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May 16, 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

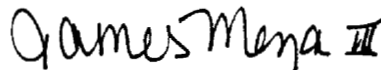
**RE: Docket No. 001305-TP (Supra)**

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Emergency Motion for Stay Pending Consideration by Panel and/or Judicial Review of Order No. PSC-02-0663-CFO-TP and Notification of Exercise of Rights Under Rule 25-22.006(10), 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 (LJA)

Enclosures

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

DOCUMENT NUMBER - DATE  
05281 MAY 16 02  
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 16th day of May, 2002 to the following:

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James Meza (LKA)

**(+) Signed Protective Agreement**

**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: May 16, 2002  
Telecommunications Act of 1996. )  
\_\_\_\_\_ )

**BELLSOUTH'S EMERGENCY MOTION FOR STAY  
PENDING RECONSIDERATION BY PANEL AND/OR JUDICIAL  
REVIEW OF ORDER NO. PSC-02-0663-CFO-TP AND  
NOTIFICATION OF EXERCISE OF RIGHTS  
UNDER RULE 25-22.006(10)**

Pursuant to Rule 25-22.061, Florida Administrative Code, BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Commission Panel stay Order No. 02-0663-CFO-TP ("Order"), issued by the Prehearing Officer on May 15, 2002, pending reconsideration of the Order by the Commission Panel and/or Judicial Review. In addition, BellSouth respectfully requests that, pursuant to Rule 25-22.006(10), the Commission Panel (1) immediately issue an emergency order stating that the information contained in Supra's Letter, for which BellSouth sought to be classified as confidential, will be kept confidential at least until the time for filing an appeal has expired; and (2) recognize that, with this filing, BellSouth has exercised its rights under Rule 25-22.006(10) to request that the information contained in Supra's Letter, for which BellSouth sought to be classified as confidential, will be kept confidential through completion of judicial review of the Prehearing Officer's Order.

## **BACKGROUND**

1. At the close of business on April 1, 2002, Supra's Chairman and CEO, Olukayode A. Ramos, sent a letter with attached exhibits to Commissioner Palecki ("Supra Letter" or "Letter"). Several portions of the Supra Letter as well as certain exhibits to the Letter contained substantive references to the private commercial arbitration proceeding between the parties. Both BellSouth and Supra are contractually bound under a previous Interconnection Agreement to keep the proceeding of the private arbitration confidential.

2. In the Letter, Supra recognized that the Letter and attachments contained confidential information. Supra claimed, however, that the subject information had become public because BellSouth purportedly had waived the confidential nature of the information by allegedly disclosing certain confidential information to Commission Staff. Supra provided no evidence whatsoever to support its assertion that BellSouth waived its rights to treat certain information confidential or that BellSouth improperly disclosed confidential information to Commission Staff.

3. Supra gave BellSouth no notice of its filing of this confidential information. Consequently, on April 2, 2002, the next business day, BellSouth immediately filed a Notice of Intent for certain portions of the Supra Letter, claiming that the Letter and attachments contained confidential information and thus should be exempt from public disclosure. In the Notice of Intent, BellSouth informed the Commission that, contrary to Supra's statements in the Letter, BellSouth did not waive any of its rights regarding the confidentiality of the

commercial arbitration proceedings. Supra filed a Response to BellSouth's Notice of Intent on April 5, 2002.

4. Pursuant to Rule 25-22.066, Florida Administrative Code, BellSouth filed its Request for Confidential Classification for the Supra Letter on April 22, 2002. BellSouth filed an Amended Request for Confidential Classification on April 23, 2002 to correct a typographical error and to add an additional paragraph, which was omitted from the original filing. In the Amended and Original Request for Confidential Classification, BellSouth argued that the identified portions of the Supra Letter were entitled to confidential classification because they constituted proprietary confidential business information under Section 364.183, Florida Statutes. BellSouth argued that the subject information was entitled to confidential treatment pursuant to Section 364.183 because (1) both Supra and BellSouth are contractually bound under a previous Interconnection Agreement to keep the proceedings of the private arbitration confidential; (2) the confidential nature of the commercial arbitration proceedings has been confirmed by the Federal District Court for the Southern District of Florida, in Civil Action No. 01-3365; (3) BellSouth treats the subject information as private and it has not been generally disclosed; (4) BellSouth has not waived its rights regarding the confidentiality of the commercial arbitration proceedings; and (5) the information contained customer specific account information. Supra filed an Objection to BellSouth's Request for Confidential Classification on May 1, 2002.

