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June 10, 2002

Mrs. Blanca Bayo, Director  
Division of Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**RE: Docket No. 001305-TP –  
Supra's Emergency Motion For Stay Pending Judicial Review of Order Nos.  
PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP and Notification of  
Exercise of Rights Under Rule 25-22.060**

Dear Mrs. Bayo:

Enclosed is the original and seven (7) copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Emergency Motion For Stay Pending Judicial Review of Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP and Notification of Exercise of Rights Under Rule 25-22.060 and exhibit in the above captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return it to me.

Sincerely,

Brian Chaiken  
General Counsel

DOCUMENT NUMBER - DATE  
06031 JUN 10 08  
FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE**

**Docket No. 001305-TP**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery and/or U.S. Mail this 10<sup>th</sup> day of June, 2002 to the following:

Wayne Knight, Esq.  
Staff Counsel  
Division of Legal Services  
Florida Public Service Commission  
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& INFORMATION SYSTEMS, INC.  
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Telephone: (305) 476-4248  
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By: Brian Chaiken/AH's  
BRIAN CHAIKEN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Arbitration of the )  
Interconnection Agreement between )  
BellSouth Telecommunications, Inc. and )  
Supra Telecommunications & Information )  
Systems, Inc. pursuant to Section 252(b) )  
of the Telecommunications Act of 1996 )  
\_\_\_\_\_ )

Docket No. 001305-TP

Dated: June 10, 2002

**SUPRA'S EMERGENCY MOTION FOR STAY PENDING JUDICIAL REVIEW  
OF ORDER NOS. PSC-02-0772-PCO-TP AND PSC-02-0773-PCO-TP AND  
NOTIFICATION OF EXERCISE OF RIGHTS UNDER RULE 25-22.060**

COMES NOW Supra Telecommunications & Information Systems, Inc. ("Supra"), by and through its undersigned counsel, pursuant to Florida Administrative Code Rule 25-22.061 requests for stay of Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP released on June 7, 2002, pending reconsideration of the Orders and/or Judicial Review by the First District Court of Appeal ("1<sup>st</sup> DCA") of the Orders declining Recusal of Chairman Lila A. Jaber and Commissioner Michael A. Palecki from this docket. In addition, Supra requests a stay on item nos. 7, 8, 9 and 10 from the June 11, 2002 Agenda Conference relating to this docket.

Supra notes that both orders declining recusal by Chairman Jaber and Commissioner Palecki failed to address Supra's Verified Second Supplemental Motion To Disqualify And Recuse Commission From All Further Consideration Of This Docket And To Refer This Docket To The Division Of Administrative Hearing For All Further Proceedings ("Second Supplemental Motion To Recuse") filed on June 5, 2002. The Second Supplemental Motion To Recuse provided a further basis for recusal based upon facts and events which either transpired or were discovered after the filing of the two

prior motions filed on April 17, 2002 and April 26, 2002.

On June 7, 2002, Supra filed with the 1<sup>st</sup> DCA a Petition for Emergency Issuance of Writ of Mandamus, Writ of Prohibition and Other Relief. On June 10, 2002, Supra filed an Amendment To Petition For Emergency Issuance of Writ of Mandamus, Writ of Prohibition and Other Relief. A copy of Supra's petitions are attached hereto as Composite Exhibit A (without exhibits attached to the respective petitions).

In addition, Supra hereby provides notice to the Commission that it will exercise its rights pursuant to Rule 25-22-060, *Florida Administrative Code*. Supra states in support as follows:

#### **I. BACKGROUND**

1. On October 5, 1999, Supra adopted the Interconnection Agreement ("Current Agreement") entered into by BellSouth and AT&T of the Southern States, such Current Agreement having been approved by the Commission. The Current Agreement provides for the term of the agreement, a termination date, and a process for the negotiations of a "Follow-On Agreement." Most importantly, the Current Agreement includes an "evergreen" clause, which provides that "[u]ntil [a] Follow-on Agreement becomes effective, BellSouth shall provide Services and Elements pursuant to the terms, conditions and prices of this Agreement that are then in effect." Interconnection Agreement, GTC, § 2.3.

2. On August 9, 2000, BellSouth filed a complaint with the Commission seeking to resolve a billing dispute with Supra. The Commission docket number assigned to this complaint was 001097-TP.

3. Shortly thereafter, on September 1, 2000, BellSouth filed a second complaint with the Commission seeking to arbitrate certain issues in a Follow-On Agreement between the parties pursuant to 47 U.S.C. § 252(b). The Commission docket number assigned to this second complaint was 001305-TP. Essentially this proceeding sought the assistance of the Commission in arbitrating disputes between the parties on certain contractual provisions which could not be negotiated by the parties for their Follow-On Agreement.

4. On January 26, 2001, Supra filed a Motion to Dismiss BellSouth's petition, citing as grounds for the dismissal, BellSouth's failure to follow contractually agreed upon terms that required that this matter be submitted to an Inter-Company Review Board prior to the filing of a petition before the Commission.

