ATTACHMENT B

REQUEST FOR CONFIDENTIAL CLASSIFICATION FOR PORTIONS OF SUPRA'S MOTION TO STRIKE AND REPLY TO BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION TO DISQUALIFY AND RECUSE FILED ON MAY 1, 2002 IN FLORIDA DOCKET NO. 001305-TP

TWO REDACTED COPIES

REDACTED

Redacted

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May 1, 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 To Strike And Reply To BellSouth's Opposition To Supra's Motion To Disqualify and Recuse

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion to Disqualify and Recuse.

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

Brian Chaiken
General Counsel

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TALLAHASSEE, FL

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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 Federal Express this 1st[h] day of May, 2002 to the following:

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By: Brian Chaiken/amb
BRIAN CHAIKEN, ESQ.

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition for Arbitration of the Interconnection Agreement between Bell-South 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 1, 2002

SUPRA'S MOTION TO STRIKE AND REPLY TO BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION TO DISQUALIFY AND RECUSE

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEM'S INC. ("Supra"), by and through its undersigned counsel, pursuant to Rule 1.140(f), Florida Rules of Civil Procedure, hereby files this Motion to Strike certain portions of BellSouth's Response which are scandalous and designed only for purposes of harassment and embarrassment, and its Reply to BellSouth's Opposition to Supra's Motion for Disqualification and Recusal. Nothing in the Florida Administrative Rules expressly prohibits the filing of a necessary reply. Accordingly, Supra files this Motion To Strike, and its Reply and states the following in support thereof:

MOTION TO STRIKE PORTIONS OF BELLSOUTH'S RESPONSE

Standard for Motion to Strike

Pursuant to Rule 1.140(f), Florida Rules of Civil Procedure a party may move to strike redundant, immaterial, impertinent or scandalous matter from any pleading at any time. This rule permits a motion to strike to be filed at any time.

BellSouth has failed to deny a single allegation

Portions of BellSouth's Response must be stricken as impertinent and scandalous. First, BellSouth begins its Response by claiming that Supra's Motion for Disqualification is "a baseless motion." Yet, throughout its entire fourteen (14) pages, BellSouth fails to (a) deny a single allegation set forth in Supra's Motion, (b) identify a single misrepresentation with respect to the facts made by Supra, or (c) otherwise specify how Supra has done anything wrong other than seek a fair, unbiased hearing.

Second, BellSouth's claim that Supra continues "to avoid paying BellSouth for legitimate services received" is an **outright false statement**, set forth solely to unduly prejudice the opinion of this Commission and/or any ultimate finder of fact against Supra. This scandalous allegation regarding non-payment has been a common theme for BellSouth throughout this docket, despite the fact that BellSouth currently has a remedy if it believes that Supra is withholding amounts due and owing. BellSouth can, and in fact has, brought such claims before Commercial Arbitrators pursuant to the parties' current agreement. See letter dated April 1, 2002 from Supra's Chairman and CEO to Commissioner Palecki. It is interesting to note that BellSouth at least as far as Supra is aware, has not responded to that letter.

Significantly, BellSouth has and, continues to, collect and withhold third party revenues on Supra's access lines. If Supra had been afforded the opportunity to respond to Commissioner Palecki's inquiry, the Commission would have understood what is truly happening: (1) BellSouth has collected and withheld revenues (Supra believes such to be substantial) rightfully belonging to Supra as a UNE-based provider, (2) BellSouth has continuously sought to bill Supra at the higher priced resale rates, (3) BellSouth seeks to (and on more than one instance actually has) disconnect Supra's services unless Supra immediately pays the higher resale rates, while Supra is denied the additional revenues to which it is entitled.

This tortious and anti-competitive strategy has already caused the bankruptcy of more than one CLEC.

Now it should be clear what BellSouth's motivation is: push Supra, its biggest competitor, into a Follow-On Agreement which would permanently extract jurisdiction from the commercial arbitrators and force Supra to resolve disputes before this Commission, which has repeatedly demonstrated a predisposition in favor of BellSouth and a bias against Supra. The evidence demonstrates that BellSouth's arguments do not carry the same weight before experienced, neutral commercial arbitrators as they do before the Commission. Surely, the United States Congress, in passing the Telecommunications Act, did not intend this result. Florida consumers deserve better.