5. As a result of BellSouth claiming that the Supra Letter contained confidential information, the Commission, upon information and belief, did not and has not posted the Letter on its website or otherwise made it publicly available.

6. On May 15, 2002, the Prehearing Officer denied BellSouth's Request for Confidential Classification on the sole basis that, because Supra submitted the April 1, 2002 letter as a public document, it immediately became a matter of public record and therefore not subject to protection under Section 364.183. Order No. PSC-02-0663-TP. Specifically, the Prehearing Officer stated: "The letter submitted by Supra on April 1, 2002, was submitted as a public document and as such, became a matter of the public record. Once disclosed, it is not possible to 'put the chicken back in the egg' so to speak." Id. at 3.

7. For the reasons set forth in detail below and as will be more fully set forth in BellSouth's Motion for Reconsideration, the Prehearing Officer's decision is flawed, potentially violates an order from a Federal Court, and rewards Supra for violating the terms of a confidentiality agreement and a Federal Court Order.

#### **LAW AND ARGUMENT**

8. Rule 25-22.061(2), Florida Administrative Code, allows a party to seek to stay of a final order or nonfinal order of the Commission pending judicial review. In determining whether to grant a stay, the Commission may consider the following: (a) whether the petitioner is likely to prevail on appeal; (b) whether

the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and (c) whether the delay will cause substantial harm or be contrary to the public interest. See Rule 25-22.061(2), Florida Administrative Code. In addition, the Commission may condition a stay upon the posting of a corporate bond or corporate undertaking, or both. Id.

#### **Likelihood of Prevailing on Appeal**

9. While BellSouth will fully address the Prehearing Officer's mistakes of fact and law in its Motion for Reconsideration, BellSouth believes that either the Commission Panel or an appellate court will reverse the Prehearing Officer's Order for the following reasons:

10. First, both Supra and BellSouth are contractually bound by an expired Interconnection Agreement approved by this Commission to keep the proceedings of the private arbitration confidential. The parties agreed to this provision in the previous Interconnection Agreement because they considered any information relating to the commercial arbitrations to constitute "confidential proprietary business information." The parties are obligated under that Agreement to keep the confidential information contained in the Supra Letter as private. Thus, the information is subject to confidential protection under Section 164.183, Florida Statutes.

11. Second, the Prehearing Officer previously determined that a portion of the information that was included in the Supra Letter, including references to the June 5, 2001 commercial arbitration award, was entitled to confidential classification in Order No. PSC-02-0293-CFO-TP. Now, directly contrary to that

Order, the Prehearing Officer has found the same information to be not entitled to confidential treatment solely because Supra attempted to publicly disclose the subject information, thereby violating its contractual obligations. Indeed, the Prehearing Officer recognized that Supra violated the confidential nature of the information by not disclosing it pursuant to "a statutory provision, an order of a court or administrative body, or private agreement. . . ." Order at 3.

12. Third, the Prehearing Officer's Order potentially violates an October 31, 2001 Order of the Federal District Court for the Southern District of Florida in Civil Action No. 01-3365, wherein Judge King held that both Supra and BellSouth are required under the previous Agreement to keep all information related to the commercial arbitration proceedings confidential. As stated by Judge King:

The exception to the confidentiality provision does not permit the parties to disclose information and evidence produced during the arbitration proceedings and other related matters (including an arbitration award), beyond a judicial proceeding or unless by order of a court or a government body. Further, the Arbitral Tribunal, in its Order dated July 20, 2001, concluded that the arbitration award may contain proprietary or confidential information, which the parties agreed to be held in confidence in accord with the terms of the Agreement. Therefore, to unseal the filings in this case would contravene the confidentiality provision with which the parties agreed.

See October 31, 2002 Order in Civil Action No. 01-3365, at p.5-6 ("Federal Court Order"). By denying BellSouth's request to grant confidential classification to the confidential information contained in the Supra Letter, thereby finding that the information is public, the Prehearing Officer is assisting Supra's violation of the Federal Court's Order. Stated another way, the Prehearing Officer's Order is



effectively encouraging Supra's violation of the Federal Court's Order as well as Supra's violation of its contractual obligations with BellSouth.