5. On May 3, 2001, the Commission held an evidentiary hearing on the billing dispute in Docket No. 001097-TP. The main issue in that docket was whether Supra was entitled to approximately \$350,000 of credits from BellSouth, under a true-up provision in a prior resale agreement which required certain credits in the event the parties' entered into a new agreement containing lower pricing.

6. On May 23, 2001, the Commission Issued Order No. PSC-01-1180-FOF-T1 directing the parties' to convene an Inter-Company Review Board meeting within 14 days of the issuance of the Order.

7. On July 31, 2001, the Commission entered a final order on Docket No. 001097-TP, which in essence denied Supra any credits.

8. On August 18, 2001, Supra filed a motion for reconsideration of the final order previously entered on July 31, 2001 in Docket No. 001097-TP.

9. On September 20, 2001, the Commission's telecommunications and legal Staff filed a recommendation in Docket No. 001097-TP, which recommended a denial of Supra's motion for reconsideration.

10. On September 26 - 27, 2001, the Commission held an evidentiary hearing in Docket No. 001305-TP. The purpose of the evidentiary hearing was for the parties to present evidence in support of the contractual provisions which each side was advocating for inclusion in the parties' Follow-On Agreement.

11. On October 5, 2001, the Commission's General Counsel Harold McLean sent a letter to both Supra and BellSouth officially advising both parties that on May 2, 2001 (a day before the evidentiary hearing in Docket No. 001097-TP), Ms. Kim Logue a senior member of the Commission's telecommunications staff, who was intimately involved in both Docket Nos. 001097 and 001305, provided cross-examination questions to BellSouth on the eve of the evidentiary hearing in Docket No. 001097-TP. Documents produced pursuant to Supra's recent public records requests indicate that Ms. Logue's supervisor and the Commission's senior staff knew of Ms. Logue's conduct in advance of the evidentiary hearing in Docket 001305, and, further, elected to allow Ms. Logue's continued involvement in this proceeding and further elected not to disclose these facts to Supra. In McLean's notice to Supra regarding Ms. Logue's conduct, the Commission's General Counsel makes no mention of other e-mails between Ms. Logue and BellSouth or the fact that other Commission staff were involved in the development of the questions which were forwarded to BellSouth and in communications with BellSouth regarding important facts pertaining to these dockets.

12. On October 25, 2001, Inspector General John Grayson of the Commission initiated an investigation into Ms. Logue's conduct in providing the Commission Staff's cross-examination questions to BellSouth.

13. Based on Supra's public document requests, Supra has recently discovered that on October 29, 2001, over one month after the evidentiary hearing in Docket 001305, the Commission's lead staff attorney Wayne Knight, initiated a communication with BellSouth's legal counsel, Mr. Twomey, for the purpose of informing Mr. Twomey that BellSouth had **failed** to include a position for Issue B in its Post-Hearing Brief in this Docket. BellSouth's omission was significant. Issue B was one of Supra's most important issues in this Docket because it dealt with whether BellSouth's standard agreement or the AT&T/BellSouth agreement was the starting point for all revisions. Commissioner Palecki's Order Establishing Procedure stated that:

Post-Hearing Procedure

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. **If a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.**

**Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.**

(See Order No. PSC-01-1401-PCO-TP Establishing Procedure, issued on June 28, 2001)

14. On January 31, 2002, Chairman Jaber entered order No. PSC-02-0143-PCO-TP in Docket 001097-TP ordering a rehearing. That order states, in relevant part:

On May 3, 2001, an evidentiary hearing was held on the portions of the complaint over which we retained jurisdiction . . . 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. (Emphasis added.)

This order made moot the September 20, 2001 Commission Staff Recommendation in Docket No. 001097-TP which recommended a denial of Supra's motion for reconsideration.

15. On February 8, 2002, the Commission Staff filed a recommendation in Docket No. 001305-TP, which recommended that the Commission adopt for the parties' Follow-On Agreement, BellSouth's standard agreement and virtually all of the contractual provisions advanced by BellSouth.

16. On February 11, 2002, Commission Inspector General John Grayson sent Chairman Jaber a memorandum informing her that he had closed his investigation into Ms. Logue's misconduct as a result of Chairman Jaber's January 31, 2002 Order granting Supra a new hearing in Docket No. 001097-TP.

17. On February 18, 2002, Supra filed in this Docket, a motion seeking a new hearing based upon the fact that Ms. Logue was the Commission Staff supervisor responsible for Docket No. 001305-TP and that her actions as well as BellSouth's decision to remain silent about Logue's actions created an appearance of impropriety in Docket No. 001305-TP.



18. At the Commission's Agenda Conference regarding Docket No. 001305-TP held on March 5, 2002, Chairman Jaber stated that:

**And I know that what Ms. Kim Logue did that I now can say definitely, because we have the affidavit from Ms. Sims<sup>1</sup>, 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.**

**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.**<sup>2</sup>

19. On March 6, 2002, Supra made a public records request upon the Commission seeking among other items, documents relating to Ms. Logue, the Commission's investigation into Ms. Logue, and copies of various Commission e-mails.