BellSouth would have this Commission ignore the specific facts outlined in Inspector Grayson's file and the bias uncovered in the e-mail transmissions of the

Commission Staff. The Commission, however, has a duty not to close its eyes to impropriety in its proceedings.[1]

BellSouth goes as far as making the failure to pay claim a second time on page two of its Motion. Supra moves to strike both instances of this false statement. One of BellSouth's few legitimate, and non-scandalous, responses to the facts outlined in Supra's Motion for Disqualification and Recusal was that its communications with the Commission Staff,[2] on or before March 1, 2002, regarding BellSouth's false claim that Supra owes between "50 and 70 million"[3] dollars, were not *ex parte* communications in violation of Section 350.042(1), Florida Statutes. Supra will address the *ex parte* nature of these communications in the Reply portion of this document.

Supra moves to strike BellSouth's use of the phrase "belittle and browbeat" as scandalous and inflammatory. Supra has simply outlined the facts contained in Inspector Grayson's investigation file. The suggestion that bringing this information to the Commission's attention is an attempt to "belittle and browbeat" the Commission is simply a hysterical comment made by a party afraid of the facts. These terms must be stricken.

Supra moves to strike BellSouth's statements that Supra has made baseless accusations and "conspiracy theory" claims. BellSouth fails to cite to a single fact in Inspector Grayson's file that is false. Inspector Grayson's file details a "conversation" between Marshall Criser, BellSouth's Vice-President of Regulatory Affairs and Dr. Mary Bane, Deputy Executive Director, on or before September 21, 2001 regarding Kim Logue's

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[1] *See Communications Workers of America, Local 3170 v. City of Gainesville*, 697 So.2d 167, 169 (Fla. 1st DCA 1997) (Administrative agencies, however, 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.").

[2] *See* Pg. 11-12, BellSouth's Motion in Opposition to Disqualify, in which BellSouth writes: "Supra's contention should be rejected outright because Section 350.042(1) specifically provides that the ex parte statute "shall not apply to Commission staff."

[3] *See* Composite Exhibit C, to Supra's Motion for Disqualification and Recusal, filed April 17, 2002.

wrongdoing.[4] This conversation took place *prior* to the evidentiary hearing in Docket No. 001305-TP. The product of this conversation is that Supra was not notified of Logue's wrongdoing until after the close of the evidentiary hearing. A conspiracy by definition is an agreement between two or more people. The actions detailed above are facts, not theory. As such, BellSouth's assertion that Supra is raising "baseless accusations and 'conspiracy theory' claims" must be stricken.

No claim for libel

Supra moves to strike BellSouth's baseless assertion that the facts detailed in Supra's Motion are "almost-libelous behavior."[5] This language is scandalous and designed solely to unduly prejudice Supra. As set forth above, BellSouth has not denied, or even addressed, a single allegation set forth by Supra. Supra welcomes the opportunity to depose the Commission and BellSouth personnel in this matter in connection with any suit BellSouth wishes to file.

Supra has identified specific wrongdoing on the part of BellSouth and the Commission. BellSouth is correct when it says that Supra will stop at nothing to ensure (1) that Supra is provided a new hearing that is fair and unbiased, and (2) that the parties that have engaged in this wrongdoing accept the consequences of their actions. This is not a game, as BellSouth would like to believe. The actions detailed in all of Supra's motions demonstrate an indifference to the public interest. The Florida legislature has already spoken on this issue and has clearly articulated that "promoting the public interest and maintaining the respect of the people in their government must be of foremost concern." *See* Section 112.311(6), Florida Statutes.

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[4] *See* Exhibit W, Supra's Motion for Reconsideration for Re-Hearing.
[5] *See* Page 2, first full paragraph, BellSouth's Motion in Opposition to Disqualify.

Given the facts, Supra moves to strike, as baseless, BellSouth's assertion that Supra's motions are "almost-libelous."

REPLY IN SUPPORT OF MOTION

Supra's Motion is timely

BellSouth trots out the same old tricks. When a party lacks a legitimate argument, it will seek to re-characterize its opponent's motion. In this case, BellSouth suggests that what Supra "really" filed was a Motion for Reconsideration with respect to having a new hearing sent to DOAH. This is simply not the case. Supra filed a Motion to disqualify the staff from drafting and filing any further recommendations and to recuse the Commission from considering Supra's Motion for Reconsideration and any other pleading or motion filed in this docket. This is the threshold issue. Once the Staff is disqualified and the Commission recused, then the Governor is afforded the opportunity to assign whoever he wants to decide the matter. Because the statute and case law suggest that DOAH is a preferable alternative, Supra simply suggested that the Chairman decide to send the matter to DOAH. Supra will of course accept whatever forum Governor Bush decides to choose.