13. Fourth, as a result of the Supra Letter, BellSouth is currently attempting to enforce the confidentiality provisions of the expired Interconnection Agreement in the appropriate forum. Thus, while the Prehearing Officer has determined that the information cannot be considered confidential because Supra has already disclosed it, another forum is determining whether Supra violated the Agreement and the restrictions on the disclosure of this information. Accordingly, another forum may decide that the Supra Letter was an impermissible filing and order Supra to withdraw the letter, thereby potentially rendering the Order moot.

14. Fifth, contrary to the Prehearing Officer's finding, the contents of the Supra Letter have not been publicly disclosed. As stated above, BellSouth sought confidential treatment of the subject information by filing a notice of intent the morning after receipt of the Letter (the Letter was faxed to BellSouth at the close of business on preceding day). Under Rule 25-22.006(3)(a)(1), the filing of a notice of intent automatically exempts the confidential information from Section 119.07, Florida Statutes, or the "sunshine laws" for a period of 21 days. Further, in order to maintain a claim of confidentiality a party must file a request for confidential classification within this 21-day period, which is exactly what BellSouth did on April 22, 2002. Id. Under Rule 25-22.006(2)(d), any information that is subject to a pending request for confidential classification is also exempt from the "sunshine laws."

Accordingly, despite Supra's attempt to violate the confidentiality provisions of the previous Interconnection Agreement, the information was not publicly disclosed because BellSouth filed a notice of intent and a timely request for confidential classification. In compliance with these rules, the Supra Letter has not and is not, upon information and belief, on the Commission's website or otherwise publicly available.<sup>1</sup>

The Prehearing Officer's rationale – that a party can waive the confidential status of another party's information by simply including it in a public filing – eviscerates Rule 25-22.006 and the rights a party has to prevent disclosure of its confidential business information. This Order allows any party to disclose another party's confidential information by simply including the information in a public filing. Such a rationale cannot be supported by the Commission as it (1) would have a chilling effect on the disclosure of information between the parties and between the parties and the Commission; and (2) is directly contrary to the Commission's rules.

15. For these reasons and those that will be provided in BellSouth's Motion for Reconsideration, BellSouth submits that it has a strong likelihood of success either on reconsideration or on appeal.

#### **Likelihood of Irreparable Harm**

16. As succinctly stated by the Prehearing Officer in the Order, "[o]nce disclosed, it is not possible to 'put the chicken back in the egg' so to speak." Order at 3. This statement recognizes that BellSouth would suffer irreparable

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<sup>1</sup> BellSouth informed the State Attorney's office of the confidential nature of the subject information.

harm if the confidential information contained in the Supra Letter became a matter of public record. Once the information is disclosed, BellSouth could not do anything to reinstate the confidential nature of the subject information or seek confidential treatment of the same information in other proceedings.

17. This concept was recognized in Prudential Ins. Co. of Am. V. Florida Dep't. Ins., 694 So. 2d 772, 773 (Fla. 2<sup>nd</sup> DCA 1997). In that case, the court reviewed the Department of Insurance's order, compelling a party to produce certain documents that it claimed were covered by the work product privilege. In granting the request for certiorari of the nonfinal order, the court stated that "an order requiring discovery is a proper subject for review 'since an erroneously compelled disclosure, once made, may constitute irreparable harm which cannot be remedied by way of appeal.'" Id. (citing Florida Cypress Gardens, Inc. v. Murphy, 471 So. 2d 203 (Fla. 2<sup>nd</sup> DCA 1985)). Similarly, in finding that it had the authority to review a discovery order, the court in Strasser v. Yalamanchi, 669 So. 2d 1142, 1445 (Fla. 4<sup>th</sup> DCA 1996), held that the harm in the disclosure of information alleged to be confidential is "irreparable because once confidential information is disclosed, it cannot be 'taken back' . . . ."

18. The Commission's rules also recognize that a party would be irreparably harmed by the disclosure of confidential information when a request for confidential classification is denied. Specifically, Rule 25-22.006(10) provides:

When the Commission denies a request for confidential classification, the material will be kept confidential until the time for filing an appeal has expired. The utility or other person may request

continued confidential treatment until judicial review is complete. The request shall be in writing and filed with the Division of Records and Reporting. The material will thereafter receive confidential treatment through completion of judicial review.

Thus, under the Commission's own rules, even after a request for confidential classification has been denied, that information is still treated as if it were confidential until "completion of judicial review," presumably to avoid the premature disclosure of confidential information.

