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April 17, 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 –  
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**

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) 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 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  
General Counsel

DOCUMENT NUMBER-DATE  
04272 APR 17 8  
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 Federal Express this 17<sup>th</sup> day of April, 2002 to the following:

Wayne Knight, Esq.  
Staff Counsel  
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SUPRA TELECOMMUNICATIONS  
& INFORMATION SYSTEMS, INC.  
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Miami, Florida 33133  
Telephone: (305) 476-4248  
Facsimile: (305) 443-9516

By: Brian Chaiken/AHS  
BRIAN CHAIKEN, ESQ.

**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

Petition for Arbitration of the	)	
Interconnection Agreement between Bell-	)	
South Telecommunications, Inc. and	)	Docket No. 001305-TP
Supra Telecommunications & Information	)	
Systems, Inc. pursuant to Section 252(b)	)	Dated: April 16, 2002
of the Telecommunications Act of 1996	)	
_____	)	

**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**

**RESPONDENT SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEM'S INC.** ("Supra"), by and through its undersigned counsel and pursuant to Florida Statute § 120.665, hereby moves the Florida Public Service Commission ("Commission") to disqualify and recuse the Commission Staff from participating in the drafting and filing of a recommendation with respect to Supra's Motion for Reconsideration and hereby moves to disqualify and recuse the Commission Panel – and the Commission - from considering and voting on Supra's Motion for Reconsideration as well as any and all further matters in this docket (including any other future motions), and to refer this docket to the Division of Administrative Hearings ("DOAH") for all further proceedings, and in support thereof states as follows:

1. Pursuant to Section 120.68, Florida Statutes, and Florida case law, Supra moves this Commission to disqualify the Commission Staff from participating in the drafting and filing of a recommendation with respect to Supra's Motion for Reconsideration (both parts – that dealing with the new hearing and that dealing with the arbitrated issues).

DOCUMENT NUMBER-DATE

04272 APR 17 8

REG. COMMISSION CLERK

2. The Commission Staff have demonstrated a bias in favor of BellSouth in two respects: (a) Supervisory Staff member Kim Logue, who participated and was present at the hearing in this docket, undisputedly acted in a manner aimed at benefiting BellSouth, and (b) Senior Staff members, upon learning of Logue's misconduct, deliberately withheld information regarding such from Supra and, in fact, allowed Logue to continue to participate in the present docket. *See* Supra's Motion for Reconsideration of the Denial of its Motion for Re-Hearing, filed on April 10, 2002 ("Reconsideration for Re-Hearing"). The Commission website has Supra's Motion listed as Document No. 03993-02. Supra's Reconsideration for Re-Hearing, along with its accompanying attachments, is incorporated by reference as if fully set forth herein.
3. Supra moves to have this Commission assign this matter to the Division of Administrative Hearing (DOAH) in accordance with Section 350.125, Florida Statutes and Florida case law, for the consideration and filing of a recommendation on Supra's entire Motion for Reconsideration (both parts – that dealing with the new hearing and that dealing with the arbitrated issues).
4. Supra also moves to recuse Chairman Lila Jaber and Commissioner Mike Palecki from considering this Motion and all future matters in this docket. Both Commissioners have demonstrated certain behavior which would lead a reasonably prudent person to believe that Supra cannot obtain a fair hearing – such behavior to be outlined in detail in the memorandum of law below.
5. In accordance with Section 350.125, Florida Statutes and Florida case law, Supra moves that Supra's Motion for Reconsideration be decided by a DOAH hearing

officer. *See* World Transportation, Inc. v. Central Florida Regional Transportation, 641 So.2d 913, 914 (Fla. 5th DCA 1994) (the Court held that where an adverse posture exists between the petitioner and the agency, the better procedure is not to select another agency member, but rather to request an independent hearing officer from the DOAH). *See also* Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So.2d 322, 324 (Fla. 1990) (where the Florida Supreme Court stated that where the agency head has been appointed by the Governor, the procedure under the APA is to have any recommended orders be decided upon by a substitute appointed by the Governor, who is not a member of the agency). *See also* Florida Statute § 120.68(1); and 2 Fla.Jur.2d, Administrative Law, § 280. As such, it is within the Governor's discretion to allow a DOAH hearing officer to make the final decision.

6. BellSouth's Response to Supra's Motion for Reconsideration is due to be filed until today. This Motion for disqualification and recusal is being filed April 17, 2002, as well. Accordingly, this Motion is timely. Pursuant to the statute, the standard is **"when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding."** Southern States, *supra*, at LEXIS pages 18-21. *See also* Bay Bank & Trust Co. v. Lewis, 634 So.2d 672, 678, n.6 (Fla. 1st DCA 1994) (the Court held that the reference to "within a reasonable time prior to the agency proceeding" in the APA recusal statute should be read as applying only to matters at issue before the hearing officer). Accordingly, this motion for recusal applies to all pending and future motions in this docket and is thus timely with respect to these matters.

**WHEREFORE**, Supra respectfully requests to disqualify and recuse the Commission Staff from participating in the drafting and filing of a recommendation with respect to Supra's Motion for Reconsideration and hereby moves to disqualify and recuse the Commission Panel – and the Commission - from considering and voting on Supra's Motion for Reconsideration as well as any and all further matters in this docket (including any other future motions), and to refer this docket to the Division of Administrative Hearings ("DOAH") for all further proceedings.

### **FACTUAL BACKGROUND**

On September 26 and 27, 2001, an evidentiary hearing was held in **this docket**. On October 5, 2001, Supra was officially informed that Ms. Kim Logue (a Commission Staff Supervisor) had sent cross-examination questions to Nancy Sims (BellSouth's Director of Regulatory Affairs) on the eve of an evidentiary hearing in Docket No. 001097-TP.<sup>1</sup>

On October 25, 2001, Inspector General John Grayson initiated an investigation into Logue's misconduct. In his memorandum to then Chairman E. Leon Jacobs, Jr., he outlines the scope of his inquiry:

**"Whether anyone with managerial responsibility over Ms. Logue had knowledge of the distribution of the cross-examination questions. If so, who was this knowledge communicated to, in what manner, and what if anything was done in response."**

The wrongdoing evidenced to date, in Docket 001097-TP, demonstrates that at a minimum there were several *ex parte* communications between Logue and BellSouth. On May 24, 2001 the parties had filed their post-hearing briefs in that docket, with Supra submitting revised positions on the issues (as allowed by the rules and pre-hearing order).

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<sup>1</sup> Docket No. 001097 was a billing dispute initiated by BellSouth against Supra, in which, at the time of the hearing, the sole issue was whether Supra had overpaid approximately \$350,000.00 to BellSouth.

On June 28, 2001, the Commission Staff Recommendation was filed in that Docket. The Recommendation was jointly filed by Ms. Logue (as the Staff Supervisor) and Lee Fordham (as Staff Attorney). The Recommendation improperly stated Supra's positions as those taken earlier in the proceeding and made no reference to any argument or position addressed by Supra in its post-hearing brief -- a reasonable conclusion being that Staff never even read Supra's post-hearing brief. The Commission subsequently voted to adopt Staff's recommendation on July 10, 2001, and issued a corresponding final order on July 31, 2001.