20. On March 21, 2002, Supra made a second public records request upon the Commission seeking further documents regarding Ms. Logue, the Commission, Commissioners and Commission Staff.

21. On March 26, 2002, Supra and BellSouth entered into a joint voluntary dismissal without prejudice of Docket No. 001097-TP.

22. On March 26, 2002, the Commission entered a final order in Docket No. 001305-TP. The order also denied Supra's motion for a new hearing in Docket No. 001305-TP of February 18, 2002.

23. On April 10, 2002, Supra filed motions for reconsideration of the Commission's March 26, 2002 final order in Docket No. 001305-TP. The motions for

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<sup>1</sup> Ms. Sims is BellSouth's Director of Regulatory Affairs.

<sup>2</sup> See March 5, 2002 Agenda Conference Transcript, pg. 41, lines 2-15.

reconsideration sought a new evidentiary hearing in Docket No. 001305-TP and a reconsideration of various portions of the Commission's order that addressed the merits.

24. On April 17, 2002, Supra filed its 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 Recuse"). The Motion To Recuse asked the Commissioners and Staff to recuse themselves from all further proceedings in Docket No. 001305-TP and to refer the docket to the Division of Administrative Hearings ("DOAH") for all decisions in the docket (including Supra's April 10, 2002 motions for reconsideration in Docket No. 001305-TP).

25. On April 26, 2002, Supra filed its Verified Supplemental Motion To Disqualify And Recuse Commission From All Further Consideration Of This Docket And To Refer This Docket To The Division Of Administrative Hearing For All Further Proceedings ("Supplemental Motion To Recuse"). The Supplemental Motion To Recuse supplemented the original Motion to Recuse by attaching exhibits referenced in the Motion to Recuse which although found elsewhere in the docket, for convenience should have been attached again in the Motion to Recuse. The Supplemental Motion To Recuse also provided a further basis for recusal based upon Supra's then recent discovery of e-mails obtained from a public records request which showed many ex-parte communications such that they undermined the very integrity of the Commission's adversarial process.

26. On June 5, 2002, Supra filed its Verified Second Supplemental Motion To Disqualify And Recuse Commission From All Further Consideration Of This Docket

And To Refer This Docket To The Division Of Administrative Hearing For All Further Proceedings ("Second Supplemental Motion To Recuse"). The Second Supplemental Motion To Recuse provided a further basis for recusal based upon facts and events which either transpired or where discovered after the filing of the two prior motions.

27. Each of the three motions to recuse, describe in detail facts uncovered by Supra as part of its public records request, which demonstrate that: (1) the Commissioners and Staff engaged in ex-parte communications with BellSouth regarding substantive matters in the two disputed dockets involving Supra and BellSouth (Docket Nos. 001097-TP & 001305-TP); (2) unbeknownst to Supra, Commission Staff had actively assisted BellSouth in litigating against Supra in the two dockets; and (3) the Commissioners and Staff are biased in favor of BellSouth.

28. On May 30, 2002 Commission Staff filed two Recommendations in Docket No. 001305-TP, which recommend a denial of Supra's motions to recuse. Both recommendations reference orders entered by Commissioners Jaber and Palecki, which deny the first two (2) motions to recuse, only. The first recommendation states in pertinent part that: **"Although both the Motion and Supplemental Motion seek the recusal of the entire Commission panel, allegations of fact are directed only toward Chairman Lila A. Jaber and Micheal A. Palecki. Their orders respectively declining to recuse are incorporated herein by reference."** Similarly, the second recommendation states that: **"Although both the Motion and Supplemental Motion seek the recusal of the Commission staff, allegations of fact are directed against Chairman Jaber and Commissioner Micheal A. Palecki concerning their communications with staff. Their respective Orders declining to Recuse From**

**Docket No. 001305-TP are therefore incorporated by reference herein."** The staff recommendation goes on to quote from Commissioner Jaber's Order:

The origin of Supra's claim that Commission staff should be recused is found in the incident described at length by Chairman Jaber in her Order Declining to Recuse From Docket No. 001305-TP. Therein Chairman Jaber notes Supra's statement on p. 21 of the Motion that she "directed an inquiry into Kim Logue's ex parte communications with BellSouth's Director of Regulatory Affairs" also described by Supra as "Logue's misconduct." . . . The characterizations "ex parte" and "misconduct" appear to be Supra's conclusions, rather than facts as determined by Inspector General Grayson.

29. Significantly, this docket reflects that as of May 30, 2002, the date of the Commission's staff memorandum, no orders declining recusal were part of the Commission record.

30. In the evening of June 7, 2002, Commissioner Palecki and Chairman Jaber issued Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP respectively, declining to recuse themselves from this docket. In the orders, both Commissioners attempt to dispute the factual allegations of Supra's motions filed on April 17, 2002 and April 26, 2002. Additionally, **both orders failed to address Supra's Verified Second Supplemental Motion To Disqualify And Recuse Commission From All Further Consideration Of This Docket And To Refer This Docket To The Division Of Administrative Hearing For All Further Proceedings ("Second Supplemental Motion To Recuse")** filed on June 5, 2002 as well failed to address Supra's specific relief.

