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April 24, 2002

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

RE: Docket No. 001305-TP (Supra)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to Supra Telecommunications & Information Systems, Inc.'s Motion to Disqualify and Refer, which we ask that you file in the captioned docket.

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

Sincerely,


James Meza III (KA)

Enclosures

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

DOCUMENT NUMBER-DATE

04540 APR 24 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

Electronic Mail and U.S. Mail this 24th day of April, 2002 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection)
Agreement Between BellSouth Telecommunications,) Docket No. 001305-TP
Inc. and Supra Telecommunications & Information)
System, Inc., Pursuant to Section 252(b) of the) Filed: April 24, 2002
Telecommunications Act of 1996.)
_____)

**BELLSOUTH'S OPPOSITION TO SUPRA'S
MOTION TO DISQUALIFY AND REFER**

BellSouth Telecommunications, Inc. ("BellSouth") opposes Supra Telecommunications & 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 ("Motion to Disqualify and Refer" or "Motion").

INTRODUCTION

Not surprisingly, Supra's latest Motion is devoid of legal and factual support and provides no legitimate grounds for relief. Like Supra's nine previous motions, all filed after Staff issued its recommendation on February 8, 2002, this Motion to Disqualify and Refer is nothing more than a delay tactic to avoid operating under a new interconnection agreement with BellSouth. Based on the voluminous, repetitive, venomous, and baseless motions that Supra has filed in this docket – Supra's motive is clear: Supra will do and say anything to avoid operating under a new agreement, and in turn, to avoid paying BellSouth for legitimate services received. As admitted by Supra's CEO at the hearing of this matter, Supra had not paid BellSouth for service in two years.

What is surprising is how far Supra will go to in order to frustrate the arbitration process, avoid operating under a new agreement, and avoid paying BellSouth. In this latest Motion, Supra has raised the same baseless accusations and “conspiracy theory” claims and rhetoric that it has repeatedly raised in several previous pleadings. These claims and accusations, as well as any information produced in response to Supra’s numerous public records requests, however, do not establish any impropriety in Docket No. 001097-TP, any impropriety in this docket, or even an appearance of impropriety in this docket. Notwithstanding the lack of any evidence in support, and in an obvious attempt to belittle and “browbeat” the Commission into reversing its decision in this docket, Supra is now challenging the integrity and honesty of the Chairman, this Commission and its Staff based upon nothing more than, at best, conjecture and speculation, and at worst, outright fiction. The Commission should not tolerate such unacceptable, almost-libelous behavior and should sanction Supra. As made clear by this Motion and its previous filings, Supra will stop at nothing, including making misrepresentations to the Commission, to avoid operating under a new interconnection agreement with BellSouth.

At a minimum, for the reasons discussed in detail below, the Commission should deny Supra’s Motion because (1) it is untimely; (2) the Commission lacks the authority to refer it to the Division of Administrative Hearings (“DOAH”); (3) the Commission should not defer this proceeding to DOAH; and (4) Supra has not satisfied the standard for disqualification. This Motion is simply Supra’s latest attempt to game the system in order to avoid executing a new interconnection agreement with BellSouth. As Chairman

Jaber observed at the hearing, under the present circumstances, Supra has no incentive to execute a new agreement.

LAW AND ARGUMENT

I. Supra's Motion Is Untimely.

As an initial matter and without getting into its substantive defects, Supra's Motion to Disqualify and Refer is untimely and/or procedurally improper. This is so because (1) Supra's request to refer the matter at this stage to DOAH is nothing but a time-barred motion for reconsideration; (2) Supra brought the Motion after the issuance of the final order in this docket; and (3) Supra's request for DOAH to resolve its pending Motions for Reconsideration is moot because said motions are procedurally improper and thus cannot be considered.

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

MR. CHAIKEN: What Supra is seeking is a fair hearing. This Commission has the authority pursuant to Florida Statute 350.125 to order that this hearing take place before the Division of Administrative Hearings, and we make that request in lieu of a request for a special master to hear this case.

CHAIRMAN JABER: Mr. Chaiken, I got the impression that you modified today your request to ask that the case go to DOAH in lieu of a special master.

MR. CHAIKEN: That's correct.

See March 5, 2002 agenda transcript at p. 24, ll. 4-9; p. 34, ll. 10-13. At the agenda conference and in Order No. PSC-02-0413-FOF-TP, the Commission denied Supra's request for a transfer of the case to DOAH and/or special master. See March 5, 2002 Agenda Transcript at p. 50.