In the first week of January 2002, Commissioner Jaber ascended to the Office of Chairman of the Florida Public Service Commission.

On January 31, 2002, Chairman Jaber entered an Order in Docket No. 001097 which granted a new hearing based upon a procedural irregularity stating as follows:

**"On May 3, 2001, an evidentiary hearing was held on the portions of the complaint over which we retained jurisdiction. The findings from that hearing were incorporated in our Final Order of Complaint, Order No. PSC-01-1585-FOF-TP, issued July 31, 2001. On August 15, 2001, Supra filed its Motion for Reconsideration of Final Order No. PSC-01-1585-FOF-TP, and that Motion was set for Agenda Conference on October 2, 2001.**

**Prior to the scheduled Agenda Conference, a procedural irregularity was brought to my attention, which prompted a deferral of the item from the scheduled Agenda. I directed further inquiry, and have since reviewed the findings of that inquiry. Although the inquiry has failed to disclose any prejudice to either party, the Commission is sensitive to the mere appearance of impropriety. Accordingly, in order to remove any possible appearance of prejudice, I find that this matter should be afforded a rehearing." See Order No. PSC-02-0143-PCO-TP (1/31/02) at pages 1-2.**

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Interestingly, although BellSouth initiated this dispute, and although Supra sought to dismiss it, BellSouth did not have any affirmative claims pending.

On February 11, 2002, Inspector Grayson's ongoing investigation of Ms. Kim Logue was terminated. A memorandum dated February 11, 2002, from John Grayson to Commission Jaber, states, in pertinent part:

**"Effective October 10, 2001, Ms. Logue reported for active duty in the US Air Force. Her absence and the inability to interview her has rendered my investigation incomplete.**

**However, on January 21, 2002, an order setting Docket No. 001097-TP for rehearing was issued. Thus, I am closing my file on this investigation with the recommendation that training in the area of staff communications be conducted on an ongoing basis."**

On February 18, 2002, Supra filed a motion for new hearing in this docket based upon the precedent set out by Chairman Jaber in Commission Order PSC-02-0143-PCO-TP.

Supra moved for a new hearing in Docket No. 001305-TP based upon the "appearance of impropriety" that began with the improper and illegal communications between Kim Logue (Commission Staff Supervisor) and Nancy Sims (BellSouth's Director of Regulatory Affairs) and continued on and permeated Docket No. 001305-TP, as a direct result of Commission Staff's and BellSouth's decision to keep Logue's wrongdoing a secret from Supra. BellSouth could have removed the "appearance of impropriety" at any time from Docket No. 001305-TP by simply notifying Supra. As a direct result of BellSouth's "silence," a supervisory level staff member, who unquestionably demonstrated a bias in favor of BellSouth, who was not reprimanded in any way for doing so, was allowed to participate in and was present at the hearing in Docket No. 001305-TP.

At the March 5, 2002, Agenda Conference Supra's Motion for a new hearing was considered. At this Agenda Conference Commissioner Palecki had the following exchange of questions and answers with Supra's General Counsel, Brian Chaiken:

**"COMMISSIONER PALECKI: First, I would like to ask Supra -- I understand that based upon the events that happened in the other**



**docket that Supra believes that it cannot get a fair hearing before this Commission. My question is, has Supra done discovery to indicate whether impropriety occurred in this docket?**

**MR. CHAIKEN: I believe we've made a public document request asking for phone records, facsimile records, e-mails.**

**COMMISSIONER PALECKI: Has there been any indication that you can show us that there was impropriety in this docket?**

**MR. CHAIKEN: I have not received the documents back yet. So at this point in time, other than the fact that Ms. Logue has shown a predisposition to favor BellSouth and that she did participate in 1305 and was present at the hearing, as well as the evidence regarding Issue 1 that I presented earlier, that's all I have at this time, but we're waiting for the document request to come back."**

**COMMISSIONER PALECKI: Thank you."**

See March 5, 2002 Hearing Transcript in Docket No. 001305-TP, at page 34, lines 20-25 and page 35, lines 1-17 (copies of these transcript pages are attached hereto as Exhibit "D").

Later during that March 5, 2002 hearing, Commissioner Jaber had the following comments:

**CHAIRMAN JABER: And I say all of this to you because I want you to know that this is a new Commission with a new set of Commissioners and a new staff executive management team. We have a new General Counsel that you have gotten to know really well. We have a new Executive Director that has articulated completely to her staff the team philosophy and the role that these Commissioners have and the role that this staff has in serving the public. And I know this staff, Mr. Chaiken.**

**And I know that what Ms. Kim Logue did that I now can say definitely, because we have the affidavit from Ms. Sims, was completely inappropriate, and for that I want to publicly apologize to you. I want to apologize to you on behalf of this agency and on behalf of staff, because it was completely wrong to send cross-examination questions prior to the hearing.**

**But, BellSouth, I want to send you a strong message too. It was inappropriate for you to receive the cross-examination questions, not just Supra's questions, but you should have returned BellSouth's questions too.**

**But we've lived and we've learned, and those kinds of things will not happen anymore. It's for that reason we will have a rehearing in the complaint docket.**

**\* \* \* \* \***

**And, you know, all you have is the message I'm sending you. I realize that. But I also want to send you my gratitude, because you pointing out to us these sorts of situations is the feedback that I have. You've shown me where it was broken. We will fix it.**

**And the other place I think that we've let someone down, to some degree, I think I've let staff down, or we've let staff down. Whatever Ms. Logue did, whatever she was thinking, I have to believe there was a lack of staff training, because it is wrong to send out cross-examination questions on the eve of the hearing. I have to believe she didn't realize it was wrong, so that's where we failed. But live and learn."**

See March 5, 2002 Hearing Transcript in Docket No. 00-1305-TP, at page 40, lines 16-25, page 41, lines 1-19, and page 42, lines 1-16 (copies of these transcript pages are attached hereto as Exhibit "E").

Notwithstanding that the Commission's own precedent required only a showing of an "appearance of impropriety", upon completion of the above remarks, Commissioner Jaber requested a vote from the Commission Panel. Supra's Motion for a new hearing was unanimously denied.

Beginning in late March 2002 and continuing to the present, the Commission (through David Smith of the Office of General Counsel) began delivering in bits and pieces, documents in response to Supra's public records requests upon the Commission. Only a fraction of the documents requested have been provided to date. On April 15, 2002, the FPSC produced several series of e-mail communications which revealed that Kim Logue's e-mail file evidenced at least 114 e-mails regarding Docket No. 001305.

## LEGAL STANDARD

The parties to an administrative adjudicatory proceeding are entitled to a fair hearing before an impartial tribunal, and to a determination made without bias, hostility, or prejudice. 2 Fla.Jur.2d, Administrative Law, § 273. In this regard, an agency head (whether individually or collectively) can be disqualified from serving in any agency proceeding for bias, prejudice, or interest. 2 Fla.Jur.2d, Administrative Law, § 277.

In Florida, administrative proceedings are governed, in general, by the Florida Administrative Procedure Act ("APA"). Except where specifically provided for in superseding provisions of law, the Florida Public Service Commission ("Commission") is subject to the APA. 2 Fla.Jur.2d Administrative Law, § 23. With respect to recusals and disqualifications of FPSC Commissioners, the APA applies. In this regard, Florida Statute § 120.68 states in pertinent part as follows:

"(1) . . . any individual serving alone or with others as an agency head may be disqualified from serving in any agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding. If the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified.

