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May 22, 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. 0013005- TP – SUPRA'S OPPOSITION TO BELLSOUTH'S EMERGENCY MOTION FOR STAY PENDING RECONSIDERATION BY PANEL AND/OR JUDICIAL REVIEW OF ORDER NO. PSC-02-0663-CFO-TP AND NOTIFICATION OF EXERCISE OF RIGHTS UNDER RULE 25-22.006(10)

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Opposition to Bellsouth's Emergency Motion For Stay Pending Reconsideration by Panel and/or Judicial Review of Order No. PSC-02-0663-CFO-TP And Notification of Exercise of Rights Under Rule 25-22.006(10) in the above captioned docket.

We have enclosed a copy of this letter, and ask that you mark it to indicate that the original was filed, and thereupon return it to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Brian Chaiken/ahs

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 22nd day of May, 2002 to the following:

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By: Brian Chaiken/ATS
BRIAN CHAIKEN, ESQ.

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information Systems, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996	)	Docket No. 001305-TP Dated: May 22, 2002

SUPRA'S OPPOSITION TO BELLSOUTH'S EMERGENCY MOTION FOR STAY PENDING RECONSIDERATION BY PANEL AND/OR JUDICIAL REVIEW OF ORDER NO. PSC-02-0663-CFO-TP AND NOTIFICATION OF EXERCISE OF RIGHTS UNDER RULE 25-22.006(10)

Supra Telecommunications & Information Systems, Inc. ("Supra") files this Motion in Opposition to BellSouth's Emergency Motion for Stay Pending Reconsideration as well as BellSouth's Motion for Stay Pending Judicial Review because the contents of the June 5, 2001 Award and the February 4, 2002 Award has been *publicly* disclosed by the Commission Staff employees on or before March 1, 2002. Accordingly, consistent with Order PSC-02-0293-CFO-TP as well as Order PSC-02-0663-CFO-TP, the Prehearing Officer was correct in denying BellSouth's request for confidential classification.

Decision consistent with precedent

Commission Order PSC-02-0293-CFO-TP was entered on March 7, 2002. This procedural Order involved a Joint Request for Confidentiality of testimony and exhibits filed on September 19, 2001, in Docket No. 001305-TP. This Order outlined the law of public records in stating: "Florida law presumes that documents submitted to governmental agencies shall be public records."[1] After noting this legal maxim, the Prehearing Officer granted confidential classification on the basis that the motion pending before him was a "joint stipulation" and that

"this information has not been generally disclosed."[2] In the matter presently pending before this Commission, the contents of the Arbitration Awards were *publicly* disclosed on March 1, 2002.

Public Disclosure

On March 21, 2002, Supra submitted a public records request to the Commission. Paragraph five (5) of that request included all e-mails between Harold McLean (Commission General Counsel) and all five Commissioners relating to or referencing Supra, BellSouth or Kim Logue.

The Commission's e-mail system is a public record pursuant to Chapter 119, Florida Statutes. *Johnson v. Butterworth*, 713 So.2d 985, 986 (Fla. 1998) *citing Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980). Evidence that e-mails are public records is the fact that on or about March 29, 2002, in response to Supra's Public Records Request, David Smith (Commission Legal Counsel) provided Supra with two pages of e-mails. The e-mail transmissions were among and between Harold McLean (Commission General Counsel), Beth Keating (Commission Legal Counsel), Katrina Tew (Aide to Commissioner Palicki) and Commissioner Mike Palecki.[3]

These e-mails publicly disclosed the contents of the parties Commercial Arbitration Awards ("Awards"). The $3.5 million figure, addressed in Beth Keating's e-mail, could only have come from the June 5, 2001 Arbitration Award. The $4.2 million figure, addressed in Harold McLean's e-mail, could likewise only have come from either BellSouth or from the February 4, 2002 Arbitration Award (otherwise known as Arbitration's III & IV).

These e-mails were before the Prehearing Officer at the time he rendered his judgment in Order PSC-02-0663-CFO-TP. The Prehearing Officer's Order specifically includes a reference

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[1] *See* pg. 1, third paragraph, lines 1-2, of Order PSC-02-0293-CFO-TP.
[2] *See* Pg. 2, first full paragraph, lines 10-11, of Order PSC-02-0293-CFO-TP.

to this evidence: **"this information [contents of the Awards] has otherwise been communicated *publicly* within the Commission."**[4] The e-mails *publicly* disclosing the contents of the Awards were attached to the April 1, 2002 Letter. The e-mails were discussed and referenced in Supra's April 5, 2002 Response to BellSouth's Notice of Intent to Seek Confidential Classification.[5] The e-mails were also discussed and referenced in Supra's May 1, 2002 filing with the Commission.[6]

The evidence is specific and definite that the contents of the awards were *publicly* disclosed by Commission Staff via the Commission's public e-mail system as of March 1, 2002. There was a second *public* disclosure on March 29, 2002, after the Commission Staff distributed the e-mails in response to a *public* records request. BellSouth argues that the Prehearing Officer's decision in Order PSC-02-0663-CFO-TP is contrary to his decision in PSC-02-0293-CFO-TP.[7] On the contrary, the decisions are consistent.