19. Simply put, BellSouth would be irreparably harmed if the confidential information contained in the Supra Letter became a matter of public record. As stated by the court in Strasser v. Yalamanchi, 669 So. 2d at 1145, the disclosure of information alleged to be confidential creates irreparable harm "because once confidential information is disclosed, it cannot be 'taken back' . . . ."

**Delay Will Not Cause Substantial Harm or Be Contrary to Public Interest**

20. Staying the Prehearing Officer's Order will not cause substantial harm to either BellSouth or Supra. Indeed, the Order does not give Supra any affirmative relief. Rather, it simply denies BellSouth's request that the Commission find that certain information contained in the Supra Letter is confidential. In addition, the substance of Supra's allegations in the Letter is contained in numerous pleadings currently before the Commission, including but not limited to Supra's Motion to Recuse. Moreover, even if the information at issue were solely contained in the Supra Letter, the fact that the information

would be kept confidential pending judicial review would not prohibit the Commission from reviewing that information.

21. Further, it would be against the public interest to deny a stay. This is so because the Prehearing Officer's Order rewards Supra for violating a Federal Court Order as well as its obligations to BellSouth. It is not in the public interest for the Commission to ignore obvious malfeasance let alone sanction it. Similarly, the chilling effect this Order will have on the parties' confidence in the Commission's treatment of confidential information is also against the public interest. Namely, parties will be extremely reluctant to exchange information with opponents and with the Commission if this Order is not stayed because there will be a risk that an opponent can make information public that the parties agreed to keep confidential.

**A Bond Is Not Required**

22. Because the Prehearing Officer's Order does not award any monies to a party or otherwise require certain monies to be paid or refunded to a party, there is no need for a security bond.

23. For all of the above reasons, BellSouth respectfully requests that the Commission stay the Prehearing Officer's Order pending reconsideration by the Commission Panel and/or judicial review.

**NOTIFICATION OF EXERCISE OF RIGHTS  
UNDER RULE 25-22.006(10)**

24. Under Rule 25-22.006(10), Florida Administrative Code, when the Commission denies a request for confidential classification, as a matter of right, "the material **will** be kept confidential until the time for filing an appeal has

expired.” (emph. added). Further, the utility can request that the confidential treatment continue until judicial review is completed, at which point, “[t]he material **will** thereafter receive confidential treatment through completion of judicial review.” Rule 25-22.006(10), Florida Administrative Code (emph. added).

25. Pursuant to this Rule, BellSouth requests that the Commission Panel (1) immediately issue an emergency order stating that the subject information will remain confidential, at least until the time to file an appeal has expired; and (2) recognize that, with this filing, BellSouth is requesting that the subject information confidential information will continue to be treated as confidential until judicial review is complete. See In re: Application for Rate Increase and Increase in Service Availability Charges by Southern States Utilities, Inc., Docket No. 950496-WS, Order No. PSC-96-0211-CFO-WS (denying utility’s request for confidential classification but stating in the order that the information “shall be kept confidential until the time for filing an appeal of this Order has expired, and, upon request, through competition of judicial review);

**WHEREFORE**, BellSouth respectfully requests the following:

1. The Commission Panel immediately issue an Order stating that, pursuant to Rule 25-22.006(10), the information contained in Supra’s Letter, for which BellSouth sought to be classified as confidential, will be kept confidential at least until the time for filing an appeal has expired.

2. The Commission Panel recognize that, with this filing, BellSouth has exercised its rights under Rule 25-22.006(10) to request that the information contained in Supra’s Letter that BellSouth sought to be classified as confidential

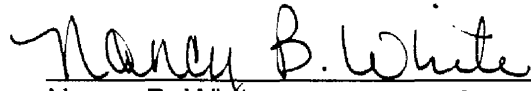
be kept confidential through completion of judicial review of the Prehearing Officer's Order.

3. The Commission Panel stay the Prehearing Officer's Order pending reconsideration by the Commission Panel and/or judicial review pursuant to Rule 25-22.061(2).

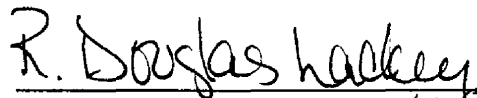
4. Any other relief the Commission Panel deems appropriate.

Respectfully submitted this 16th day of May 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

  
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