(2) Any agency action taken by a duly appointed substitute for a disqualified individual shall be as conclusive and effective as if agency action had been taken by the agency as it was constituted prior to any substitution."

In the Commission docket of In Re: Southern States Utilities, Inc. (Order No. PSC-95-1438-FOF-WS) (Docket Nos. 950495-WS, 930880-WS, 920199-WS) (1995 Fla. PUC LEXIS 1467), this Commission held that the procedural statutes and rules dealing with the recusal of court officials does not apply to recusals of Commissioners. Rather that the time constraints and procedure to be used in seeking to recuse Commissioners is that set forth by the APA. Southern States, *supra*, at LEXIS pages 18-21. Pursuant to the statute, the

standard is **"when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding."** *Id.*

In Bay Bank & Trust Co. v. Lewis, 634 So.2d 672, 678, n.6 (Fla. 1st DCA 1994), the Court held that the reference to "within a reasonable time prior to the agency proceeding" in the APA recusal statute should be read as applying only to matters at issue before the hearing officer. Accordingly, this motion for recusal applies to all pending and future motions in this docket and is thus timely with respect to these matters.

In further defining the standard under the predecessor APA statute (i.e. Fla.Stat. § 120.71), this Commission stated in In Re: Southern States Utilities, Inc. as follows: **"We note that the holding of Bundy v. Rudd, supra, still states the law with respect to a motion for the disqualification of a trial judge, i.e., a judge presented with a motion for his disqualification shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification, but shall limit his inquiry to the legal sufficiency of the motion."** Southern States, supra, at LEXIS page 17. See also Bay Bank & Trust Co. v. Lewis, 634 So.2d 672, 678 (Fla. 1st DCA 1994) ("We do not decide disputed issues of fact in such a proceeding, but assume, as must the agency head, that all allegations of fact in the motion are true . . . [it is thus] a proceeding to review the legal sufficiency of the motion for disqualification") and Bundy v. Rudd, 366 So.2d 440 (Fla. 1978); see also 2 Fla.Jur.2d, Administrative Law, § 277 (In determining whether to grant or deny a motion for disqualification, the presiding officer(s) must assume that all allegations of fact in the motion are true).

In Southern States this Commission further stated that, **"The applicable test for legal sufficiency for recusal in any event is enunciated in Hayslip v. Douglas, supra, i.e.,**

**whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial." Southern States, supra, at LEXIS page 17. This standard has also been enumerated in Pelham v. School Board of Wakulla County, Florida, 451 So.2d 1004, 1005 (Fla. 1st DCA 1984) ("well-grounded fear that he will not receive a fair hearing at the hands of the respondent agency").**

With respect to procedural matters, the DOAH employs administrative law judges (ALJ) to conduct hearings required by the Florida APA. 2 Fla.Jur.2d, Administrative Law, § 280. Florida Statute Section 120.569(2)(a) allows any agency covered by the APA to request an ALJ from the division. Florida Statute Section 120.65(7) further empowers the DOAH to provide ALJs on a contract basis to any other governmental entity not covered by the APA. Additionally, Florida Statute Section 350.125 also contemplates the FPSC's use of the DOAH from time to time.

In World Transportation, Inc. v. Central Florida Regional Transportation, 641 So.2d 913, 914 (Fla. 5th DCA 1994), the Court held that where an adverse posture exists between the petitioner and the agency, the better procedure is not to select another agency member, but rather to request an independent hearing officer from the DOAH.

It is evident from the facts stated herein that Supra cannot receive a fair and impartial recommendation from the Commission Staff or receive a fair and impartial decision from the Commission. *See* In Re: Southern States Utilities, Inc. (Order No. PSC-95-1438-FOF-WS) (Docket Nos. 950495-WS, 930880-WS, 920199-WS) (1995 Fla. PUC LEXIS 1467) (where the Florida Commission held that "[t]he applicable test for legal sufficiency for recusal in any event is enunciated in Hayslip v. Douglas, supra, i.e.,

**whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial." Southern States, supra, at LEXIS page 17.**

The Commission Staff have demonstrated a bias in favor of BellSouth. *See* Supra's Motion for Reconsideration of the Denial of its Motion for Re-Hearing, filed on April 10, 2002 ("Reconsideration for Re-Hearing"). Supra's Reconsideration for Re-Hearing, along with its accompanying attachments, is incorporated by reference as if fully set forth herein.

It is undisputed that, Kim Logue, a FPSC staff supervisor who participated in and was present at the hearing in this docket, has acted in an improper manner to aid BellSouth.<sup>2</sup> The evidence, detailed in both John Grayson's file and Supra's Motion, indicates that some of Kim Logue's superiors had actual knowledge of her wrongdoing as early as July 2001, others learned of her misconduct on or about August 20, 2001, but **all** of the following individuals had actual knowledge of her misconduct no later than September 21, 2001: **Dr. Mary Bane, Walter D'Haeseleer, Beth Salak, Sally Simmons, Karen Dockham, Beth Keating<sup>3</sup>, Lee Fordham<sup>4</sup>, Nancy Sims (BellSouth, Director of Regulatory Affairs), an unidentified BellSouth legal counsel, and Marshall Criser (BellSouth, Vice-President, Regulatory Affairs).** In spite of this knowledge, the facts show:

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<sup>2</sup> Notwithstanding the undeniable wrongdoing in another docket involving the same parties demonstrating her bias in favor of BellSouth, Logue's e-mails, tendered to Supra on April 15, 2002, evidence that she did in fact participate in the present docket.

<sup>3</sup> Significantly, the Inspector General's notes, attached as Exhibit U to Supra's Reconsideration for Re-Hearing, reflect that both Lee Fordham and Beth Keating, Staff Legal Counsel, "may have knowledge" of Logue's misconduct prior to the evidentiary hearing in this Docket.

<sup>4</sup> *Id.*

1. Walter D'Hasaeleer, Director of Competitive Markets and Enforcement, held a Division meeting on August 20, 2001, to discuss "ethics in dealing with utilities."<sup>5</sup>
2. On September 12, 2001, a CD-ROM containing all of Kim Logue's e-mails was produced for Beth Salak, Assistant Director of Competitive Markets and Enforcement, for her review. A copy of the e-mail from Logue to BellSouth sent at 5:39 pm on May 2, 2001, containing the cross-examination questions, was provided to both Walter D'Hasaeleer and Dr. Mary Bane, Deputy Executive Director.<sup>6</sup>
3. Dr. Mary Bane, Deputy Executive Director, and Marshal Criser, BellSouth Vice-President for Regulatory Affairs, discussed Kim Logue's wrongdoing on or before September 21, 2001.<sup>7</sup> This conversation took place prior to the evidentiary hearing in Docket No. 001305-TP.
4. On September 21, 2001, a high level meeting was held between Walter D'Haeseleer, Beth Salak, Sally Simmons and Dr. Bane involving "what is going to be done" with Kim Logue.<sup>8</sup> The evidentiary hearing in Docket No. 001305-TP was not held until September 26 and 27, 2001.
5. Kim Logue has never been disciplined in any manner for her wrongdoing.
6. Logue was neither terminated nor asked to resign nor reassigned from Docket No. 001305-TP.