What BellSouth has suggested in its Motion is that in considering Supra's Motion for Disqualification and Recusal, the Commission should reverse the order and apply an inverse standard. BellSouth suggests that you first pretend that our Motion is a Motion for Reconsideration on sending a new hearing to DOAH. If you accept this legal fiction, the Commission could then arrive at the conclusion that the Motion is untimely.[6] If the Commission found that the Motion is untimely, then the Commission need not address the issue of disqualification and recusal. This entire logic is flawed and should be disregarded as a red herring.

BellSouth's improper attempt to "re-characterize" Supra's Motion begins on page 3 of its Motion in Opposition and continues for several pages. At one point BellSouth's argument becomes circuitous: BellSouth admits that the Governor can appoint a substitute to conduct a rehearing, and then BellSouth suggests that there is no *rule* or *statute* that would prohibit Commissioner Baez from solely ruling on Supra's Motion. Oddly enough, BellSouth's ultimate conclusion is that in no event can the Chairman refer this matter to DOAH.

The flaw in BellSouth's argument is that the Chairman has the discretion to "re-assign" a docket to other Commissioners and even to DOAH. *See* 350.01(5), Florida Statutes. Nothing in this statutory provision precludes the Chairperson from reassigning Commissioners from a docket. In fact, Chairpersons in the past have done just that when a conflict has arisen. Accordingly, BellSouth's argument has no merit.

Special expertise?

The issue of referring this matter to DOAH is a *secondary* issue, to the *threshold* matter before the Commission: whether the facts and law demonstrate that the Staff should be disqualified and Commission Panel recused. Once the threshold questions have been addressed, the Chairman can then decide whether to refer this matter to DOAH. If necessary the Governor can decide which is the appropriate forum.

On the issue of having this matter referred to DOAH, in defending the staff, BellSouth writes: "this proceeding is replete with technical, telecommunications issue that require the decision maker to have special expertise and knowledge."[7] However, an e-mail from Sally Simmons, Bureau Chief for Market Development dated October 22, 2001,

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[6] *See* Pg. 3, BellSouth's Motion in Opposition to Disqualify.
[7] *See* pg. 8, BellSouth Motion.

demonstrates that at least four (4) Commission Staff members assigned to Docket No. 001305-TP had absolutely no experience in writing a recommendation dealing with an arbitration of this magnitude.[8] This raises serious questions regarding the repeated assertion that the staff can never be disqualified because their expertise is indispensable.

Policy questions?

In Docket No. 001305-TP the Staff did not recommend and the Commission did not alter any pre-existing policy of the Commission. There were also no issues of first impression that would typically compel the Chairman to refer such an issue to the full Commission for consideration. In Docket No. 001305-TP the issues all involved whether BellSouth or Supra met their respective evidentiary burden for a particular issue and also whether what was being asked for was within the scope of the 1996 Telecommunications Act.

Administrative Law Judges are trained and experienced lawyers. The entire arbitration in this docket involves precisely the expertise that these experienced lawyers (now judges) are trained to deal with: evaluating evidence and interpreting the law. Section 350.01(5), Florida Statutes, specifically contemplates and presumes that the Chairman will utilize DOAH. Notwithstanding the specific legal expertise residing at DOAH and the fact that the Commission did not consider any change in policy or an issue of first impression in this docket, and the fact that at least four Commission staff employees had absolutely no experience in drafting a post-hearing recommendation in an arbitration, Supra submits that referring this matter to DOAH would be an appropriate decision.

[8] *See* e-mail (attached hereto as Composite Exhibit A) from Sally Simmons to David Dowds dated October 22, 2001 at 1:36 pm.

Standard for Recusal or Disqualification has been met

Contrary to BellSouth's assertions, the test for recusal and disqualification has been met. The test is whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.[9]

Any objective individual who was presented with evidence in this case would most certainly fear that a fair and impartial hearing could not be obtained: (1) that BellSouth and Commission employees worked together to conceal information of wrongdoing by a Commission Supervisory Staff employee (Kim Logue), (2) that these same Senior Commission Managers then debated whether to force Logue's resignation for the particular wrongdoing, and then (3) after deciding not to terminate Logue, that these same Senior Commission Managers allowed Logue to remain assigned to Supra's case and allowed Logue to participate in and supervise the remaining technical staff assigned to Supra's case.

