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February 25, 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 Response to BellSouth’s
Opposition to Supra’s Motion for Rehearing in Docket
No. 001305-TP; Motion for the Appointment of a
Special Master; Motion For an Indefinite Deferral;
and Motion For Oral Arguments**

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 Response to BellSouth’s Opposition to Supra’s Motion for Rehearing in Docket No. 001305-TP; Motion for the Appointment of a Special Master; Motion For an Indefinite Deferral; and Motion For Oral Arguments 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
General Counsel

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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 25th day of February, 2002 to the following:

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By: Brian Chaiken/ATS
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 25, 2002
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SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC.'S
RESPONSE TO
BELLSOUTH'S OPPOSITION
TO SUPRA'S MOTION FOR REHEARING IN
DOCKET NO. 001305-TP;
MOTION FOR THE APPOINTMENT OF A SPECIAL MASTER;
MOTION FOR AN INDEFINITE DEFERRAL;
MOTION FOR ORAL AGRUMENTS

SUPRA TELECOMMUNICATIONS & INFORMATIONS SYSTEMS, INC. ("Supra"), by and through its undersigned counsel, hereby files this RESPONSE TO BELLSOUTH'S OPPOSITION to Supra's Motion For Rehearing in Docket No. 001305-TP. Supra could find nothing in the Florida Administrative Rules expressly prohibiting the filing of a necessary response to place BellSouth's affidavit in context. Accordingly, Supra files this Response and states the following in support thereof:

1. The legal justification for this filing is Commission Order No. PSC-02-0143-PCO-TP, entered by Chairman Jaber on January 31, 2002, as well as federal and state case law involving the failure to disclose a conflict of interest.
2. The courts are clear that once "having found an actual conflict of interest, the Court must presume prejudice resulting therefrom." *See Cuyler v. Sullivan*, 466 U.S. 335, 349-351 (1980). "A defendant who shows that a conflict of interest

actually affected the adequacy of representation **need not demonstrate prejudice in order to obtain relief.**” *Id.* (Emphasis added).

3. Accordingly, Supra is not required to introduce videotape evidence of Ms. Kim Logue actually providing BellSouth with additional documentation or information in Docket No. 001305-TP, in order for Supra to have filed this Motion or for the Florida Public Service Commission (Commission) to grant Supra its requested relief.
4. Supra is only required to demonstrate that a conflict of interest existed between the Commission Staff and BellSouth and that this conflict of interest remained a secret from Supra until after the evidentiary hearing in Docket No. 001305-TP.
5. BellSouth filed its response to Supra’s Motion on February 20, 2002, and attached the affidavit of Ms. Nancy Sims, Director of Regulatory Affairs. The one glaring fact that this affidavit confirms is that neither Ms. Sims or her Legal Counsel ever decided to notify Mr. Harold McLean, Commission General Counsel, of, what by all standards of common sense was, the existence of an actual conflict of interest.

Existence of conflict of interest

6. As stated in Supra’s Motion for Rehearing, Supra first became aware of the conflict of interest on October 5, 2001, when Mr. McLean informed Supra that an internal investigation would be conducted and that Supra should await its outcome before taking any action on its own. Supra complied with that request.
7. BellSouth states in its response that it has already “addressed” the matter involving Ms. Logue and will not repeat its position again. *See page 1 of*

BellSouth response. BellSouth can only be directing this comment at Commission Staff, because BellSouth has never addressed this issue with Supra.

8. Supra was informed, however, that as a result of the Staff's internal investigation, the only communication between Ms. Logue and Ms. Sims was the e-mail of May 2, 2001.
9. This is troubling because Ms. Sims' affidavit demonstrates that, in addition to the e-mail, there was at least one facsimile transmission and two telephone calls between Ms. Sims and Ms. Logue all between 5:39 p.m. and 8:00 p.m. on the evening of May 2, 2001 – all on the eve of the evidentiary hearing in Docket No. 001097-TP.
10. Given this new and troubling information, this document will address Ms. Sims' affidavit.

