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June 7, 2002

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
And Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 001305-TP (Supra)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to Supra's Second Verified Supplemental Motion to Disqualify and Recuse FPSC from All Further Consideration of This Docket and to Refer this Docket to the Division of Administrative Hearings for All Further Proceedings, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

Nancy B. White

Nancy B. White

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 7th day of June, 2002 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information System, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 001305-TP Filed: June 7, 2002

BELLSOUTH'S OPPOSITION TO SUPRA'S SECOND VERIFIED SUPPLEMENTAL MOTION TO DISQUALIFY AND RECUSE FPSC FROM ALL FURTHER CONSIDERATION OF THIS DOCKET AND TO REFER THIS DOCKET TO THE DIVISION OF ADMINISTRATIVE HEARINGS FOR ALL FURTHER PROCEEDINGS

Bellsouth Telecommunications, Inc. ("BellSouth") opposes Supra Telecommunications & Information Systems, Inc.'s ("Supra") Second Verified Supplemental Motion To Disqualify And Recuse FPSC From All Further Consideration Of This Docket And To Refer This Docket To The Division Of Administrative Hearings For All Further Proceedings ("Second Supplemental Motion"). For the reasons discussed below, the Florida Public Service Commission ("Commission") should reject this improper Second Supplemental Motion and sanction Supra for filing it.

INTRODUCTION

Once again, with this latest motion, Supra is abusing the regulatory process by filing impermissible and baseless motions. Supra's Second Supplemental Motion is nothing more than an impermissible reply memorandum and should be summarily rejected.

On April 17, 2002, Supra filed a Motion to Disqualify and Recuse Commission Staff and Commission Panel From All Further Consideration Of This Docket And To Refer This Docket To The Division of Administrative Hearings For All Further Proceedings ("Motion to Recuse") in Docket No. 001305-TP. BellSouth timely filed its Opposition to that motion on April 24, 2002. BellSouth incorporates by reference all of the arguments and information contained in its Opposition as though reproduced fully herein. For the reasons set forth in that Opposition, the Commission should deny Supra's Motion to Recuse. It is a groundless submission calculated solely to attempt to delay the effective date of the parties' new agreement.

On April 26, 2002, Supra filed a Supplemental Motion. A cursory review of the Supplemental Motion revealed that it was nothing more than a failed attempt to rebut and reply to the arguments that BellSouth presented in its Opposition. Supra did not even pretend that it has submitted anything other than a reply brief. The Supplemental Motion was simply a re-hash of the same arguments that Supra has raised over and over again since the Staff recommendation was issued in this docket. BellSouth incorporates by reference all the arguments and information contained in its Opposition as though reproduced fully herein.

On June 5, 2002, Supra filed a Second Supplemental Motion for the stated purpose of providing "even more facts which establish a further basis for recusal..." (Second Supp. Mot. at pg. 2) based on the alleged discovery of certain information since Supra's previous motions. Id. This Second

Supplemental Motion is nothing more than the continued web of half-truths, baseless accusations, and malicious attacks that Supra is so adept at weaving.

Argument

The Commission should refuse to consider the Second Supplemental Motion for several reasons. First, Supra's characterization of its pleadings as containing "further evidence" is superficial and groundless. Essentially, Supra is attempting to extort the result they want from the Commission through the use of mischaracterizations, twisted interpretation of twisted words, and an avalanche of raw unadulterated sewage. Supra's so-called "further evidence" consists of nothing more than e-mails discussing procedural issues.

Supra alleges the "most damaging incident" to Supra is an exchange of e-mails contained in Composite Exhibit 4 to the Second Supplemental Motion. In this exchange, a Staffer makes a Staff Attorney aware of the fact that BellSouth had not included a summary position on one issue in its brief. The Staff Attorney advised BellSouth of this fact and BellSouth filed an amendment to its brief on October 3, 2001, to include a thirteen word sentence as its summary position.

Supra claims this contact was an ex-parte communication. This claim is just plain wrong. Rule 25-22.033, Florida Administrative Code, does not prohibit communications regarding procedure or matters not concerned with the merits of the case. Advising an attorney that a summary of a position is missing is nothing more than procedural, particularly when the brief contained argument by BellSouth on the substance of the issue. BellSouth had merely neglected to include its thirteen word summary position.