Accordingly, Supra's evidence meets the test for recusal and disqualification.

Chairman Jaber

Supra stands by the facts and legal duties public officials must observe as outlined in our Motion.

Commissioner Palecki

The evidence demonstrates that McLean's e-mail was sent to Commissioner Palecki.[10] The evidence also demonstrates that McLean's follow-up e-mail was specifically transmitted with the intent to answer Commissioner Palecki's inquiry.[11]

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[9] *See* In Re: Southern States Utilities, Inc. (Order No. PSC-95-1438-FOF-WS) (Docket Nos. 95-0495-WS, 93-0880-WS, 92-0199-WS) (1995 Fla. PUC LEXIS 1467).
[10] *See* e-mail attached to Supra's Motion for Disqualification and Recusal.
[11] *Id.*

BellSouth's first defense to its disclosure of the false information to Commission Staff is that Section 350.042(1), Florida Statutes, specifically provides that Commission Staff are exempt from the provisions under that particular statutory section.[12] The statutory exemption is specifically designed to apply to Commissioner's only. The exemption, however, does not relieve the staff from engaging in *ex parte* communications – as BellSouth suggests.

Rule 25-22.033, Florida Administrative Code, specifically prohibits Commission employees from engaging in *ex parte* communications. The rule does, however, recognize that Commission employees must exchange information with parties who have an interest in Commission proceedings, but the information is generally procedural in nature. This is evident because the Commission also recognizes in this rule that "all parties to adjudicatory proceedings need to be notified and given an opportunity to participate in certain communications."[13] Subsection (5) of this Rule expressly provides that "no Commission employee shall directly or indirectly relay to a Commissioner any communication from a party or an interested person which would otherwise be a prohibited *ex parte* communication under Section 350.042, Florida Statutes."

The referenced statutory section prohibits a Commissioner from considering an *ex parte* [one sided] communication concerning the merits in any proceeding. Any communication of information that touches upon the decision-making process is a communication concerning the merits. The information communicated to Commissioner Palecki, under any objective standard, was a communication in which Supra most certainly should have been notified and given an opportunity to respond to. The Staff

[12] *See* BellSouth's Motion in Oppositions to Supra's Motion to Disqualify, pg 12, and Section 350.042(1), last sentence.

violated Rule 25-22.033, Florida Administrative Code, when it directly relayed information obtained from BellSouth to Commissioner Palecki and his aide. The Commission need only ask itself: if the inquiry made by Commissioner Palecki were made directly to BellSouth, would the inquiry have been a violation of the *ex parte* statute? The answer is yes. The e-mail sent to Commissioner Palecki and to Katrina Tew (Palecki's aide) specifically references that the information originated with BellSouth. Accordingly, Supra should have been notified and afforded an opportunity to respond.

BellSouth and the Staff may be under the misapprehension that no violation of the Commission Rule took place because of a sentence which appears in subsection (5) of the Rule: "Nothing in this subsection shall preclude non-testifying advisory staff members from discussing the merits of a pending case with a Commissioner, provided the communication is not otherwise prohibited by law." Supra concedes that "advisory" staff can discuss the information with a Commissioner that touches upon the Commission's decision-making process. This is in fact necessary because the whole purpose of the "advisory" staff is to provide "advice" on the merits of a proceeding.

But this language does not provide the "advisory" staff with a license to then engage in *ex parte* communications with one party, and not the other, while it is "advising" the Commission on the merits of a proceeding. This is an absurd result.[14] This absurd result is precisely the argument advanced by BellSouth: "said communications were not in violation of Section 350.042(1), because the Commission staff submitted the communications."[15] It is evident that Commissioner Palecki could not

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[13] *See* introductory paragraph to said Rule.
[14] *See City of St. Petersburg v. Siebold*, 48 So. 2d 291 (Fla. 1950) (absurd or unreasonable results should be constrained when interpreting statutes, and rules).
[15] *See* BellSouth's Motion in Opposition to Disqualification pg. 12.

have asked this question directly to BellSouth. As such, the Staff could not likewise engage in one-sided communications with BellSouth in an attempt to answer the Commissioner's inquiry. The one-sided communications were a violation of the *ex parte* rule. Likewise, the subsequent communication directly to the Commissioner and his aide was a second violation of the *ex parte* rule. Finally, the Commissioner's decision not to notify Supra and afford Supra an opportunity to respond was a violation of the *ex* parte statute. BellSouth is incorrect in its interpretation of the *ex parte* prohibitions under the administrative code as well as Florida Statutes.