## II. MEMORANDUM OF LAW

### STAY REQUEST UNDER RULE 25-22.061, FLA. ADMIN. CODE

31. Pursuant to Petition for Emergency Relief by Supra against BellSouth concerning Collocation and Interconnection Agreements filed on June 30, 1998, the Commission issued Order No. PSC-99-0047-FOF-TP dated January 5, 1999 and Order

No. PSC-99-0060-FOF-TP dated January 6, 1999. On February 4, 1999, BellSouth filed a Motion for Stay Pending Appeal of these orders. On March 4, 1999, the Commission staff recommended approving the stay requested by BellSouth. The staff wrote:

Staff believes that it would be appropriate and prudent to stay Order No. PSC-99-0047-FOF-TP pending the outcome of BellSouth's appeal. Further, staff does not believe a bond or corporate undertaking is necessary at this time.

32. On March 29, 1999, the Commission issued Order No. PSC-99-0582-FOF-TP in Docket No. 980800, in which the Commission granted BellSouth's Motion for Stay Pending Appeal. In that Order, the Commission wrote:

BellSouth has adequately demonstrated that the order should be stayed in accordance with Rule 25-22.061(2), Florida Administrative Code. **Although we believe that our decision set forth in Order No. PSC-99-0047-FOF-TP is correct, the determination is one of first impression and one upon which reasonable minds may differ.** We agree with BellSouth that if the order is not stayed and Supra physically collocates in these offices, reversal of our decision could prove to be procedurally and financially difficult not only for BellSouth, but also for Supra and for the Commission.

**In addition, the stay is not likely to impose substantial harm on Supra; thus, it would not be proper for us to require BellSouth to post a bond to cover Supra's suggested losses during the appeal. Further, we cannot award compensatory damages, which appears to be what Supra is requesting.** Historically, we have only required the posting of a bond or corporate undertaking when the decision at issue involves collection of monies or refunds to customers or to a party.

**For the forgoing reasons, we find that it is appropriate and prudent to stay order No. PSC-99-0047-FOF-TP pending the outcome of BellSouth's appeal. Further, BellSouth will not be required to post a bond or corporate undertaking at this time.** (Emphasis added).

33. Accordingly, like BellSouth, Supra seeks a stay of Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP issued on June 7, 2002, by Commissioner Palecki and Chairman Jaber declining to recuse themselves from further participation in this docket pending judicial review in accordance with Rule 25-22.061(2), *Florida Administrative Code*. In determining whether to grant a stay under Rule 25-22.061(2), 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) In addition, the Commission may condition a stay upon the posting of a corporate bond or corporate undertaking, or both. Id.

**i. Likelihood of Prevailing on Appeal**

34. While Supra will fully address Chairman Jaber and Commissioner Palecki mistakes of fact and law in its Motion for Reconsideration, Supra believes that the 1<sup>st</sup> DCA will reverse Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP issued on June 7, 2002. As noted above, Supra has sought review of these orders by the 1<sup>st</sup> DCA and will seek reconsideration of the Orders pursuant to Rule 25-22.060, *Florida Administrative Code*. If the 1<sup>st</sup> DCA concludes that these Commissioners erred in the recusal orders, then this docket would be referred to the Division of Administrative Hearings ("DOAH") for all further proceedings. Conversely, if these recusal orders are not stayed by this Commission – pursuant to this Motion - pending reconsideration and possible appeal, then this Commission will rule on matters that ultimately may not be appropriately before this Commission.

35. Supra believes that it will prevail on the appeal of the recusal orders. In Supra's Emergency Issuance of Writ of Mandamus, Writ of Prohibition and Other Relief. A petition for writ is an original proceeding, and the 1<sup>st</sup> DCA is charged to "determine, not whether the judicial or quasi-judicial officer involved should be disqualified for bias or other reasons, but whether such an officer has exceeded the jurisdiction of the office

by denying a clearly valid motion for disqualification.” Bay Bank & Trust Co. v. Lewis, 634 So. 2d 672, 678 (Fla. 1st DCA 1994.) The DCA will review the materials presented to the Commission to determine whether Supra alleged sufficient facts to objectively establish a sufficient ground for fear of bias and prejudice. Neither the lower administrative tribunal, nor the 1<sup>st</sup> DCA, can resolve the issues of fact, but rather, all allegations of fact must be taken as true. See also Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). If the 1<sup>st</sup> DCA determines, based upon a review of the record before the agency, that the Motions for Disqualification are legally sufficient, the 1<sup>st</sup> DCA will declare that the Commission is disqualified from any further proceedings on Docket 001305.