Sims' Affidavit

11. First and foremost are Ms. Sims' qualifications. In 1994, she was hired as Director of Regulatory Affairs. It is fair to suggest that Ms. Sims must have had some high degree of knowledge of the Commission regulatory process before she was given this position. BellSouth is the largest Incumbent Local Exchange Carrier in the State of Florida and the position of Director of Regulatory Affairs is not likely to be given to a person with minimal experience.
12. The observation regarding Ms. Sims' qualifications back in 1994 is important, because Ms. Sims has now had nearly eight (8) additional years of experience with dealing with the Commission Staff and Commission procedure.

13. At the outset of Ms. Sims' affidavit, she admits to receiving an e-mail from Ms. Logue on May 2, 2001. *See par. 3.*
14. We know that the e-mail was sent after normal working hours, at approximately 5:39 p.m.
15. The next admission is new to Supra. The Commission Staff had told Supra that the only communication between Ms. Logue and BellSouth was the one e-mail.
16. Ms. Sims states that she could not open the e-mail from Ms. Logue. *See par 3.*
17. As a result of her inability to open the e-mail, Ms. Sims states that she "telephoned" Ms. Logue. *See par 4.* This telephone call took place some time after 5:39 p.m. on the evening of May 2, 2001.
18. Ms. Sims' states that she telephoned Ms. Logue to "advise" her that "I could not open the e-mail." *See par 4.*
19. During this "telephone" conversation, Ms. Sims [experienced Director of Regulatory Affairs] listened to Ms. Logue explain that Ms. Logue "had drafted suggested cross-examination questions for BellSouth's witnesses in Docket No. 001097, . . ." Let's stop right here.
20. At this moment, Ms. Sims should have informed Ms. Logue that she could not continue with this conversation, because if Ms. Logue followed through with her intended course of action the simple receipt of the cross-examination questions by Ms. Sims would create an actual conflict of interest. *Zuck v. Alabama*, 588 F. 2d 436 (5th Cir. 1979) (an actual conflict of interest occurs when an individual places himself or herself in a situation inherently conducive to divided loyalties). Ms. Sims had just been informed by a Commission Staff employee – who holds a

supervisory position - that cross-examination questions for the next day's evidentiary hearing were about to be provided to her. In any judicial forum, knowing the questions in advance, so that answers could be prepared in advance, is without question a prejudicial act to the other litigant – Supra in this case.

Staff sits like a Judge

21. The Commission Staff assigned to a Docket are permitted to ask cross-examination questions during the evidentiary hearing to help clarify issues for the Staff and the Commissioners. The Staff assigned to the Docket are the ones who determine, at the close of the hearing, what testimony was relevant and should be relied upon in the drafting of a recommendation for the outcome of each issue.
22. In any other judicial forum, the Staff's action in a Commission proceeding is similar to a Judge asking clarifying questions during a bench trial. The Judge in this instance is the trier of fact. The Judge is also permitted to ask clarifying questions, because as the trier of fact, it is the Judge who determines what is relevant and substantive for the purposes of the Judge's ultimate findings.
23. Now imagine the Judge, on the eve of the evidentiary hearing, sending one of the litigants the clarifying questions the Judge intended to ask. The Judge's actions would create an actual conflict of interest, the existence of which would be sufficient for another Court to order a new trial or rehearing.
24. To make matters worse, now imagine that the same two litigants have a second case before the same Judge. After the close of the evidentiary hearing in the second case, the Judge informs one of the litigants of the existence of the Judge's

actions in the first case. The Judge of course denies any wrongdoing in the second case.

25. Under this scenario the Courts would apply the test that once “having found an actual conflict of interest, the Court must presume prejudice resulting therefrom.” *See Cuyler v. Sullivan*, 466 U.S. 335, 349-351 (1980). As such, a rehearing would be in order.

26. The key problem for BellSouth 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. BellSouth of course has no legitimate answer.