BellSouth's second defense to the evidence of the *ex parte* communication is to suggest that "there is no evidence that . . . the purported review of this information evidenced a bias in favor of BellSouth." While BellSouth may believe that this information was innocuous, it is not unrealistic to believe that a fair and objective fact finder would conclude that that this false information created a negative impression in the mind of the Commissioner leading to the false belief that BellSouth needed the Follow-on Agreement in order to force Supra to pay for services. Accordingly, a bias in favor of BellSouth was demonstrated when the Commission Staff acted as a conduit for BellSouth to provide false information to a Commissioner in which Supra was not afforded an opportunity to respond.

Staff

In BellSouth's attempt to defend the Staff, BellSouth oddly asserts that "the Commission should reject this request [for disqualification] because the Commission, not the staff, makes the final decision." *See* pg. 13, BellSouth's Motion. Given this assertion, BellSouth should have absolutely no objection to Supra's request for the staff's disqualification. If the Commissioners are the ones that make the decision, then it should be

of no consequence to BellSouth who the underlying recommendation is drafted and filed by (i.e. an administrative law judge from the Division of Administrative Hearing). BellSouth's insistence that Staff not be disqualified demonstrates that BellSouth is uncomfortable with a neutral party evaluating the evidence in this docket. Accordingly, Supra's Motion must be granted.

WHEREFORE, Supra respectfully requests that this Commission (a) strike those portions of BellSouth's Response which are immaterial, impertinent and scandalous, (b) grant Supra's Motion for Recusal, and for such further relief which it deems fair and just.

RESPECTFULLY SUBMITTED THIS 1ST DAY OF MAY 2002.

SUPRA TELECOMMUNICATIONS &
INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, FL 33133
Telephone: 305-476-4248
Facsimile: 305-443-9516

BY: Brian Chaiken/ARS

BRIAN CHAIKEN
Florida Bar No. 0118060

 Composite Exhibit - A

From: David Dowds
Sent: Monday, October 22, 2001 2:31 PM
To: Sally Simmons
Subject: RE: Misc.

OK by me

-----Original Message-----
From: Sally Simmons
Sent: Monday, October 22, 2001 2:08 PM
To: David Dowds
Subject: RE: Misc.

I was thinking pretty early -- 7:30 - 7:45 (whenever Walter gets here)

-----Original Message-----
From: David Dowds
Sent: Monday, October 22, 2001 1:52 PM
To: Sally Simmons
Subject: RE: Misc.

Re 1(a): I have an issue ID at 0900; would have to be before then

OK on other points.
-----Original Message-----
From: Sally Simmons
Sent: Monday, October 22, 2001 1:36 PM
To: David Dowds
Subject: RE: Misc.

Re. (1)(a), I think we should discuss with WDH -- how about first thing tomorrow?

Re. (1)(b), I want to do this next week. I'll check with all concerned to figure out the best day -- it won't be Tuesday (due to my golf outing at Golden Eagle).

Re. (2), we need to do this selectively. I think we should talk to Tobey, Latesa, Todd, and Jason. I'll get with the first two, and you can get with the last two. My reasoning is twofold -- they're new and haven't written a post-hearing rec before, and their workloads are such that they may be able to get their issues out of the way and be able to handle new cases that come in.

Re. (3), let's give them all to Jason. They're all so similar that it would be best to have one person dealing with all of them.

-----Original Message-----
From: David Dowds
Sent: Monday, October 22, 2001 12:54 PM
To: Sally Simmons
Subject: Misc.

1) 271 Qs:
a) Re the cost studies and Bell's desire we set rates within the 271 proceeding: Any idea what the prevailing sentiment is? Critique and set rates? Or decline, as inappropriate ('cause not proper venue 'cause no one's interests are affected by PSC actions in 271 docket)

b) 271 issues meetings: Any thoughts as to when we should have the first one?

2) 001305: You mentioned a concern that staff may not be ramping up on this rec as quickly as would be desirable. Should I say something to the troops (either via email or verbally) about this? (Diplomatically, of course)

3) PIU dockets: We discussed assigning these to Jason; since we are up to four, still think we should go ahead? Or perhaps pair him with someone else?