36. Additionally, Supra filed its motions to disqualify on April 17, 2002; April 26, 2002; and June 5, 2002. On June 7, 2002, Chairman Jaber and Commissioner Palecki issued orders declining to recuse themselves from this docket. The orders are significant for two reasons. First, the Commissioners attempt to dispute the factual allegations of Supra’s motion. Florida law is well settled that the facts in a motion for disqualification must be taken as true. See MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978) (noting that “a judge who is presented with a motion for his disqualification ‘shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.’”). **The mere fact that the Commissioners comment upon or attempt to refute Supra’s allegations of fact, is sufficient in itself to support disqualification.** Second, the orders denying recusal of Chariman Jaber and Commissioner Palecki failed to address the full scope of the relief sought by the motions for disqualification as evidenced by the Orders. Specifically, Supra seeks disqualification of “the Commission Staff from participating in the drafting and

filing of a recommendation with respect to Supra’s Motion for Reconsideration” and 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.”

37. As a matter of procedure, the Commission was required to address and resolve Supra’s motions for disqualification prior to ruling on any other substantive matters. The Commissioners, who adjudicate issues in administrative proceedings much like a judge would in a trial, should not wait to decide motions for recusal, but rather must rule upon them immediately. See Fuster-Escalona v. Wisotsky, 781 So. 2d. 1063 (Fla. 2000)(trial judge must rule upon motion for recusal immediately and with dispatch); Stimpson Computing Scale Co.,Inc. v, Knuck, 508 So.2d. 482 (Fla. 3d DCA 1987) (a judge faced with a motion for recusal should first resolve that motion before making additional rulings in a case).

38. In Loevinger v. Northrup, 624 So. 2d. 374, 375 (Fla. 1st DCA 1993), the Court reiterated the long-standing rule that “[a] judge faced with a motion for recusal should first resolve that motion before making any other rulings in a case.” In Loevinger, Judge Davey of the Second Judicial Circuit ruled upon a motion to disqualify one of the party’s attorneys prior to ruling on the defendant’s motion to disqualify the judge. Judge Davey received and ruled upon the motion to disqualify counsel before he received the motion for his own disqualification, despite the fact that the motion for disqualification was filed with the clerk’s office first. The Court explained that once the motion to disqualify Judge Davey was filed with the clerk, the Judge was without authority to rule on any other pending matters, even though he was not personally aware of the motion seeking his disqualification. Id.



39. Similarly, the Commission was without authority to rule on any other pending matters once the motions for disqualification were filed on April 17, 2002. Despite this, the Commission issued Order PSC-02-637-PCO-TP on May 8, 2002; and Orders PSC-02-700-PCO-TP, PSC-02-701-PCO-TP, and PSC-02-702-PCO-TP on May 23, 2002. As of the date of this filing, Supra's Second Supplemental Motion To Recuse is still pending before the Commission.

**ii. Likelihood of Irreparable Harm**

40. Supra will be irreparably harmed should the orders of Chairman Jaber and Commissioner Palecki not be stayed pending judicial review. As noted above, Supra has sought review of these orders by the 1<sup>st</sup> DCA and will seek reconsideration of the Orders pursuant to Rule 25-22.060, *Florida Administrative Code*. If the Commission Staff are not removed from participating in the drafting and filing of a recommendation with respect to Supra's Motion for Reconsideration and 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 and the 1<sup>st</sup> DCA concludes that these Commissioners erred in the recusal orders, then the Commission would have ruled on matters that may not be appropriately before this Commission. In either scenario, Supra is faced with an untenable position. No amount of money damages could adequately compensate Supra since the extent of such damage inflicted by this Commission would be impossible to measure accurately. See Spiegel v. City of Houston, 636 F.2d 997 (5<sup>th</sup> Circuit 1981) (where the possibility of customers being permanently discouraged from patronizing one's business equated to a substantial threat of harm that could not be undone through monetary remedies); Tally-Ho, Inc., v. Coast Community College

District, 889 F.2d 1018 (11<sup>th</sup> Cir. 1990) (injury to a business' reputation and revenues equated to irreparable injury). As stated by the Commission in Order No.PSC-99-0582-FOF-TP on March 29, 1999:

**We agree with BellSouth that if the order is not stayed and Supra physically collocates in these offices, reversal of our decision could prove to be procedurally and financially difficult not only for BellSouth, but also for Supra and for the Commission.**

Accordingly, like BellSouth, Supra seeks to preserve the status quo pending appeal. Preserving the status quo is one of the basis for granting a motion to stay. Perez v. Perez, 769 So.2d 389, 391, n.4 (Fla. 3d DCA 1999) ("Court has authority to issue stay . . . for the purpose of preserving the status quo during an appellate proceeding.").

41. In Docket No. 980800-TP, cited previously, BellSouth argued that allowing Supra to collocate equipment would cause harm if Supra then had to vacate such equipment if the final order was reversed on appeal. In this instance, not only are collocation rights at issue, but so are all basic rights associated with the relationship between Supra and BellSouth. Thus if the Commission is subsequently reversed on appeal, not only will collocations taking place be effected, but pricing and other services as well. Thus in this instance, Supra has demonstrated more potential of harm than BellSouth did in Docket No. 980800-TP in support of this stay request.