Identical to Supra's original request to transfer this docket to DOAH, in this Motion to Disqualify and Refer, Supra is requesting that the Commission transfer the docket to DOAH pursuant to the same procedural vehicle -- Section 350.125, Florida Statutes, and for the same erroneous reason -- to allegedly obtain a fair hearing or ruling. Consequently, Supra's Motion to Disqualify is nothing more than an improper request that the Commission reconsider its previous decision to deny Supra's request for a transfer of this docket to DOAH.

Unlike the two other Motions for Reconsideration that Supra filed in this docket, this Motion, however, is time-barred because it was not filed within the mandatory 15-day time period to file motions for reconsideration or by April 10, 2002. See Rule 25-22.060(3), F.A.C. Accordingly, as a matter of law, the Commission cannot consider Supra's request that the Commission transfer the decision on Supra's Motions for Reconsideration and any other proceedings in this docket to DOAH.

Further, Supra's Motion is untimely under the Administrative Procedure Act ("APA"). Section 120.665, Florida Statutes, provides in pertinent part:

. . .any individual acting alone or with others as an agency head may be disqualified from serving in an 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.

(emph. added).

The phrase “agency proceeding” is not defined by the statute and has yet to be expressly defined by Florida courts; however, previous decisions indicate that the filing of a motion to disqualify prior to a formal hearing would not be considered untimely. For instance, in Bay Bank & Trust Co. v. Lewis, 634 So. 2d 672, 678 (Fla. 4th DCA 1994), the court, in deciding the issue on other grounds, refused to find that an “agency proceeding” meant the filing of a petition for a hearing under Section 120.57, Florida Statutes. Similarly, the Commission in In re: Southern States Util., Inc., Order No. 95-1438-FOF-WS refused to find that a motion to disqualify a Commissioner was untimely because, among other reasons, technical hearings and an agenda conference had yet to take place.¹

BellSouth submits that, as in this case, the filing of a motion to disqualify cannot be considered timely after a final hearing has taken place and after a final order has been issued and in effect. Such a finding is consistent with the standard for disqualifying a Commissioner under the APA, which is “whether the facts alleged would prompt a

¹ In In re: Southern States Util., Inc., the Commission briefly discussed whether a motion to disqualify filed after an evidentiary hearing was timely but did not reach a conclusion as to this issue. Instead, in finding the motion timely, the Commission focused on the fact that technical hearings and an agenda conference were scheduled in one of the dockets in which the motion to disqualify was filed.

reasonably prudent person to fear that he could not get a fair and impartial trial.” In re: Southern States Util., Inc., Order No. PSC-95-1438-FOF-WS.²

In addition, such a conclusion is consistent with the purpose of the statute empowering parties to seek to disqualify a biased agency head to insure a fair hearing. Once a hearing has concluded, an agenda conference has been held, the Commission has voted, and a final order has been issued, the purpose of that statute cannot be achieved. To find otherwise would lead to absurd and unreasonable consequences as parties could use Section 120.665 to attempt to reverse adverse final rulings after a Commission vote, which is exactly what Supra is doing in the instant matter. See City of St. Petersburg v. Siebold, 48 So. 2d 291 (Fla. 1950) (absurd or unreasonable results should be constrained when interpreting statutes).

Third, Supra has filed the Motion to Disqualify and Refer in an attempt to get DOAH, instead of the Commission, to rule on its two pending Motions for Reconsideration. As BellSouth previously set forth in its oppositions, said motions are procedurally deficient and should be summarily rejected as a matter of law because they (1) raise the same arguments previously raised and rejected by the Commission; (2) are based on information not in the record; and (3) raise new legal arguments. See BellSouth’s Opposition to Supra’s Motions for Reconsideration, filed April 17, 2002.

Therefore, Supra’s request to refer the disposition of its pending motions to DOAH is moot because neither the Commission nor DOAH could grant Supra’s procedurally deficient Motions for Reconsideration. Thus, the Commission should reject Supra’s Motion to Disqualify and Refer.

² This conclusion is also supported by the fact that, under Section 120.569(2)(a), a party may request the disqualification of an ALJ “by filing an affidavit with the division prior

II. The Commission Does Not Have the Authority to Transfer the Arbitration Proceeding to DOAH.

Supra is requesting that the Commission refer the consideration of its Motions for Reconsideration as well as all future proceedings in this arbitration docket to DOAH. Supra argues that such a request is permissible under Section 350.125, Florida Statutes. See Motion at 4. The fundamental flaw with this argument is that the Commission does not have the authority under Florida law to refer this arbitration to DOAH.

Section 350.125, Florida Statutes, governs the Commission's authority to refer proceedings to DOAH. Section 350.125 provides:

Any provision of law to the contrary notwithstanding, the commission shall utilize administrative law judges of the Division of Administrative Hearings of the Department of Management Services to conduct hearings of the commission **not assigned** to members of the commission.