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<sup>5</sup> The Division meeting was confirmed by Beth Salak and Sally Simmons in two separate interviews with Inspector John Grayson. An e-mail from Sally Simmons on August 20, 2001, confirms that Walter held a 30 minute private meeting with Sally Simmons, Beth Keating and Beth Salak, prior to the Division Meeting.

<sup>6</sup> See *Exhibit R*, Reconsideration for Re-Hearing.

<sup>7</sup> See *Exhibit W*, Reconsideration for Re-Hearing.

7. Logue was allowed to continue to supervise other staff subordinates and to participate in the evidentiary hearing in Docket No. 001305-TP.
8. An inquiry into Logue's wrongdoing was directed by Commissioner Jaber on October 1, 2001.<sup>9</sup>
9. Supra was **not** notified of the improper and illegal communications between Kim Logue and BellSouth until four days later on October 5, 2001, after the hearing in this docket. At that time, Supra was promised that the Commission would conduct a thorough investigation.<sup>10</sup>
10. Commission Inspector General, John Grayson, was not informed of Logue's misconduct until October 9, 2001. Senior Management had prior knowledge that Logue was required to report for active duty on October 10, 2001. It was common knowledge that Logue would be leaving the Commission on October 8, 2001.<sup>11</sup> As a direct result of the delay in notifying John Grayson, he was unable to interview Logue.
11. Richard Bellak, Commission legal counsel in the Division of Appeals, was directed to draft a memorandum analyzing the impact of BellSouth receiving a "single" e-mail sent at 5:39 p.m., and the impact of receiving cross-

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<sup>8</sup> See *Exhibit W*, Reconsideration for Re-Hearing.

<sup>9</sup> Commission Order PSC-02-0143-PCO-TP; See also March 5, 2002, Agenda Conference Transcript, pg. 36, lines 14-17.

<sup>10</sup> See October 8, 2001 Letter to Commission (attached hereto as Exhibit A) in which we expressly ask Harold McLean to provide Supra with the answer to "why BellSouth never informed the Commission that it had received the e-mail from Ms. Logue back in May 2001." Inspector Grayson's file proves that Logue's misconduct was well known **prior** to the evidentiary hearing in Docket No. 001305-TP. Contrast this with Bellak's "Internal Investigation" which simply stated that "it will leave to BellSouth any response to the suggestion that it should have informed the Commission about the receipt of Ms. Logue's e-mail."

<sup>11</sup> E.g., e-mail from Beth Keating to Kim Logue dated October 8, 2001 at 1:26 pm, entitled "Good luck!: "Been meaning to tell you good lick! I hope everything goes well." E-mail from Laura King to Kim Logue dated October 8, 2001, at 3:55 pm: "Just wanted to wish you well . . . take care."



examination questions on the eve of an evidentiary hearing.<sup>12</sup> Inspector Grayson's file, however, reflects that the cross-examination questions were received by BellSouth at 1:40 p.m., and that several other e-mails were exchanged between Logue and BellSouth discussing the merits of the proceeding.

12. Bellak's three (3) page document entitled "Internal Investigation and Report"<sup>13</sup> was issued on January 3, 2002. Bellak makes two conclusions (1) that the sending of the single e-mail at 5:39 p.m. to have been in error, and (2) the error was harmless.
13. Chairman Jaber relied on Bellak's "Internal Investigation and Report" as the basis for her directing a new hearing in Docket No. 001097-TP.
14. In Commission Order PSC-02-0143-PCO-TP, Chairman Jaber found no inappropriate conduct on the part of Logue and no bias. A new hearing was nevertheless ordered on the standard that an "appearance of impropriety" was created, and that this "appearance of impropriety" must be removed.
15. Inspector Grayson closed down his ongoing investigation upon the issuance of the Order for new hearing issued on January 31, 2002.
16. The facts set forth hereinabove were all contained in Inspector's Grayson's file as of February 11, 2002, yet Supra was not provided with such until it made a public documents request several weeks later.

Any recommendation with respect to the legal question regarding whether a new hearing is warranted in this docket will have to be filed by a Commission staff attorney.

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<sup>12</sup> It is unclear who directed Bellak to draft a memorandum regarding such. This is particularly disconcerting in light of the fact that Grayson was already conducting an investigation.

It is simply unrealistic to expect a Commission staff attorney to be fair and impartial in reviewing the facts, especially when the evidence indicates that those involved, at a minimum, include: a Senior Attorney, Legal Bureau Chief for telecommunications, Bureau Chief Market Development, Assistant Director Competitive Markets and Enforcement, Director Competitive Markets and Enforcement and the Executive Director of the Commission.

The lone Commission employee asked to file a recommendation on this issue, would also have a conflict of interest: there will be a great deal of pressure on this lone employee not to file a recommendation in favor of a new hearing in this docket, because the wrongdoing involves Senior Management.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering an Order. See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981); and In re: Complaint of Supra Telecom, 98 FPSC 10, 497, at 510 (October 28, 1998) (Docket No. 980119-TP, Order No. PSC-98-1467-FOF-TP).

#### **RECUSAL OF COMMISSION STAFF**

The Commission Staff involved in telecommunications matters named in John Grayson's investigative file must be **disqualified** from participating in any further motions and/or proceedings in Docket No. 001305-TP: Lee Fordham (staff legal

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<sup>13</sup> Notwithstanding the title of the Report, Bellak did not conduct any meaningful investigation.

counsel), Beth Keating<sup>14</sup> (Bureau Chief, legal), Walter D'Haeseleer (Director of Competitive Markets and Enforcement), Beth Salak (Assistant Director of Competitive Markets and Enforcement), Sally Simmons (Bureau Chief, Market Development). These individuals basically form the top tier of the telecommunications portion of the Commission.

Any remaining staff assigned to work on this docket would have a conflict of interest. The Staff is most likely to seek to defend the Commission as a whole, especially after Chairman Jaber's comments at the March 5, 2002, Agenda Conference:

“ . . . this is a new Commission with a new set of Commissioners and a new staff executive management team. We have a new General Counsel that you have gotten to know really well. We have a new Executive Director that has articulated completely to her staff the team philosophy and the role that these Commissioners have and the role that this staff has in serving the public.” (Agenda Transcript, pg. 40, lines 16-25).

In light of this strong defense of the Staff and the fact that the “team philosophy” resulted in all of the Senior Managers involved in Telecommunications being involved in the “conspiracy” and “cover-up” of Logue's misconduct until after the close of the evidentiary hearing in Docket No. 001305-TP, it is unrealistic to expect that any lone Commission staff employee will recommend a new hearing because of wrongdoing engaged in by Senior Managers of the agency.