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

42. Staying the Orders denying recusal which have already been entered will not cause substantial harm to either Supra or BellSouth or be contrary to public interest. Indeed, the orders denying recusal do not give BellSouth any affirmative relief. Rather, the orders denied Supra's requests seeking disqualification of the Commission Staff from

participating in the drafting and filing of a recommendation with respect to Supra's Motion for Reconsideration and 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. The harm to BellSouth and the public, if a stay is granted, will be inconsequential in contrast to the harm to Supra if a stay is not granted.

43. Further, it would be against the public interest to deny a stay. As a matter of procedure, the Commission was required to address and resolve Supra's motions for disqualification prior to ruling on any other substantive matters. The Commissioners, who adjudicate issues in administrative proceedings much like a judge would in a trial, should not wait to decide motions for recusal, but rather must rule upon them immediately. See Fuster-Escalona v. Wisotsky, 781 So. 2d. 1063 (Fla. 2000) (trial judge must rule upon motion for recusal immediately and with dispatch); Stimpson Computing Scale Co., Inc. v. Knuck, 508 So.2d. 482 (Fla. 3d DCA 1987)(a judge faced with a motion for recusal should first resolve that motion before making additional rulings in a case). In Loevinger v. Northrup, 624 So. 2d. 374, 375 (Fla. 1st DCA 1993), the Court reiterated the long-standing rule that “[a] judge faced with a motion for recusal should first resolve that motion before making any other rulings in a case.” In Loevinger, Judge Davey of the Second Judicial Circuit ruled upon a motion to disqualify one of the party's attorneys prior to ruling on the defendant's motion to disqualify the judge. Judge Davey received and ruled upon the motion to disqualify counsel before he received the motion for his own disqualification, despite the fact that the motion for disqualification was filed with the clerk's office first. The Court explained that once the motion to disqualify Judge Davey was filed with the clerk, the Judge was without authority to rule on any other

pending matters, even though he was not personally aware of the motion seeking his disqualification. Id. This is so because, as a matter of procedure, the Commission was required to address and resolve Supra's motions for disqualification prior to ruling on any other substantive matters. It is not in the public interest for the Commission to ignore its procedural obligations.

**iv. A Bond Is Not Required**

44. Because the orders do 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.

45. For all the above reasons discussed herein, Supra requests that the Commission stay the Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP issued on June 7, 2002, pending reconsideration of the Orders and/or Judicial Review.

**III. NOTIFICATION OF EXERCISE OF RIGHTS  
UNDER RULE 25-22.060**

46. Under Rule 25-22.060, Florida Administrative Code, "any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order." Supra intends to exercise such rights with respect to Commissioner Jaber and Commissioner Palecki's orders denying Supra's motions to recuse.

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

- A. The Commission stay Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP issued on June 7, 2002 pending reconsideration and judicial review .
- B. For all such further relief as is deemed equitable and just.

**RESPECTFULLY** submitted this 10<sup>th</sup> day of June 10, 2002.

**SUPRA TELCOMMUNICATIONS  
& INFORMATION SYSTEMS,  
INC.**

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

Miami, Florida 33133

Telephone: 305/476-4248

Facsimile: 305/443-1078

By: Brian Chaiken/ajh

Brian W. Chaiken

Florida Bar No. 0118060

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

SUPRA TELECOMMUNICATIONS &  
INFORMATION SYSTEMS, INC.

Petitioner,

v.

CASE NO. \_\_\_\_\_  
L.T. 001305-TP

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

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PETITION FOR EMERGENCY ISSUANCE OF WRIT  
OF MANDAMUS, WRIT OF PROHIBITION AND OTHER RELIEF

Petitioner, Supra Telecommunications & Information Systems, Inc., by and through its undersigned counsel, files this Emergency Petition for Writ of Mandamus and Writ of Prohibition to compel the State of Florida, Public Service Commission ("FPSC"); Lila Jaber as Chairperson of the FPSC and in her individual capacity as a Commissioner ("Commissioner Jaber" or "Chairperson Jaber"); and Michael A. Palecki, in his capacity as a Commissioner of the FPSC ("Commissioner Palecki"), to rule upon the pending motions for disqualification<sup>1</sup> filed by Petitioner in Docket No. 001305-TP

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<sup>1</sup> Petitioner's Motion to Disqualify and Recuse Commission Staff and Commission Panel From All Further Consideration of This Docket and Refer This Docket to The Division of Administrative Hearings For All Further Proceedings ("Motion to Disqualify") was filed on April 17, 2002; a Verified Supplemental Motion to Disqualify and Recuse FPSC From All Further Consideration of this Docket and to Refer This Docket To the Division of Administrative Hearings For All Further Proceedings ("Supplemental Motion to Recuse") was filed on April 26, 2002; and a Verified Second Supplemental Motion to Disqualify and Recuse FPSC From All Further

("Docket 001305"). Petitioner further seeks an Order precluding Chairperson Jaber and Commissioner Palecki from any further participation in the proceedings associated with Docket 1305. Petitioner states in support as follows:

**I. JURISDICTION**

1. Petitioner invokes the original jurisdiction of this Court on the basis of Article V, Section 4(b), Florida Constitution; Rules 9.030(b)(3) and 9.100, Florida Rules of Appellate Procedure; and section 350.128, Florida Statutes.