(emph. added). In this case, it undisputed that this docket has already been assigned to the Commission panel of Commissioner Jaber, Commissioner Palecki, and Commissioner Baez. Thus, based on the plain language of Section 350.125, the Commission cannot defer the matter to DOAH because the proceeding has already been assigned to "members of the commission."

Further, even if Commissioners Jaber and Palecki recused themselves, Section 350.125 would not be implicated because (1) under Section 120.665, Florida Statutes, the Governor could appoint a substitute; (2) under Section 350.01(5), Florida Statutes, the Chairman can appoint a substitute commissioner; and (3) there does not appear to be any rule or statute that would prohibit Commissioner Baez from solely ruling on Supra's

to the taking of evidence at a hearing, stating the grounds with particularity."

pending motions and any future proceedings. Therefore, in no event, could the Commission refer this proceeding to DOAH.

III. The Commission Should Not Refer this Proceeding to DOAH.

Assuming arguendo that the Commission has the authority to refer this proceeding to DOAH under Section 350.125, Florida Statutes, the Commission should refuse to make such a referral. The Commission has previously articulated that “while Section 350.125, Florida Statutes, recognizes that ALJs are to be utilized to conduct hearings not assigned to members of the Commission, it gives us no guidance on what sort of cases may be assigned to DOAH.” In re: Southern States Util., Inc., Order No. 99-0664-PCO-WS.

Notwithstanding the lack of any direction as to what types of cases should be sent to DOAH, the Commission has repeatedly refused to refer actions to DOAH when referring the proceeding would prevent the application of the Commission’s special expertise and knowledge to the proceeding. See id.; In re: Southern States Util., Inc., Order No. 96-0500-FOF-WS. Chairman Jaber highlighted this well-settled rule in addressing Supra’s original motion to refer to DOAH:

“[O]ne of the concerns I’ve always had as it relates to sending dockets that might have policy implications is just that, that DOAH will send it back because they don’t make decisions that are imbued with policy ramifications. And I agree with that. I think the Public Service Commission has the expertise and the technical knowledge to make those kinds of decisions.”

March 5, 2002 agenda conference at 43, ll. 3-11.

This proceeding is replete with technical, telecommunications issues that require the decision maker to have special expertise and knowledge. Granting Supra’s Motion

will prevent the Commission's special expertise and knowledge from being applied in the resolution of the pending Motions for Reconsideration and any future proceedings. Accordingly, consistent with the Commission's prior precedence, even if the Commission has the authority to refer this proceeding to DOAH, the Commission should refuse such a request.

IV. The Standard for Disqualification or Recusal Is Not Satisfied.

Because agency heads have "significantly different functions and duties than do judges," the standard for disqualifying an agency head is different from the standard for disqualifying a judge. Bay Bank & Trust Co. v. Lewis, 634 So. 2d 672, 678 (Fla. 1st DCA 1994). As stated by the Commission in In re: Southern States Util., Inc., Order No. PSC-95-1438-FOF-WS, "a petitioner seeking the recusal of a commissioner is faced with satisfying a more stringent standard than is one seeking the recusal of a trial judge." The test for disqualification is whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial. Id. Supra cannot meet this standard because there is no evidence that Commissioner Jaber, Commissioner Palecki, or Staff acted improperly, prejudiced Supra, or otherwise prevented Supra from receiving a fair hearing.

A. Chairman Jaber

Without any evidence in support, Supra concludes that "given the totality of the circumstances, Chairman Jaber has demonstrated a bias in favor of BellSouth." Motion at 25. Supra's sole basis for making this statement is the fact that Chairman Jaber did not disclose to Supra prior to February 18, 2002 the contents of John Grayson's investigation into the procedural irregularities that took place in Docket No. 001097-TP. Motion at 24.

Supra's allegation ignores the fact that Mr. Grayson's investigation revealed no evidence of prejudice or impropriety in this docket or that Commissioner Jaber somehow showed a bias towards BellSouth by not disclosing to Supra the contents of the investigation regarding the procedural irregularities in Docket No. 001097-TP. The fact of the matter is that all of the events in question relate to a separate docket – a docket in which Chairman Jaber ordered a rehearing and that Supra voluntarily dismissed without prejudice after the rehearing was ordered. Supra has not presented any evidence that it did not receive a fair and impartial hearing in this docket. As stated by Chairman Jaber at the March 5, 2002 agenda conference:

There isn't a doubt in my mind that these dispositions are fair and not biased and that we do our homework and participate in the hearings and in the process wholeheartedly.

I don't have that concern with this docket. The arbitration docket is different. I'm comforted with the record. I know that everyone asked questions that they were entitled to ask. I have faith in this staff. They have not let me down.