### CONFLICT OF INTEREST

In order to deny Supra's Motion for Reconsideration for Re-Hearing the lone staff employee would have to find that Chairman Jaber through the exercise of reasonable care

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<sup>14</sup> Attached hereto as Exhibit B is an e-mail from Beth Keating to Wayne Knight regarding Supra's Motion to Dismiss filed in Docket No. 001305. Therein, Keating writes to Knight, “Lovely! Well, I guess we go with what BST and staff can agree to.”

could **not** have known that John Grayson's file contained facts demonstrating that Senior Management Employees of the Commission had direct knowledge of Ms. Kim Logue's wrongdoing prior to the evidentiary hearing in Docket No. 001305-TP held on September 26 and 27, 2001. *See Goin v. Commission On Ethics*, 658 So.2d 1131, 1136 (1<sup>st</sup> DCA 1995).

The facts in this case regarding Chairman Jaber demonstrate that:

- On or about October 1, 2001, Commissioner Lila Jaber directed an inquiry into Kim Logue's *ex parte* communications with BellSouth's Director of Regulatory Affairs<sup>15</sup>;
- On October 25, 2001, Inspector General for the Commission John Grayson, initiated an investigation into Logue's misconduct.<sup>16</sup>
- John Grayson conducted his interviews of Senior Managers in November 2001.
- Sometime after Grasyon was notified of Logue's misconduct, Commissioner Jaber directed David Smith, Commission legal counsel, to contact both Supra and BellSouth in order to conduct a settlement mediation.
- Procedurally, however, Docket No. 001097-TP had already gone to hearing on May 3, 2001 and been voted on by the Commissioners on July 10, 2001. The Commission Panel, in which Commissioner Jaber was the presiding officer, voted in favor of BellSouth and against Supra.
- Mediation was held on November 20, 2001. No settlement was reached.
- On January 31, 2002, newly invested Chairman Jaber issued Commission Order No. PSC-02-0143-PCO-TP, in Docket No. 001097-TP, ordering a new hearing.

- Supra never filed a motion asking for a new hearing in that docket.
- On or before February 11, 2002, John Grayson, closed down his ongoing investigation into what did Logue's Senior Managers know and when did they know it.
- On February 11, 2002, John Grayson sent Chairman Jaber a memorandum informing her that he had closed down his ongoing investigation into Logue's misconduct as a direct result of her decision to Order a new hearing in Docket No. 001097-TP.<sup>17</sup>
- The Inspector General is a resource attached and within the trust of the Office of the Chairman of the Florida Public Service Commission. All of the facts evidencing specific wrongdoing prior to the evidentiary hearing in Docket No. 001305-TP were contained in John Grayson's file and within the trust of the Chairman's Office at the time John Grayson sent Chairman Jaber his memorandum on February 11, 2002.
- Chairman Jaber did not disclose the information that John Grayson had been conducting an ongoing investigation to Supra, nor did Chairman Jaber disclose the facts contained in John Grayson's file.

Had the information in John Grayson's file been disclosed to Supra on or about February 11, 2002, then this information would have been included in Supra's Motion for

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<sup>15</sup> March 5, 2002, Agenda Conference Transcript, pg. 36, lines 14-17; *See also* Commission Order PSC-02-0143-PCO-TP.

<sup>16</sup> *See* Exhibit N, of Supra's Reconsideration for Re-Hearing.

<sup>17</sup> *See* Exhibit Y, of Supra's Reconsideration for Re-Hearing. On February 11, 2002, John Grayson sent Chairman Lila Jaber a Memorandum in which he stated, among other things: "On January 31, 2002, an order setting Docket No. 001097-TP for rehearing was issued. Thus I am closing my file on this investigation with the recommendation that training in the area of staff communications be conducted on an ongoing basis." *See Exhibit Y, last paragraph.*

Re-Hearing filed on February 18, 2002. The failure to provide Supra with Grayson's file is the only reason the evidence of wrongdoing by the Commission's Senior Managers was not included in Supra's Motion for Rehearing filed on February 18, 2002.

In the absence of widespread bias in favor of BellSouth, Supra could have expected the Senior Managers of the Commission to have notified Supra immediately upon learning of the misconduct and to have immediately removed Logue from all cases involving BellSouth, much less BellSouth and Supra. This was not done.

The facts demonstrate that the "conspiracy" and "cover-up" began prior to the evidentiary hearing in Docket No. 001305-TP and continued up through and until the March 5, 2002 Agenda Conference at which Supra's Motion for Re-hearing was considered. These acts of obstruction, by Commission Senior Staff, provide another reason as to why this evidence of wrongdoing is only coming out now.

It is fair to conclude that a reasonably prudent person would fear that Supra could not get a fair and impartial recommendation from the Commission Staff on its Motion for Reconsideration (both parts – that dealing with the new hearing and that dealing with the arbitrated issues).

The facts demonstrate that Supra is entitled to a new hearing. It is simply unrealistic to believe that a lone Commission staff employee will make the findings that are necessary in light of the individuals who committed the wrongdoing and Chairman Jaber's strong defense of the Staff at the March 5, 2002, Agenda Conference. The Staff simply has too great a conflict of interest in this matter, and must therefore be disqualified.

As such, in accordance with Section 350.125, Florida Statutes and Florida case law, Supra moves that Supra's Motion for Reconsideration (both parts) be decided by a DOAH hearing officer. *See World Transportation, Inc. v. Central Florida Regional Transportation*, 641 So.2d 913, 914 (Fla. 5<sup>th</sup> DCA 1994) (the Court held that where an adverse posture exists between the petitioner and the agency, the better procedure is not to select another agency member, but rather to request an independent hearing officer from the DOAH).

### **RECUSAL OF CHAIRMAN JABER**

On or about October 1, 2001, Commissioner Lila Jaber directed an inquiry into Kim Logue's ex parte communications with BellSouth's Director of Regulatory Affairs. On October 25, 2001, Inspector General for the Commission John Grayson initiated an investigation into Logue's misconduct. John Grayson sent to Chairman E. Leon Jacobs, Jr., (Chairman at the time) a Memorandum stating that he has "initiated an investigation" into Logue's misconduct.<sup>18</sup> Grayson notes that the scope of his investigation will include:

"Whether anyone with managerial responsibility over Ms. Logue had knowledge of the distribution of the cross-examination questions. If so, who was this knowledge communicated to, in what manner, and what if anything was done in response."

John Grayson conducted his interviews of Senior Managers in November 2001. Sometime after Grayson was notified of Logue's misconduct, Commissioner Jaber directed David Smith, Commission legal counsel, to contact both Supra and BellSouth in order to conduct a mediation. According to David Smith, Commissioner Jaber wanted the parties to

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<sup>18</sup> See *Exhibit N*, Reconsideration for Re-Hearing.

“settle” the case in Docket No. 001097-TP. John Grayson closed down his investigation after a new hearing was ordered in Docket No. 001097-TP. A “settlement” would have had the same consequences on John Grayson’s investigation. Procedurally, Docket No. 001097-TP had already gone to hearing on May 3, 2001 and been voted on by the Commissioners on July 10, 2001. The Commission Panel, in which Commissioner Jaber was the presiding officer, voted in favor of BellSouth and against Supra.

Now, nearly three and half months after the vote against Supra, Commissioner Jaber directed David Smith to encourage the parties to “settle” the case. This request came at the time when the Inspector General’s internal investigation was just getting underway. BellSouth, although it had already received a favorable ruling from the Commission agreed to mediate the matter, and the mediation took place on November 20, 2001.