Given the evidence demonstrating *public* disclosure by the Commission Staff, it cannot be said that: "this information has not been generally disclosed."[8] As such, the Preheaing Officer's Orders are consistent. Accordingly, BellSouth's request for a stay must be denied.

No violation of Federal District Court Order

BellSouth suggests, rather boldly, that the Prehearing Officer's decision "potentially" violates an Order of the Federal District Court in the Southern District of Florida in Civil Action No. 01-3365-CIV-KING.[9] This is simply untrue. BellSouth, itself, invoked the Commission's

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[3] *See* E-mail transmissions attached hereto as Composite Exhibit A.
[4] *See* Page 2, first full paragraph, lines 5-6, of Order PSC-02-0663-CFO-TP.
[5] *See* Document No. 03874-02, on the Commission's web-site, entitled "Response to BellSouth's Request for Confidential Classification."
[6] *See* Document No. 04771-02, on the Commission's web-site, entitled "Objection to BellSouth's Request for Confidential Classification."
[7] *See* Pg. 5, BellSouth's present Motion to Stay.
[8] *See* Pg. 2, first full paragraph, lines 10-11, of Order PSC-02-0293-CFO-TP.
[9] *See* pg. 6, paragraph 12, of BellSouth's present Motion.

jurisdiction by requesting confidentiality. Florida law dictates that the Prehearing Officer has the discretion to grant or deny the request for confidential classification. It is simply irresponsible and reckless for BellSouth's legal counsel to even intimate that the Prehearing Officer is legally prohibited from denying BellSouth's request because of an Order, in another forum, which provides that all documents in "that" proceeding must be filed under seal.

BellSouth very graciously cites to a portion of the Federal District Court's Order on page 6 of its Motion. On line five (5) of that excerpt, the Court makes clear that the Awards may be utilized in other "judicial proceedings." This exception is without qualification. Docket No. 001305-TP is a judicial "proceeding."[10]

The excerpt cited by BellSouth *also* references the July 20, 2001 Arbitral Award.[11] The Federal District Court correctly observed that the Awards may, and may not contain, proprietary information. The Court's October 31st Order does not include any specific findings of fact on that particular issue. Interestingly, no judicial body has ever made any specific findings of fact that the Arbitration Awards contain any proprietary information. The Court simply concluded that with respect to "that" particular case in Federal Court, all documents must be filed under

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[10] *See Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission*, 453 So.2d 780, 783 (Fla. 1984) (in which the Court found that the Commission in certain circumstances properly exercises "quasi-judicial" authority). *See also Reedy Creek Utilities Co.v Florida Public Service Commission*, 418 So.2d 249, 253 (Fla. 1982) (in which the Court defined the Commission as a "quasi-judicial body"). The October 31st Order allows the parties to use the Awards in other judicial "proceedings." Docket No. 001305-TP is an adversarial proceeding, governed by the Florida rules of civil procedure as well as rules of evidence, and the outcome is to be determined by an impartial group of decision-makers. In all respects, the docket is a judicial "proceeding." The October 31st Order does not limit the use of the Awards to judicial "tribunals." *See Myers v. Hawkins*, 362 So.2d 926, 931-932 (Fla. 1978) (in which the Court found that within the strict limits of the newly amended Article II, Section 8(e) of the Florida Constitution, the term judicial "tribunal" was limited to "judges of industrial claims, the Industrial Relations Commission, and all courts of the state created under Article V of the state Constitution." The Court expressly found that the FPSC fell outside the parameters of what the term "tribunal" was intended to include, and, as such, Mr. Myers [an elected State Senator at the time] was prohibited from representing clients before the FPSC while he was a current member of the state senate). *See also Myers v. Hawkins*, 362 So.2d at 929 (in which the Court presumes that "language differentiation is intentional").

