeding that is "adversely affected" by an order of the Commission may filed a motion for reconsideration." If Supra's Motion for a new hearing were denied,

Supra would be denied its due process rights if the Commission immediately proceeded to a vote on the underlying docket without issuing a written order.

48. By bifurcating the proceeding and deferring the underlying docket to a later point in time, the Commission would guarantee the due process rights of both parties to file a motion for reconsideration as well as to pursue its other appellate remedies.

49. Pursuant to Section 120.68, Florida Statutes, either party may seek review of a "preliminary, procedural or intermediate order of the agency." These orders are "immediately reviewable, if review of the final agency decision would not provide an adequate remedy."

50. In this instance, if the Commission votes for a new hearing, then the deferral issue is moot and BellSouth will have all the time it needs to seek reconsideration and its appellate remedies. If the Commission, on the other hand, denies Supra's Motion for a new hearing, then Supra should be entitled to avail itself of the remedy outlined in Section 120.68 and seek an "immediate review" of the Commission's denial. As it presently stands, only Supra stands to be prejudiced should all of the issues remain on the March 5, 2002 Agenda.

51. Accordingly, to avoid denying Supra's due process rights, the underlying issues in this matter (Issues B through 67) should not be heard and voted on by the Commission until a written order on Supra's Motion for Rehearing is provided to the parties. Only such an action will provide Supra with due process.

WHEREFORE, Supra respectfully requests the Commission to defer the underlying Docket until a later point in time in order to safeguard the parties' procedural due process rights; also Supra respectfully requests that the Commission grant Supra's

Motion for a new hearing in Docket No. 001305-TP given that it is procedurally proper to do so.

RESPECTFULLY SUBMITTED this 27th day of February 2002.

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