On January 3, 2002, Richard Bellak issued his “Internal Investigation and Report” in which he addressed the impact of BellSouth receiving only a single *ex parte* communication from Logue and the impact of receiving the cross-examination questions on the eve of the evidentiary hearing.<sup>19</sup> The evidence from Grayson’s file, however, indicates that there were several violations of *ex parte* rules. Logue’s own e-mails demonstrate that she had been e-mailing BellSouth throughout the day on May 2, 2001. This was not an isolated, innocent mistake. Logue’s actions were willful and deliberate.

On January 31, 2002, newly invested Chairman Jaber issued an order directing that a new hearing be conducted in Docket No. 001097-TP. Significantly, Supra never filed for a new hearing in Docket No. 001097-TP. Chairman Jaber, relying on Richard Bellak’s

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<sup>19</sup> See Exhibit K., Reconsideration for Re-Hearing.



“Internal Investigation” – and never mentioning anything about Grayson’s investigation – on her own initiative ordered a new hearing.

In Commission Order PSC-02-0143-PCO-TP, there was no finding of bias or improper conduct. (See Chairman Jaber’s comments at the March 5, 2002, Agenda Conference; Transcript, pg 36, lines 8-11). The Chairman’s actions in Docket No. 001907-TP, however, were precisely the opposite of what the Commission wrote in its March 26, 2002, Decision in Docket No. 001305-TP (on page 20, first paragraph): “Absent proof or specific allegations of wrongdoing, however, we will not halt the processing of any of our dockets simply because those opportunities [to commit wrongdoing] may exist.” Notwithstanding this comment, without any finding of wrongdoing or any finding of bias, Chairman Jaber, on her own motion, halted the proceedings in Docket No. 001097-TP and ordered a new hearing.<sup>20</sup>

On or before February 11, 2002, John Grayson, closed down his ongoing investigation. On February 11, 2002, John Grayson sent Chairman Jaber a Memorandum informing her that he had closed down his ongoing investigation into Logue’s misconduct as a direct result of her decision to Order a new hearing in Docket No. 001097-TP.<sup>21</sup> Accordingly, on February 11, 2002, Chairman Jaber had knowledge that Grayson had been conducting an investigation into Logue’s, and possibly other senior Staff members’, misconduct.

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<sup>20</sup> It should be noted that BellSouth had no affirmative claims pending in Docket No. 001907, whereas Docket No. 001305 is an arbitration regarding a Follow-On Interconnection between the parties which will significantly impact the manner in which the companies do business in the future – for example, BellSouth seeks the right to disconnect Supra’s service during the pendant billing disputes.

<sup>21</sup> See Exhibit Y, of Supra’s Reconsideration for Re-Hearing. On February 11, 2002, John Grayson sent Chairman Lila Jaber a Memorandum in which he stated, among other things: “On January 31, 2002, an order setting Docket No. 001097-TP for rehearing was issued. Thus I am closing my file on this investigation with the recommendation that training in the area of staff communications be conducted on an ongoing basis.” See Exhibit Y, last paragraph.

The Inspector General is a resource attached and within the trust of the Office of the Chairman of the Florida Public Service Commission. All of the facts evidencing specific wrongdoing prior to the evidentiary hearing in Docket No. 001305-TP were contained in John Grayson's file and within the trust of the Chairman's Office at the time John Grayson sent Chairman Jaber his memorandum on February 11, 2002.

Chairman Jaber is charged with constructive knowledge of the contents of John Grayson's file. *See Goin v. Commission On Ethics*, 658 So.2d 1131, 1135 (1<sup>st</sup> DCA 1995) ("A public official subject to the ethics code may not forge blindly ahead, oblivious to the legitimate public concerns raised by his or her actions"; and the provisions under Section 112.313, Florida Statutes, "permits proof of a violation by evidence of constructive knowledge.").

On February 11, 2002, Chairman Jaber was under a duty to review Grayson's file on his investigation into Logue. Had Chairman Jaber disclosed the information contained in John Grayson's file to Supra on or after February 11, 2002, then this information of official misconduct would have been included in Supra's Motion for Re-Hearing filed on February 18, 2002.

Section 112.311(6), Florida Statutes, outlines the ethical duties of public officials.

This statutory provision reads in part:

"It is declared to be the policy of the state that **public officers** and employees . . . **are agents of the people** and **hold their positions for the benefit of the public**. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. **Such officers** and employees are **bound to observe, in their official acts, the highest standards of ethics** consistent with this code . . . recognizing that promoting the public interest and maintaining the

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respect of the people in their government must be of foremost concern.”

Upon becoming Chairman, Commissioner Jaber should have reviewed all ongoing investigations the Chairman’s Inspector General was conducting. John Grayson only had one investigation into Commission Staff wrongdoing ongoing at the time Commissioner Jaber ascended into the Office of the Chairman.

The Inspector General of the Commission, while technically reporting to all members of the Commission, serves at the direction of the Chairman of the Commission. This is evidenced by John Grayson’s e-mail to Chairman Jacob’s Office on October 24, 2001, asking whether an investigation should be initiated into Ms. Kim Logue’s conduct.<sup>22</sup>

If the Inspector General had issued a report on his findings, the report would have demonstrated that Senior Manager’s of the Commission were aware of Ms. Logue’s improper conduct **prior to** the evidentiary hearing in Docket No. 001305-TP, which was held on September 26 and 27, 2001.

Commissioner Jaber is presumed to have constructive knowledge of the contents of John Grayson’s file, unless she can demonstrate that through the exercise of reasonable care she could not have known of the contents of John Grayson’s file. Likewise, her constructive knowledge can be proven by circumstantial evidence. “Proof of knowledge or intent by circumstantial evidence is widely allowed.” *See Goin v. Commission On Ethics*, 658 So.2d 1131, 1135 (1<sup>st</sup> DCA 1995). Given the totality of the circumstances, Chairman Jaber has demonstrated a bias in favor of BellSouth. Chairman Jaber must therefore recuse herself from this Motion and all future motions in this docket.

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<sup>22</sup> See *Exhibit M* Reconsideration for Re-Hearing.

In defining the standard under the predecessor APA statute (i.e. Fla.Stat. § 120.71), this Commission stated in In Re: Southern States Utilities, Inc. as follows: "**We note that the holding of Bundy v. Rudd, supra, still states the law with respect to a motion for the disqualification of a trial judge, i.e., a judge presented with a motion for his disqualification shall not pass on the truth of the facts alleged not adjudicate the question of disqualification, but shall limit his inquiry to the legal sufficiency of the motion.**" Southern States, supra, at LEXIS page 17. See also Bay Bank & Trust Co. v. Lewis, 634 So.2d 672, 678 (Fla. 1st DCA 1994) ("We do not decide disputed issues of fact in such a proceeding, but assume, as must the agency head, that all allegations of fact in the motion are true . . . [it is thus] a proceeding to review the legal sufficiency of the motion for disqualification") and Bundy v. Rudd, 366 So.2d 440 (Fla. 1978); see also 2 Fla.Jur.2d, Administrative Law, § 277 (In determining whether to grant or deny a motion for disqualification, the presiding officer(s) must assume that all allegations of fact in the motion are true).