2. Article V, Section 4(b)(2), of the Florida Constitution, states that a "district court of appeal shall have the power of direct review of administrative action, as prescribed by general law"; Article V, Section 4(b)(3), of the Florida Constitution provides, in relevant part, that "a district court of appeal may issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction."

3. Rule 9.030(b)(3), Florida Rules of Appellate Procedure, provides that when the district court of appeal has original jurisdiction the court may issue writs of mandamus, prohibition,

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Consideration of This Docket and Refer This Docket to the Division of Administrative Hearings For All Further Proceedings ("Second Supplemental Motion to Recuse") was filed on June 5, 2002. These motions are referred to collectively as the "motions for disqualification."

quo warranto, common law certiorari, and all writs necessary to the complete exercise of the Court's jurisdiction.

4. Since the underlying issue that is the subject of this Petition concerns matters unrelated to the rates of service of utilities providing electric, gas, or telephone service, this Court is also vested with jurisdiction to entertain this Petition and award the relief requested herein pursuant to section 350.128, Florida Statutes.

## II. FACTS ON WHICH PETITIONER RELIES

1. Petitioner is a Florida corporation which is certified by the FPSC as an Alternative Local Exchange Carrier (ALEC), pursuant to Chapter 364, Florida Statutes, and the rules promulgated thereunder, to provide telecommunication services within the State of Florida in accordance with the Federal Telecommunications Act of 1996, 47 U.S.C. §§251-252.

2. BellSouth is a foreign corporation authorized to provide local exchange telecommunication services in Florida.

3. The FPSC is a five-member regulatory board and state agency within the meaning of sections 11.45(j) and 120.52(1), Florida Statutes, vested with the authority, pursuant to Chapters 350 and 364, Florida Statutes, to regulate and license intra-state providers of telecommunication services.



4. The pertinent facts pertaining to this petition arise out of two FPSC docket proceedings<sup>2</sup>, referred to herein as Docket 001097 and Docket 001305, initiated by BellSouth against Petitioner.

5. These two dockets were generally proceeding in tandem time periods with the hearing on Docket 001097 occurring on May 3, 2001, and the hearing on Docket 001305 occurring on September 26-27, 2001.

6. The FPSC's telecommunications and legal staff were fully engaged throughout both proceedings, providing advice and recommendations to the Commissioners regarding all aspects of the proceedings, including recommendations regarding all actions in each docket.

7. Kim Logue, a senior member of FPSC's telecommunications staff, who was intimately involved in both proceedings, engaged in direct communications with BellSouth representatives regarding important substantive issues in Docket 001097. (Pet. App., Tab 1.) These communications included providing BellSouth counsel with proposed "friendly" questions for BellSouth and its witnesses and

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<sup>2</sup> In re: Complaint of BellSouth Telecommunications, Inc. against Supra Telecommunications and Information Systems, Inc. for Resolution of Billing Disputes, Docket No. 00-1097-TP and Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Supra Telecommunications and Information Systems, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 00-1305-TP.

"unfriendly" questions for Petitioner's witnesses, prior to the evidentiary hearing<sup>3</sup>. (Id.)

8. Ms. Logue was working directly with other senior FPSC staff in the development of these questions. (Pet. App., Tab 2.)

9. Documents produced pursuant to Petitioner's recent public records requests indicate that Ms. Logue's supervisor and FPSC's senior staff knew of her conduct in advance of the final hearing in Docket 001305, and, further, elected to allow Ms. Logue's continued involvement in this proceeding and further elected not to disclose these facts to Petitioner. (Pet. App., Tab 3.)

10. Petitioner learned of these communications only after the evidentiary hearings in each docket, both of which resulted in FPSC orders adverse to Petitioner. (Order No. PSC-01-1585-FOF-TP, Pet. App., Tab 4; Order No. PSC-02-0413A-FOF-TP. (Pet. App., Tab 6.) Only six working days after the evidentiary hearing in Docket 001305, FPSC's General Counsel advised BellSouth counsel (who, of course, already was aware) and Petitioner's counsel, of Ms. Logue's conduct in providing questions to BellSouth. (Pet. App., Tab 7.)

11. In his notice to counsel regarding Ms. Logue's conduct, FPSC's General Counsel makes no mention of other e-mails between Ms. Logue and BellSouth counsel or the fact that other FPSC staff

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<sup>3</sup> These exchanges violate the rules prohibiting ex parte communications. See Fla.Admin.Code.R. 25-22.033; Fla. Stat. § 112.313(8).

were involved in the development of the questions which were forwarded to BellSouth and in communications with BellSouth regarding important facts pertaining to these dockets.