Supra claims that BellSouth's failure to include a summary position on the issue violated the procedural order (Order No. PSC-01-1401-PCO-TP) and Rule 28-106.215, Florida Administrative Code. Once again, this claim is just wrong. The procedural order stated that failure to file a post-hearing statement waived the issue. BellSouth filed a post-hearing statement on all the issues in this case, including Issue B; it merely failed to file a summary of the Issue B position. Nothing in the procedural order states that failure to file a summary waives the issue. Moreover, Supra miscites Rule 28-106.215, Florida Administrative Code, claiming this rule requires a position summary, when in fact, it requires no such thing.

Supra apparently wants this Commission to believe that BellSouth was somehow saved from certain loss on Issue B by the Staff Attorney pointing out an oversight on BellSouth's part. BellSouth's thirteen word sentence would certainly not have caused BellSouth's brief to exceed the page restriction. Moreover, when BellSouth filed its amendment to the brief on October 30, 2001, Supra could certainly have objected. They did not do so.

Supra claims that the only reasonable conclusion from these e-mails is that the Staff is biased, that Staff would never have treated Supra the same if the situation were reversed, and that somehow this translates into an "ease" between BellSouth and the Staff. This is a huge leap for Supra to make. To make an attorney aware of a mistake is not bias; it is merely courteous notice. To claim that Supra would never have received the same courtesy from the Staff is to

speculate without basis in fact. To claim that there is an "ease" of ex-parte discussions to occur between BellSouth and Staff is just insupportable.

The next claim by Supra of "further evidence" consists of a series of e-mails attached to Supra's Second Supplemental Motion as Exhibit 1. Ironically enough, this series of e-mails begins with one from Brian Chaiken, Attorney for Supra, to a Staff Attorney stating that Supra would not be complying with the Staff's directive given at the issue identification meeting on January 23, 2001 to file proposed language regarding the issues identified. It is extraordinary that Supra views its own e-mail as non-ex-parte while everything having to do with BellSouth is an ex-parte communication in violation of the law. Moreover, Supra thought nothing of flaunting a Staff directive. In addition, a review of Supra's e-mail indicates that no BellSouth attorney was copied.

Supra claims these e-mails show bias against Supra when in reality the e-mails show that all Staff did was advise BellSouth of Supra's procedural actions since Supra had not seen fit to do so. Interestingly enough, Mr. Knight's e-mail of February 5, 2001, indicates that the Staff was considering recommending the granting of Supra's motion to dismiss. This statement indicates that Supra's claim of bias is ridiculous since it is discussing recommending an action in Supra's favor.

Supra's claim that Staff discussing Supra's e-mail with BellSouth was an ex-parte communication is once again just wrong. Supra took a procedural action (not complying with the Staff's directive) and Staff advised BellSouth of

this act. That is all that occurred. The merits of the case were not discussed, merely the fact that Supra had taken a procedural action.

Next, Supra points to Composite Exhibit 2 attached to its Second Supplemental Motion as "evidence" that Staff members at the Commission were assisting BellSouth in this docket through "unauthorized activities." Once again, Supra is wrong. BellSouth asked for and received copies of Supra's Regulatory Assessment Fee forms for 2000 and 2001 from the Commission. These forms are on file with the Commission and are public record. No formal written request is required to obtain these documents. When telephone companies file their regulatory assessment fee forms, these forms are not filed confidentially; they are public record. Supra cites no law or rule for the proposition that specific action is required to obtain these documents. No one at the Commission advised BellSouth to look at these forms. BellSouth simply wanted to know what Supra was claiming as amounts paid to BellSouth.[1] Far from demonstrating a bias, these documents demonstrate Supra's propensity to falsify records.

Next, Supra refers to Composite Exhibit 3 to its Second Supplemental Motion as "further evidence." All these e-mails show is that Supra filed a Motion to Compel discovery and Staff telephoned BellSouth to see if and when BellSouth would file a response. Nothing in these e-mails demonstrates bias or violation of the ex-parte rules. Rather, once again, it is procedural matters that were addressed.

[1] BellSouth, on June 6, 2002, filed a Complaint against Supra for violation of state law and Commission rules with regard to Supra's payment of regulatory assessment fees in 2000 and 2001. See Docket No. ____.