[11] Supra will note, with irony, that BellSouth has disclosed the existence of the July 20, 2001 Order in making this reference. BellSouth argues, without citing to any authority, that disclosure of the mere existence of the Award is a violation of the parties' agreement.

seal. This specific ruling in Federal Court did not in any way preclude Supra from continuing to utilize the Awards in proceedings before the Federal Communications Commission (FCC) or the Florida Public Service Commission (FPSC). This is evidenced by the fact that on November 14, 2001, Supra filed Judge King's October 31, 2001 Order along with the Tribunal's October 22, 2001 Order with the FPSC. The Commission granted Supra's request for Leave to File Supplemental Authority on December 17, 2001.[12]

BellSouth attempts to argue, without citing to any authority, that the "Awards" are synonymous with "proceedings" is simply incorrect. Supra has never agreed that the Awards contain proprietary information, nor had Supra agreed with BellSouth to keep the Awards confidential. In addition to Judge King's explicit authorization allowing the parties to utilize the Awards in other judicial "proceedings," the July 20, 2001 Order, referenced in Judge King's Order, also permits the parties to file the Awards in judicial "proceedings" before the FCC and/or the FPSC. If the parties file the Awards with either regulatory body, the parties are subject to the benefits and risks associated with the confidentiality rules of those agencies.

In the matter presently pending before this Commission, the evidence is specific and definite that the contents of the Awards were *first publicly* disclosed, by the Commission Staff, on March 1, 2002. There was a second *public* disclosure of the contents of the Awards after the Staff distributed the public e-mails pursuant to a public records request. Accordingly, under any legal scenario BellSouth wishes to depict, the Prehearing Officer's Order PSC-02-0663-CFO-TP cannot in any way be construed to be a violation of any State or Federal law or Federal Court Order.

Arbitrations III & IV

[12] *See* Commission Order PSC 01-2457-PCO-TP.

Significantly, Judge King's October 31, 2001 Order is the product of Supra exercising its rights to enforce its Awards. The law requires Supra to seek "confirmation" of its Arbitration Awards in Federal court. On October 31, 2001, Judge King entered an Order confirming, in fact, that the Arbitrators issued three separate Orders: June 5, 2001, July 20, 2001 and October 22, 2001. All three of these Awards are identified in Judge King's Order – which was not filed under seal, and is therefore public. This is further evidence directly contradicting BellSouth's claim that disclosure of the mere existence of the Awards is a violation of the Interconnection Agreement or the Federal District Judge's Order.

It is also important to note that the Arbitrator's February 4, 2002 Order (also known as Arbitrations III & IV) was not included within the scope of Judge King's Order. Notwithstanding this fact, BellSouth's legal counsel nevertheless claims that denying confidential classification of Arbitrations III & IV could "potentially" violate Judge King's Order of October 31, 2001.[13] This is a perfect example of how BellSouth plays "fast and loose" with the facts in order to mislead and deceive this Commission. Because Arbitrations III & IV are clearly not part of the Federal confirmation, the Prehearing Officer's decision with respect to this Award cannot in any way be remotely considered a violation of Judge King's Order.

Case law inapplicable

Rule 25-22.006(10), Florida Administrative Code, as well as all of the case law cited by BellSouth *presumes* that the contents of the Awards have not already been *publicly* disclosed. In this case, the evidence is definite and specific that the contents of the Awards were already *publicly* disclosed – more than a month [i.e. March 1, 2002] - *prior* to BellSouth's filing of its Notice of Intent to Seek Confidential Classification. Accordingly, the question of a Stay is moot.

No customer specific account information

It is also interesting to note that an examination of the April 1, 2002 Letter and its accompanying attachments reveals **no** "customer specific account information." Even if it did, it would be Supra's information and therefore Supra's right to do with such as it pleases. Notwithstanding this void, BellSouth, nevertheless, claims on page 3, paragraph 4, of its present Motion that the April 1, 2002 Letter and its accompanying attachments do contain customer specific account information. This is yet another example of playing "fast and loose" with the facts.

BellSouth and Commission Staff are responsible for disclosure of any confidential information

As described earlier herein, the $4.2 million and the overly inflated claim of $50 to $70 million dollars cited by Harold McLean were specifically attributed to BellSouth as the source.[14] The $4.2 million comes directly from Arbitrations III & IV Award. As such, the evidence demonstrates that BellSouth, itself, violated the confidential nature, if any, of the Awards. This is contrary to BellSouth's claim that Supra *first* publicly disclosed confidential information from Arbitrations III & IV. At the time, BellSouth must have believed that it was engaging in one-sided secret communications with the Commission Staff. Harold McLean, nevertheless, communicated this information over the Commission's public e-mail system on March 1, 2002.

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[13] *See* pg. 6, BellSouth's present Motion.
[14] *See* Composite Exhibit A.