See March 5, 2002 agenda transcript at p. 39, ll-16-19; p. 41, ll. 20-25.

Unbelievably, Supra blames Commissioner Jaber for its failure to include the contents of Mr. Grayson's investigation in its February 18, 2002 Motion for Rehearing. Motion at 24. It is undisputed, however, that Supra knew about the communications between a Commission staff member and a BellSouth employee in connection with Docket No. 001097-TP by October 4, 2001, yet Supra did not complain about its alleged impact on the present proceeding until February 18, 2002, over four months after it knew of the events in question. In other words, instead of raising the issue in a timely manner,

Supra deliberately held the issue in reserve for use in the event that it was dissatisfied with the Staff Recommendation, which was issued on February 8, 2002.

Further, Supra waited until after the Commission's vote in this docket before issuing its public records request. Supra submitted the requests at that time even though Supra's counsel, the same counsel who submitted the public records request, informed this Commission at the March 5, 2002 agenda conference that Supra had submitted its public records request prior to the agenda conference.

COMMISSIONER PALECKI: And what was your timing on that public document request?

MR. CHAIKEN: It was very recent, in the last few days.

See March 5, 2002 agenda transcript at 44. Ironically, Supra's own Motion highlights the fact that Supra was untruthful to the Commission regarding when Supra initiated its investigation as to whether there was any impropriety in this docket. See Motion at 7.

In sum, Supra attempts to create a finding of bias by arguing that Chairman Jaber failed to disclose the results of Mr. Grayson's investigation prior to the filing of Supra's February 18, 2002 Motion for Rehearing. With this allegation, Supra surmises, without any evidence in support, that the Chairman failed to disclose this information because she is biased in favor of BellSouth. But, the responsibility for Supra's failure to include certain information in its original Motion for Rehearing rests solely with Supra. There is no evidence that Chairman Jaber is partial to or biased towards BellSouth.

B. Commissioner Palecki

Supra claims that Commissioner Palecki is biased because he failed to report certain email exchanges between three staff members in violation of Section 350.042(4), Florida Statutes – the ex parte statute. 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.” Accordingly, assuming, arguendo, that Commissioner Palecki reviewed the emails in question, said communications were not in violation of Section 350.042(1) because the Commission staff submitted the communications.

Moreover, Supra has presented no evidence that Commissioner Palecki actually reviewed the emails in question. The communications, on their face, are limited to Staff counsel and Commissioner Palecki’s aide. Thus, even if the emails in question constituted a violation of the ex parte statute, there is no evidence that Commissioner Palecki actually reviewed the emails in question or otherwise obtained knowledge of the substance of the emails.

Finally, and most importantly, Supra has presented no evidence that the emails in question had any effect on Commissioner Palecki’s vote or that the purported review of this information evidenced a bias in favor of BellSouth. Indeed, Commissioner Palecki dissented from the Commission’s decision on the issue of dispute resolution – an issue on which Supra has focused much of its energy throughout this proceeding – and cast his vote in favor of Supra on that significant issue. Supra’s allegation of bias is based on nothing more than rank speculation and does not support any finding that Supra did not receive a fair hearing and/or will not receive a fair disposition of its Motions for Reconsideration.

C. Staff

Supra requests that Staff be recused from issuing a recommendation on Supra’s pending Motions for Reconsideration based upon the unsupported allegation that Staff will not be able to present an unbiased recommendation. The Commission should reject

this request because the, Commission, and not Staff, makes the final decision on issues presented to the Commission for resolution. As stated by the Commission in In re: Application for Transfer of Territory Served by Tamiami Village Util., Inc., Order No. PSC-95-0965-FOF-SU, “[t]he Commission is the fact finder and decision/policy maker.”

Commissioner Baez echoed this principle at the March 5, 2002 agenda: “And one thing that has been lost in all of this, say what you will about the staff, a lot of which I don’t agree with, the people that make the decisions are sitting upon on this bench.” See March 5, 2002 agenda transcript at p. 47, ll. 12-15. Therefore, the recusal of Staff is not necessary or warranted because the Commission, and not Staff, will decide Supra’s pending motions.


In addition, Supra has presented no authority to support the proposition that the Commission’s entire Staff should be banned from providing a recommendation on Supra’s pending Motions for Reconsideration. Further, as to those specific Staff members mentioned in Supra’s Motion, there is no evidence establishing that they are biased towards BellSouth or that they will not address Supra’s pending motions with impartiality. Accordingly, Supra’s Motion to Disqualify Staff should be denied as well.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission deny Supra’s “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.”


Respectfully submitted, this 24th day of April, 2002.

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