Supra's claim of "obvious conclusions" (Second Supp. Motion at pg. 10) is anything but. Supra has made an unsupported leap from a procedural discussion to an allegation that Mr. Knight's e-mail of August 30, 2001 seeking information on other orders dealing with similar issues should be construed as foreknowledge. Supra fails to give Mr. Knight any credit for being a thorough attorney by researching a possible avenue that BellSouth might use in its opposition to the motion to compel. Moreover, Supra's factually baseless conclusion is that Mr. Knight was doing research solely to support "a favorable decision on behalf of BellSouth" (Id.) when nothing in his e-mail points to such a bias. An objective reading of the e-mail shows that it is merely seeking information on other situations where the claim has arisen, not on situations where the issue was resolved in favor of one party or the other.

Next, Supra refers to Exhibit 5 to its Second Supplemental Motion. BellSouth is bewildered by the inclusion of this exhibit. It reveals nothing relevant. These e-mails merely show that in the specific situation of settlement negotiations of show cause dockets there was a difference of opinion among the Staff. The specific situation involved is completely irrelevant to the case at hand.

Next, Supra refers to Composite Exhibit 6 to its Second Supplemental Motion. Nothing contained within these e-mails is evidence of anything beyond a desire by the Commission to obtain agreement by both parties to mediate a successful conclusion to Docket No. 001097. Again, the issue of mediating or not mediating is a procedural issue, not a discussion of the merits. Moreover, Mr. McLean, on October 10, 2001, wrote a letter to both Supra and BellSouth

recommending mediation. Supra's claims of "reasonable and plausible" explanations of why individuals took the actions they took are instead unreasonable and implausible, and supported by no factual basis. Id. at p. 14.

Next, Supra uses Composite Exhibit 7 to its Second Supplemental Motion to essentially reply to the Staff's May 30, 2002 recommendations. As further discussed herein, such a reply is impermissible and should not be allowed.

Moreover, Supra's Second Supplemental Motion is untimely under Rule 25-22.06(3), Florida Administrative Code, as a time-barred motion for reconsideration because Supra previously filed and the Commission previously denied a motion to transfer the entire docket to DOAH. Specifically, on February 18, 2002, Supra filed a Motion for Rehearing and to Transfer Docket to a Special Master. At the March 5, 2002 agenda conference, Supra orally modified its request to transfer the docket to a special master to a request to transfer the docket to DOAH. Supra's request for such a transfer was premised on the erroneous belief that a transfer was necessary in order for Supra to obtain a fair hearing.

> MR. CHAIKEN: What Supra is seeking is a fair hearing. This Commission has the authority pursuant to Florida Statute 350.125 to order that this hearing take place before the Division of Administrative Hearings, and we make that request in lieu of a request for a special master to hear this case.
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> **********
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> CHAIRMAN JABER: Mr. Chaiken, I got the impression that you modified today your request to ask that the case go to DOAH in lieu of a special master.

MR. CHAIKEN: That's correct.

See March 5, 2002 agenda transcript at p. 24, 11. 4-9; p. 34, 11. 10-13. At the agenda conference and in Order No. PSC-02-013-FOF-TP, the Commission denied Supra's request for a transfer of the case to DOAH and/or special master. See March 5, 2002 Agenda Transcript at p. 50. This denial was incorporated into Order No. PSC-02-0413-FOF-TP, issued on March 26, 2002. BellSouth concludes that, when Staff relies on the order declining reversal in the recommendation, Staff is referring to Order No. PSC-02-0413-FOF-TP.

The remainder of Supra's argument on this issue consists of nothing more than speculative conclusion that someone at the Staff is "rushing to judgment", a conclusion that is no more grounded in cold hard fact that the myriad other "conclusions" Supra has manufactured in its pleadings. Supra takes one plus one and argues it equals four. Just because Supra believes its math is correct doesn't mean it is true. Supra makes a giant leap in logic from the fact that motion decisions are scheduled for the June 11, 2002 agenda to a conclusory statement that it is somehow "obvious" that the Staff and the Commission violated Florida's Sunshine law and decided the outcome of these motions prior to the agenda. As usual, however, there are absolutely no facts cited by Supra to support this leap.

Memorandum of Law

It is well-settled that reply memorandums are not recognized by Commission rules or the rules of the Administrative Procedure Act and thus cannot be considered by the Commission. Indeed, Supra is no stranger to this rule as Supra raised this very argument against BellSouth in Docket No. 980119-TP.