In this case, the presiding officer "must assume that all allegations of fact in the motion [for recusal] are true." *Id.* The only issue is whether *Supra* in fact alleged instances of bias, hostility or prejudice. Again, in Southern States this Commission further stated that: "**The applicable test for legal sufficiency for recusal in any event is enunciated in Hayslip v. Douglas, supra, i.e., whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.**" Southern States, supra, at LEXIS page 17.

It is fair to conclude that the facts alleged would prompt a reasonably prudent person to fear that she could not get a fair and impartial trial with Chairman Jaber on the

panel. Southern States, supra, at LEXIS page 17. This standard has also been enumerated in Pelham v. School Board of Wakulla County, Florida, 451 So.2d 1004, 1005 (Fla. 1st DCA 1984) ("well-grounded fear that he will not receive a fair hearing at the hands of the respondent agency").

### **RECUSAL OF COMMISSIONER PALECKI**

On or about February 28, 2002, Commissioner Palecki asked Commission General Counsel, Harold McLean, to find out how much money BellSouth owes to Supra and how much does Supra owe to BellSouth. *See* Composite Exhibit C, (pg. 1, second e-mail) specifically e-mail on March 1, 2002, to Beth Keating at 8:22 a.m. It is clear that the Commission wanted this information in anticipation of the Tuesday, March 5, 2002 Agenda Conference in Docket No. 00-1305.

Supra's Motion for Rehearing in Docket No. 001305-TP was scheduled to be heard at the March 5, 2002, Agenda Conference. What either party owed the other was not a relevant issue for consideration in deciding whether to grant a new hearing. Notwithstanding, the e-mails evidence that this information was of great importance to Commissioner Palecki. *See* Composite Exhibit C, attached hereto, (pg. 2, first e-mail) specifically *E-mail on March 1, 2002, from Katrina Tew (Palecki's Aide) to Harold Mclean at 12:54 p.m.*: "Sounds good . . . **Thanks again!**" (Exclamation point in the original).

In response to Commissioner Palecki's inquiry Harold McLean sent Beth Keating (Legal, Bureau Chief Telecommunications). *See* Composite Exhibit C, pg. 2, first e-mail. Approximately one hour later, at 9:25 a.m., Beth Keating responds as follows:

**"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. . . Supra claims BST owes them \$305,560.04 plus interest of approximately \$150,000. . . Regardless, though, it doesn't appear to be enough to offset much of the amount owed under the commercial arbitration award." See Composite Exhibit C, pg. 1, second e-mail.**

This information is absolutely false. Notwithstanding, McLean "forwarded" Beth Keating's e-mail, at approximately 11:24 a.m., to both Katrina Tew (Palecki's Aide) and to Commissioner Palecki himself. See Composite Exhibit C, (pg. 1, first e-mail) (where McLean asks: **"Commissioner, is this what you are asking for?"**)

It is evident from McLean's subsequent e-mail (See Composite Exhibit C (pg. 2, second e-mail) that this was not the information Commissioner Palecki was asking for. At approximately 12:07 p.m., McLean sent an e-mail to Katrina Tew (Palecki's Aide) in which he wrote the following:

**"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."**

Again, this information is absolutely false. Even if true, the communication should never have been made. Not only that, but it is evident from the Keating and subsequent McLean e-mails, that McLean "supplemented" the false information he received from Keating. McLean also references that he had contact with "BellSouth." See e-mail referenced above. This was an *ex parte* communication in violation of Rule 25-22.033, Florida Administrative Code.

Commissioner Palecki's Aide responded to McLean as follows:

**"Sounds good. I'm here the rest of the day. Feel free to call or drop in whenever. Thanks again!" See Composite Exhibit C, pg. 2, first e-mail.**

The combination of the e-mails also demonstrates urgency in obtaining the information. *See* first line to Keating's e-mail of March 1, 2002, at 9:25 a.m.: "Sorry for the delay. Tried to catch you yesterday before you left." If the *ex parte* information was not to be utilized in the Commissioner's deliberations on March 5, 2002, then there would be no need for urgency that is evident in the e-mail communication. It is fair to assume that this false, one-sided information, obtained via *ex parte* communications, was utilized by, at least, Commissioner Palecki in his deliberations.

The questions and answers in these e-mails were obviously relevant and significant to the Commission's decision-making process on March 5th otherwise they would not have been important enough to discuss just prior to the Agenda conference. Moreover, an underlying theme of BellSouth during the evidentiary hearing in Docket 001305-TP was that Supra was withholding payment under the current agreement and that BellSouth was allegedly not being paid. In this regard, Chairman Jaber made the following comments on September 27, 2001 during the evidentiary hearing in Docket No. 001305-TP:

**"As a Commissioner, help me understand why I should be convinced that you are acting in --how is it that I'm convinced that you have an incentive to enter into negotiations for a follow-on agreement? It sounds like you're in a win-win situation. You're operating under an existing agreement that expired, but you can do that according to the Act, and you haven't paid BellSouth because you've got this billing dispute. What incentive do you have to negotiate a new agreement?"**

See Hearing Transcript of September 26 and 27, 2001 at page 764, line 22 to page 765, line 5 (copies of which are provided as Exhibit "H", Supra's Motion for Reconsideration for Re-Hearing). Accordingly, prior to the March 5th Agenda, the Commission was under the impression (albeit it a false impression gather through an ex-parte communication with BellSouth), that Supra purportedly owed BellSouth \$4.2 million under an arbitration award

and in total between \$50 and \$70 million. In reality, based upon the prior arbitration proceedings and payments made, Supra had paid BellSouth in full for all amounts deemed to be owed by a neutral finder of fact.

Once Commissioner Palecki was transmitted information that BellSouth “claims . . . between 50 and 70 million,” pursuant to Section 350.042(4), Florida Statutes, Commissioner Palecki should have placed a copy of these e-mails in the record, and allowed Supra 10 days in which to respond. Supra would have provided documentation that no such amounts were owed to BellSouth. Supra was denied the opportunity to respond to the false information transmitted by McLean to Commissioner Palecki. The use of the false information by the Commission in its deliberations at the March 5, 2002, Agenda Conference undoubtedly prejudiced Supra – as the Commission was led to believe that Supra was not paying BellSouth undisputed bills.

It is fair to conclude that the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial with Commissioner Palecki on the panel. Southern States, supra, at LEXIS page 17. This standard has also been enumerated in Pelham v. School Board of Wakulla County, Florida, 451 So.2d 1004, 1005 (Fla. 1st DCA 1984) (“well-grounded fear that he will not receive a fair hearing at the hands of the respondent agency”).

### **DOAH**

In accordance with Section 350.125, Florida Statutes and Florida case law, Supra moves that Supra’s Motion for Reconsideration be decided by a DOAH hearing officer. *See* World Transportation, Inc. v. Central Florida Regional Transportation, 641 So.2d 913, 914 (Fla. 5th DCA 1994) (the Court held that where an adverse posture exists between the



petitioner and the agency, the better procedure is not to select another agency member, but rather to request an independent hearing officer from the DOAH). In Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So.2d 322, 324 (Fla. 1990) the Florida Supreme Court stated that where the agency head has been appointed by the Governor, the procedure under the APA is to have any recommended orders be decided upon by a substitute appointed by the Governor, who is not a member of the agency. Florida Statute § 120.68(1); see also Fla.Jur.2d, Administrative Law, § 280. As such, it is within the Governor's discretion to allow a DOAH hearing officer to make the final decision.