BellSouth claims that the Prehearing Officer's Order found that the April 1, 2002 Letter was not entitled to confidential classification "solely" because Supra attempted to first publicly disclose the contents of the Awards.[15]

BellSouth must be trying to "hang its hat" on the ambiguous sentence found on page 3 of the Prehearing Order. The Order states in part: "The letter submitted by Supra on April 1, 2002, was submitted as a public document and as such, became a matter of public record." Read out of context, it is possible to erroneously conclude that it was Supra that *first* publicly disclosed the contents of the Awards and not the Commission Staff on March 1, 2002. The sentence is ambiguous because on the preceding page the Order includes a legal maxim which provides that: "Florida law presumes that documents submitted to governmental agencies shall be public records." Given this context, it would certainly be appropriate for the Prehearing Officer to write that at the time the Commission received the April 1, 2002 Letter that the Letter was legally considered a public document. This legal conclusion, however, still does not address the issue of "when" the contents of the Awards were *first* publicly disclosed.

In Commission Order PSC-02-0293-CFO-TP, the Prehearing Officer identified the same legal maxim [i.e. "Florida law presumes that documents submitted to governmental agencies shall be public records"] when discussing the filing of the parties "Joint Stipulation." The Prehearing Officer's statement that Florida Law presumes that the April 1, 2002 Letter is a public record, is consistent with his statement that the documents filed under the "Joint Stipulation" are also presumed to be a public record. Neither statement ends the analysis. In the former case, the Prehearing Officer next examined whether the parties had met their burden of

[15] *See* Pg. 6, paragraph 11, BellSouth's present Motion.

demonstrating that the information was proprietary information in accordance with Florida Statutes. In the matter presently pending, the Prehearing Officer was required to determine if the contents of the Awards had already been *publicly* disclosed, by the Commission Staff, as early as March 1, 2002. The uncontroverted evidence demonstrates that the information was already publicly disclosed, by Commission Staff, first on March 1, 2002, and then again on March 29, 2002. The Prehearing Officer's Order says as much: "**this information has otherwise been communicated publicly within the Commission**."[16] Accordingly, the Prehearing Officer was correct in concluding: that "once disclosed, it is not possible to put the chicken back in the egg."[17]

WHEREFORE, Supra respectfully requests that this Commission deny BellSouth's request for an emergency stay pending reconsideration and pending judicial review for the reasons outlined herein.

RESPECTFULLY submitted this 22nd day of May, 2002.

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[16] *See* Page 2, first full paragraph, lines 5-6, of Order PSC-02-0663-CFO-TP.
[17] *See* Page 3, first full paragraph, lines 6-7, of Order PSC-02-0663-CFO-TP.

Michael A. Palecki

Exhibit - A
Page 1 of 2

From: Harold McLean
Sent: Friday, March 01, 2002 11:24 AM
To: Katrina Tew; Michael A. Palecki
Subject: FW: supra/bellsouth

Commissioner, is this what you are asking for?

-----Original Message-----
From: Beth Keating
Sent: Friday, March 01, 2002 9:25 AM
To: Harold McLean
Subject: RE: supra/bellsouth

Sorry, for the delay. Tried to catch you yesterday before you left. The first one's easy - from the commercial arbitration, Supra owes BellSouth $3.5 million - none of which has been paid and BST has apparently not sought enforcement. (This amount does not include any amounts accrued since the commercial arbitration for service provided by BellSouth to Supra)

The second is somewhat less clear. Before she went home sick yesterday, Patty left me a note that indicated in the complaint docket Supra claims BST owes them $305,560.04, plus interest of approximately $150,000. Lee is confirming this again for me, because the note wasn't entirely clear and Beth S. said she thought the amount was more like $256,000. Regardless, though, it doesn't appear to be enough to offset much of the amount owed under the commercial arbitration award. I'll get back to you on this second number as soon as I get confirmation from Lee.

-----Original Message-----
From: Harold McLean
Sent: Friday, March 01, 2002 8:22 AM
To: Beth Keating
Subject: supra/bellsouth

Hey, I need those numbers I asked you about yesterday -- the what does bell owe supra v. what does supra owe bell -- for Commissioner Palecki.

Exhibit - A
Page 2 of 2

From: Katrina Tew
Sent: Friday, March 01, 2002 12:54 PM
To: Harold McLean
Subject: RE: Your question

Sounds good. I'm here the rest of the day. Feel free to call or drop in whenever. Thanks again!

-----Original Message-----
From: Harold McLean
Sent: Friday, March 01, 2002 12:07 PM
To: Katrina Tew
Subject: Your question

Katrina, the answer is 'yes' -- $4.2 million.

Bell claims a much higher amount due, however, 'between 50 and 70 million'.

Lets talk this afternoon.