In that case, BellSouth filed a reply to Supra's Opposition to BellSouth's Motion for Reconsideration, at which point Supra filed a Motion to Strike BellSouth's Reply. Supra argued that the Commission should strike BellSouth's Reply because the Commission rules do not contemplate the filing of reply memorandums. Specifically, Supra argued:

> Rule 25-22.060(3), Florida Administrative Code governs motions for reconsideration of final orders. Likewise, Rule 25-22.0376(1), Florida Administrative Code, governs motions for reconsideration of non-final orders. Both rules only permit a motion for reconsideration and a response. Neither rule allows or authorizes the Reply Brief filed by BellSouth. Moreover, no reply is allowed or authorized by Rule 28-106.204, Florida Administrative Code. Accordingly, BellSouth's Reply Brief, is unauthorized and improper and thus should be stricken.

See Supra's Motion to Strike at 4, Docket No. 980119-TP, filed Jul. 11, 2000, attached hereto as Exhibit A. The Commission agreed with Supra, stating:

> We agree with Supra that neither the Uniform Rules nor or rules contemplate a reply to a response to a Motion. Therefore the Motion to Strike is granted.

In re: Complaint of Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc., Docket No. 980119-TP, Order No. PSC-00-1777-PCO-TP.

The Commission reached an identical conclusion in In re: ITC-DeltaCom, Docket No. 990750-TP, Order No. PSC-00-2233-FOF-TP, finding that "the Uniform Rules and Commission rules do not provide for a Reply to a Response to a Motion for Reconsideration." See also, In re: Petition by Florida Digital Network, Inc. for Arbitration, Docket No. 010098-TP, Order No. PSC-01-1168-PCO-TP (refusing to address arguments raised by FDN in reply memorandum because reply memorandums are "not contemplated by Commission rules.")

In its Second Supplemental Motion, Supra deliberately omits citation to this well-established principle regarding the impermissibility of reply memoranda in Commission proceedings – a principle it helped to create. Supra's Second Supplemental Motion is a bad faith filing submitted only to harass the Commission and BellSouth. Thus, Supra's Supplemental Motion should be rejected in its entirety as an impermissible reply memorandum.

Second, the law cited by Supra is inapplicable and miscited. While BellSouth incorporates herein as if reproduced fully, the arguments made by BellSouth in its opposition to Supra's Original Motion filed on April 24, 2002, there are additional points to be considered.

In its Second Supplemental Motion, Supra cites Bay Bank & Trust Co. v. Lewis, 634 So.2d 672 (Fla. 1st DCA 1994), in support of the claim that said motion is timely and "applies to all pending and future motions in this docket."

Second Motion to Disqualify and Recuse, at p. 19. Such, however, is not the case. Significantly, Supra blatantly miscites the holding in that case, for it erroneously claims that the Bay Bank court held that motions for recusal are timely as to all future matters to be decided in a docket. See id.

In discussing the "reasonable time" requirement with respect to the filing of motions for recusal, the Bay Bank court did not set forth any hard and fast rule regarding the "timeliness" of such motions. See Bay Bank, 634 So.2d at 678. On the contrary, in addressing the motion to recuse before it, the Bay Bank court specifically stated that it was "unwilling to reach [a] conclusion" with respect to the timeliness of that motion.[2] See id. The Bay Bank decision does not, in any respect, render the instant motion timely under Florida law. Rather, that decision merely reiterates the general rule that motions for recusal must be filed within a reasonable time prior to the agency proceeding. See id.

As discussed in detail in its prior opposition memoranda, BellSouth submits that this motion is untimely, as it was filed after the issuance of the final order in this docket. Moreover, said motion is nothing more than a time-barred motion for reconsideration. For these reasons, this motion should be denied.

While Supra cites the correct legal standard applicable to motions for recusal of administrative officers, Supra incorrectly cites certain case law addressing the recusal of judges for the proposition that the Commission must

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[2] BellSouth also finds it significant that Supra neglected to mention the Bay Bank court's comment that the respondent's argument that the motion for recusal at issue was untimely because it was filed several months after the filing of two petitions for formal hearings was appealing. See id.

address the instant motion prior to ruling on other motions pending in this docket. Specifically, Supra cites the Florida Supreme Court's decision in Fuster-Escalona v. Wisotsky, 781 so.2d 1063 (Fla. 2000), in support of its argument that the Commission erred in disposing of other matters in this docket prior to ruling on its motion for recusal. That decision, however, is inapplicable in this instance, because it concerns the disqualification of a trial judge, not an administrative officer. See id. at 1064.