In this instance, an adverse posture exists between Supra and the agency Staff as well as at least two of the three Commissioners assigned to Docket No. 001305-TP. The better procedure is not to select the remaining Commissioners to decide the matter, but rather to request an independent hearing officer from the Division of Administrative Hearings (DOAH).

**WHEREFORE**, Supra respectfully requests to disqualify and recuse the Commission Staff from participating in the drafting and filing of a recommendation with respect to Supra's Motion for Reconsideration and hereby moves to disqualify and recuse the Commission Panel – and the Commission - from considering and voting on Supra's Motion for Reconsideration as well as any and all further matters in this docket (including any other future motions), and to refer this docket to the Division of Administrative Hearings ("DOAH") for all further proceedings.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of April, 2002.

SUPRA TELECOMMUNICATIONS &  
INFORMATION SYSTEMS, INC.

2620 S. W. 27<sup>th</sup> Avenue

Miami, Florida 33133

Telephone: 305/476-4248

Facsimile: 305/443-9516

BY: Brian Chaiken/ahs

BRIAN CHAIKEN, ESQ.

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2620 SW 27<sup>th</sup> Avenue  
Miami, FL 33133-3001  
Phone: (305) 476-4248  
Fax: (305) 443-9516  
Email: bchaiken@stis.com

October 8, 2001

Attachment - A

**VIA FACSIMILE and FEDEX**

Harold A. McLean  
General Counsel  
Florida Public Service Commission  
Capital Circle Office Center  
2450 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Re: FPSC Docket No. 001097-TP

Dear Mr. McLean:

We are in receipt of your letter dated October 5, 2001. While we appreciate your bringing this matter to our attention, we obviously have some grave concerns. First, let me confirm that Supra did not receive an e-mail from Ms. Logue on May 2, 2001, or at any other time. Second, a close reading of the cross examination questions attached to your letter raises some question as to the neutrality and impartiality of Ms. Logue.

The questions were drafted in a manner which assumes facts not in evidence, and which would lead a person to believe that Supra had violated the parties' 1997 agreement. See question No. 8 for BellSouth, which states, "In light of what appears to be Supra's violation of its agreement with your company, why does BellSouth continue to provide service to Supra?" Please note that the issues at the hearing in this matter were narrowed to whether BellSouth had properly charged, billed and collected certain amounts from Supra. There was no issue as to whether Supra had breached a contract or whether Supra had paid BellSouth's after October 5, 1999. Yet, a number of the questions were regarding Supra's payments after this time, and whether BellSouth should have the right to disconnect Supra's service. See questions No. 10, 11B, 12, 13 and 15 for BellSouth. This line of questioning had no relevance to this proceeding, and appears designed simply to sway opinion in favor of BellSouth. Additionally, the questions appear to have been drafted with some preconceived bias against Supra. See questions for Supra witness Bentley, Nos. 1 and 2, with particular emphasis on 1B and the comment "who knows what she will say..."


Supra requests to be kept abreast of your internal investigation regarding the conduct of Ms. Logue as it relates to BellSouth, as well as the conduct of BellSouth. We are particularly interested to know why BellSouth never informed the Commission that it had received the e-mail from Ms. Logue back in May 2001. Obviously, Supra has concerns regarding any BellSouth matter in which Ms. Logue was involved. BellSouth has received many favorable rulings from

this Commission which BellSouth liberally cites to in matters involving Supra. Supra is now left to wonder what impact Ms. Logue may have had on other FPSC BellSouth decisions.

Supra appreciates the fact that "the staff will recommend to the Commission that the time for filing motions for reconsideration be extended until the close of business, October 15, 2001." However, until Supra receives all of the facts of your investigation, Supra cannot be sure as to how and to what extent it may have been prejudiced. To that end, Supra requests a copy of the e-mail sent by Ms. Logue to BellSouth's Ms. Sims, as well as a copy of the draft of the cross examination questions sent by Ms. Logue to Mr. Fordham.

If we may be of any further assistance to you, please let us know.

Very truly yours,



Brian Chaiker  
General Counsel

cc: Nancy White, Esq.  
Paul Turner, Esq.

**Ramos, Kay**

**From:** Beth Keating  
**Sent:** Wednesday, January 31, 2001 5:39 PM  
**To:** Wayne Knight  
**Subject:** RE: BellSouth v. Supra Telecom Docket No 00-1305-TP

Attachment - B

Interesting. I thought she didn't want to see it dismissed. Well, Supra may have an argument for dismissing, we can discuss that Tuesday. I don't know about saying the date for the initiation of the negotiations was the Issue I.D. Sounds funky.

-----Original Message-----

**From:** Wayne Knight  
**Sent:** Wednesday, January 31, 2001 4:54 PM  
**To:** Beth Keating  
**Subject:** RE: BellSouth v. Supra Telecom Docket No 00-1305-TP

Yes. Thing is, Sally believes we should dismiss the complaint and that since the proper filing dates for an arbitration pursuant to their agreement have passed, the Commission should determine the date that negotiation was requested was the date of issue ID. This would push the date for filing for arbitration out to sometime in May. Can we create this sort of legal fiction? I'm not sure, but I don't see much in the way of an alternative.

-----Original Message-----

**From:** Beth Keating  
**Sent:** Wednesday, January 31, 2001 4:35 PM  
**To:** Wayne Knight  
**Subject:** RE: BellSouth v. Supra Telecom Docket No 00-1305-TP

Lovely! Well, I guess we go with what BST and staff can agree to. Perhaps we should contact the prehearing officer and let him know what is going on. We can suggest holding off on issuing an Order on Procedure until the Motion to Dismiss is addressed. Sound reasonable?

-----Original Message-----

**From:** Wayne Knight  
**Sent:** Wednesday, January 31, 2001 4:31 PM  
**To:** David Dowds; Sally Simmons; Kim Logue  
**Cc:** Beth Keating  
**Subject:** FW: BellSouth v. Supra Telecom Docket No 00-1305-TP

Just letting you know the latest from our dear friends at Supra.

-----Original Message-----

**From:** Chaiken, Brian [mailto:BChaiken@STIS.com]  
**Sent:** Wednesday, January 31, 2001 3:18 PM  
**To:** 'WKNIGHT@PSC.STATE.FL.US'  
**Subject:** BellSouth v. Supra Telecom Docket No 00-1305-TP

Dear Mr. Knight:

I attempted to call you earlier today, but was unable to get a current phone number for you. The purpose of this message is to inform you that, in light of Supra's recently filed Motion to Dismiss, Supra would not be submitting proposed language regarding the issues identified last week in Tallahassee. Should you wish to speak to me regarding this matter, please feel free to call at 305/476-4248. Thank you.

Brian Chaiken, Esq.  
 General Counsel  
 Supra Telecommunications &  
 Information Systems, Inc.

2620 S.W. 27th Ave.  
Miami, Florida 33133-3001  
Phone: 305/476-4249  
Fax: 305/443-1078

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**Michael A. Palecki**

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

Attachment - C

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.



*Katrina Tew*

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**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.