Sims’ Affidavit continued

27. After Ms. Logue informed Ms. Sims of the cross-examination questions, Ms. Logue stated that “she would fax those questions to [Ms. Sims] and that she wanted [Ms. Sims] to advise her which BellSouth witness could respond to which question.” *See par 4*. This conversation simply confirms what Ms. Logue had already written in her e-mail. What is new information is the existence of the telephone call – previously denied.

28. Again, at this moment, Ms. Sims should have told Ms. Logue not to send these questions by facsimile, because of the inherent conflict of interest which would arise as a result of Ms. Logue’s actions.

29. Ms. Sims alleges she could not open her e-mail. But Ms. Sims can no longer claim naivete once having been informed of what the e-mail contained. Ms. Sims was an experienced regulatory Director for the largest Incumbent Local Exchange Company in the State of Florida. Notwithstanding Ms. Sims’ direct knowledge of

what information Ms. Logue intended on sending her, Ms. Sims told Ms. Logue to send her the questions. *See par 5.*

30. Ms. Sims' affidavit seems to imply a naivete as to the improper nature of Ms. Logue sending cross-examination questions to BellSouth with respect to BellSouth's witnesses. The conclusion for this implication arises from Ms. Sims' statement that upon discovering that the questions included questions for Supra, then and only then did Ms. Sims decide that she needed to confer with legal counsel.
31. As already pointed out, it is contrary to all notions of common sense to believe that Ms. Sims did not know that what Ms. Logue was doing was improper. Still the attempt to paint this picture is made in the affidavit.
32. Unless Ms. Sims' legal counsel was sitting in the room with her when Ms. Sims first telephoned Ms. Logue, it is fair to suggest that it took some amount of time to locate BellSouth's legal counsel.
33. The conversation with her legal counsel clearly involved (1) whether it was appropriate to review Commission Staff cross-examination questions to be directed at BellSouth Witnesses and (2) whether it was appropriate to review Commission Staff cross-examination questions to be directed at Supra Witnesses.
34. We know this much because Ms. Sims confirmed that she telephoned Ms. Logue a second time. *See par 5.* Again, this information is new to Supra.
35. During the conversation with BellSouth's legal counsel, it is evident that counsel advised Ms. Sims that it would be appropriate to review BellSouth questions, but not Supra questions.

36. The reason that such a conclusion is reasonable is because during this second telephone conversation between Ms. Sims and Ms. Logue, Ms. Sims informs Ms. Logue that “I do not believe it [is] appropriate for me to see questions designed for Supra.” *See par 5.* But, “I agreed to let Ms. Logue know which of the BellSouth witnesses could answer the questions for BellSouth.”
37. The problem with legal counsel’s advise to Ms. Sims [assuming she was really as naïve as her written affidavit is designed to portray] is that in any other context the lawyer’s advise would have been improper.
38. Take for example the scenario outlined earlier, where the Judge passes cross-examination questions to one of the litigants. Assume that the individual contacted by the Judge confers with legal counsel regarding the propriety or impropriety of accepting the questions from the Judge. It is fair to suggest that every ethical member of the Florida Bar would have advised the individual to tell the Judge: “No, I will not accept the questions, even those questions that are limited to my witnesses.” Also every ethical member of the Florida Bar, would have advised the individual to notify the other litigant of the Judge’s actions. BellSouth of course did none of this. And according to Ms. Sims’ affidavit, BellSouth’s attorney never seems to have concluded that any of this conduct created an actual conflict of interest or was improper.
39. Notwithstanding all of BellSouth’s failures in this episode, the greatest failure is an apparent agreement between Ms. Sims and her legal counsel not to inform Mr. McLean of Ms. Logue’s contacts with Ms. Sims (1) on the eve of the evidentiary

hearing in Docket No. 001097-TP, or (2) at any time prior to the second hearing in Docket No. 001305-TP held nearly five months later.