As discussed in BellSouth's prior opposition memoranda, the rules applicable for disqualifying an agency head significantly differ from the rules applicable for disqualifying a judge. See Bay Bank, 634 So.2d at 675, 679. Accordingly, the Florida Supreme Court's holding in Fuster-Escalona is not binding in this matter. Moreover, there is nothing in the Florida APA specifically requiring the Commission to address the instant motion prior to taking any other action in this docket. Supra's arguments in that regard are, therefore, unpersuasive.

Supra also relies on cases that are inapplicable in the administrative agency setting to support its arguments with respect to merits of its Motion. Indeed, Supra cites several cases in which courts found sufficient grounds to warrant the recusal of the presiding judges at issue. See Second Motion to Disqualify and Recuse, at pp. 21-22. As stated above, however, the "standards for disqualifying an agency head differ from the standards for disqualifying a judge." In re: Southern States Utilities, Inc., 1995 Fla. PUC LEXIS 1467, at * 11. In fact, a more stringent standard applies to cases in which a party seeks the

recusal of an agency head. See id. Accordingly, the cases Supra relies on in support of the merits of its motion are wholly unpersuasive and utterly inapplicable to the instant motion, as they are based upon the legal standard applicable to the recusal of judges, not administrators.

In keeping with its tendency to misconstrue case law in support of its Motion, Supra also overstates the holdings in World Transportation, Inc. v. Central Florida Regional Transportation, 641 So.2d 913 (Fla. 5th DCA 1994), and Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So.2d 322 (Fla. 1990). Contrary to Supra's assertion, the holdings in the aforementioned cases do not require the Commission to refer this docket to the DOAH for further proceedings.

First, the court in World Transportation, upon finding that there existed an adverse posture between the petitioner and the administrative agencies at issue, merely recommended that the administrative agencies request an independent hearing officer from the DOAH to preside over further proceedings between the parties. See World Transportation, 641 So.2d at 914. Likewise, in Ridgewood Properties, the court suggested that the agency at issue appoint an "outsider" to review the agency's proposed order, in the event that the agency head was required to testify at the administrative hearing. See Ridgewood Properties, 562 So.2d at 324. In neither instance did the courts automatically demand or require that the administrative bodies refer the dockets at issue to any third-party, much less the DOAH, as suggested by Supra.

As explained in BellSouth's prior opposition memoranda, in the event that this motion for recusal is granted, the Governor may appoint substitutes to take the place of the recused Commissioners, the Chairman of the Commission may appoint substitutes, or the remaining member of the Panel may rule on any further motions alone. See Fla. Stat. " 120.665 and 350.01(5). Simply put, the Commission is under no obligation to refer this docket to the DOAH for further proceedings. Furthermore, as discussed in detail in BellSouth's prior memoranda, the Commission lacks the authority to refer this docket to the DOAH, as it has already been specifically assigned to members of the Commission. See Fla. Stat. ' 350.125. Therefore, in no event could the Commission refer this docket to the DOAH as suggested by Supra.

Finally, Supra relies upon two Florida Statutes to support its motion for recusal. First, Supra cites Section 350.42(1), which states that a Commissioner must not consider or initiate *ex parte* communications concerning the merits of a proceeding before it. That section, however, applies only to Commissioners, and the alleged *ex parte* communications that purportedly took place in this instance involved merely Commission Staff members. Accordingly, Section 350.42(1) does not support Supra's claim that the Commissioners must be recused in this instance.

Supra further relies upon Section 25-22.033 of the Florida Administrative Code, which governs communications between Staff employees and parties to a proceeding pending before the Commission. Even assuming arguendo that any *ex parte* communications took place between BellSouth and Staff members, such

a fact (which BellSouth adamantly denies) does not require that the Commissioners at issue be disqualified from hearing further proceedings in this docket. Indeed, there is no evidence indicating that the alleged communications were ever relayed to those Commissioners by the accused Staffers. Moreover, as explained by BellSouth in its prior memoranda, it is the Commission, not the Staff, that makes the final decision on the issues presented for resolution. Accordingly, the recusal of the Commission Staff is not warranted, nor is the recusal of the Commissioners at issue. For these additional reasons, Supra's motion should be denied.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission refuse to consider and deny Supra's Second Supplemental Motion and Sanction Supra for filing it.

Respectfully submitted this 7th day of June 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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