40. If both Ms. Sims and her legal counsel - as BellSouth would like us to believe - were naïve to think that the law permitted them to review cross-examination questions that are only directed at BellSouth, then what is BellSouth's excuse for not informing Mr. McLean of Ms. Logue attempt to provide Ms. Sims with the cross-examination questions to be directed at Supra?
41. Accordingly, it is fair to suggest that Ms. Sims and her legal counsel reached an agreement not to notify Mr. McLean of what BellSouth's legal counsel had already concluded was improper – the sending of the Supra questions.
42. According to the information Supra has received from Staff to date, BellSouth only acknowledged the existence of the conflict of interest after being confronted by Mr. McLean – after the close of the evidentiary hearing in Docket No. 001305-TP.
43. The Sims' affidavit is unclear as to whether there was in fact a third telephone call from Ms. Sims to Ms. Logue, in which Ms. Sims informs Ms. Logue that she agreed to let Ms. Logue know which BellSouth witnesses could answer which question. *See par 5.*
44. Ms. Sims admits in paragraph 7 of her affidavit that she “reviewed Ms. Logue's draft cross-examination questions.” If Ms. Sims did not review the questions until after the second call, then there must have been a third telephone call. Paragraph 7 would be consistent with a third telephone call.
45. If there was a third telephone call – this would be new to Supra..

46. As already pointed out earlier herein, the Commission Staff assigned to a Docket is permitted to ask cross-examination questions during the evidentiary hearing to help clarify issues. The Staff are the ones who determine, at the close of the hearing, what testimony was relevant and should be relied upon in the drafting of a recommendation for the outcome of each issue. This is an important point to remember when examining Ms. Sims' next statement.
47. Ms. Sims' next "defense" as to why her agreeing to receive and review the cross-examination questions did not create a conflict of interest is: "I did not discuss the relevance, quality or substance of the draft questions with Ms. Logue." *See par 7.*
48. This "defense" is of course irrelevant. It is the Commission Staff, not BellSouth, that determines what questions and answers raised during the evidentiary hearing are relevant and substantive and should be relied upon by the Staff. The alleged fact that Ms. Sims may not have discussed the questions with Ms. Logue makes absolutely no difference. It is an irrelevant point. The fact, as admitted to by Ms. Sims in her affidavit, is that BellSouth had received cross-examination questions on the eve of the evidentiary hearing and that BellSouth took no action to inform Mr. McLean of this fact. Moreover, this fact remained a secret from both Supra and Mr. McLean until after the close of the evidentiary hearing in Docket No. 001305-TP. Ignorance of the law is no excuse.

After hours

49. What is striking about this incident and Ms. Sims' affidavit, is that all of the activities outlined above all took place between 5:39 p.m. and 8:00 p.m.

50. It was 8:00 p.m., when Ms. Logue finally sent Mr. Lee Fordham, Commission Staff Counsel, the same cross-examination questions she had sent to Ms. Sims – with the exception that the questions were now slightly modified.
51. Presumably, it took Ms. Sims until just before 8:00 p.m. to complete all of the activities outlined in her affidavit. The only way to really confirm how long this took place is to take the deposition of Ms. Logue. The amount of time engaged in the above activities is not as important as the fact that at no time did Ms. Sims or her legal counsel ever decide to contact Mr. McLean.
52. The fact is that BellSouth has admitted, in Ms. Sims' Affidavit, to the existence of a conflict of interest. The fact is that BellSouth's response fails to include any statement that they ever notified Mr. McLean of this conflict. The fact that this actual conflict of interest remained a secret from Supra until after the close of the evidentiary hearing in Docket No. 001305-TP is sufficient for this Commission to grant Supra a rehearing.

WHEREFORE, Supra respectfully requests that the Commission order an indefinite deferral of Docket No. 001305-TP until this Motion for Rehearing can be ruled upon and grant oral arguments to better aid the Commission in its decision.

RESPECTFULLY SUBMITTED this 25th day of February, 2002

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