12. Internal communications occurring before the evidentiary hearings in either docket indicate that Mr. Fordham, a staff attorney with the FPSC's General Counsel's Office, discussed an upcoming ruling with BellSouth representatives prior to issuance of Commissioner Jaber's order regarding this issue. (Pet. App., Tab 8.)

13. Specifically, in Mr. Fordham's e-mail to Ms. Logue referenced above, he reports that he and Commissioner Jaber conferenced regarding Petitioner's motion to reschedule the hearing date under consideration. Fordham suggests that Petitioner's motion was filed with a subversive "motive" and states "we called their hand" by rescheduling the prehearing date to an earlier date and, "BellSouth is delighted with this resolution." (Id.) (Emphasis added.)

14. Unlike BellSouth, Petitioner was not given prior notification of, or afforded comment on, Commissioner Jaber's decision by Mr. Fordham. Petitioner only learned of Commissioner Jaber's ruling after entry of his order four days later on March 20, 2001.

15. A BellSouth representative also initiated discussions with FPSC employees regarding Petitioner's evidence in these proceedings. In July 2001, at an FPSC Anti-Competitive Practices Workshop, a BellSouth representative approached an FPSC staff member and provided a copy of Petitioner's RAF Form. The BellSouth representative alleged that Petitioner misrepresented amounts owed on the RAF Form. This information was forwarded to other FPSC employees and later became the subject of cross-examination. (Pet. App., Tab 9.) Petitioner learned of these discussions only after it received documents in response to its public records requests.

16. On October 5, 2001, FPSC General Counsel wrote to Petitioner and advised of Ms. Logue's misconduct. FPSC counsel advised that the matter was under investigation. Petitioner responded on October 8, 2001, and requested it be kept apprised of the investigation. (Pet. App., Tab 7.)

17. On October 20, 2001, nearly one month after the evidentiary hearing in Docket 001305, FPSC staff attorney Wayne Knight sent an e-mail to Mike Twomey, counsel for BellSouth, advising that BellSouth had failed to include a position statement for "Issue B" in Docket 001305<sup>4</sup>. BellSouth's omission was

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<sup>4</sup> A copy of this e-mail reminding BellSouth that a position statement should have been included in its Pre-Hearing Statement was never provided by Knight to Petitioner as required by Rule 25-22.033, Florida Administrative Code. After receiving Twomey's e-mail, BellSouth filed an amended Pre-Hearing Statement including a position statement on Issue B.

significant. Issue B was one of Petitioner's most important issues in Docket 001305 because it dealt with whether BellSouth's standard agreement or the AT&T/BellSouth agreement was the starting point for all revisions. Commissioner Palecki's Order Establishing Procedure required, in part, that all parties have their position statements filed no later than October 26, 2001. Staff's reminder to BellSouth provided BellSouth with an opportunity to supplement their findings on this issue.

18. On or about October 22, 2001, and unbeknownst to Petitioner, then-FPSC Chairman Leon Jacobs requested that the Inspector General's Office initiate a formal investigation into Ms. Logue's conduct.

19. On January 31, 2002, Commissioner Jaber sua sponte entered Order No. PSC-02-0143-PCO-TP in Docket 001097, ordering a rehearing. That order states, in relevant part:

On May 3, 2001, an evidentiary hearing was held on the portions of the complaint over which we retained jurisdiction . . . 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.

(Pet. App., Tab 10.) (Emphasis added.)

20. On February 11, 2002, FPSC's Inspector General issued a memorandum reporting on the status of his investigation into Ms. Logue's conduct. He indicated that, due to Ms. Logue's reporting for active military duty, his investigation was "incomplete." But, his memorandum indicates he closed the file due to the fact that Commissioner Jaber ordered a rehearing in Docket 001097. (Pet. App., Tab 11.) No consideration was given to the impact upon Docket 001305.

21. On February 14, 2002, Petitioner filed a letter advising the FPSC that it was investigating potential misconduct. Petitioner further requested additional time to file a motion for reconsideration during the pendency of this investigation. (Pet. App., Tab 12.)

22. On or about February 18, 2002, Petitioner filed a motion for rehearing to evaluate the impact of an Eleventh Circuit ruling on these proceedings. FPSC denied this motion on March 26, 2002, at the time it issued the Final Order. (Pet. App., Tab 13.)

23. At the FPSC Agenda Conference regarding Docket 001305 held on March 5, 2002, Commissioner Jaber followed up her sua sponte order directing a rehearing in Docket 001097 by opining:

I know that what Ms. Logue did . . . was completely inappropriate, and for that I want to publicly apologize to [Petitioner] . . . because it was completely wrong to send cross examination questions prior to the hearing.

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.

(Pet. App., Tab 14, p. 41.)

24. FPSC records from the period immediately preceding this FPSC Agenda Conference indicate that transmission of additional substantive information pertaining to open dockets was exchanged between BellSouth and FPSC staff and Commissioner Palecki. (Pet. App., Tab 15.) This series of internal e-mails reveals that FPSC's General Counsel and possibly other staff, have received information that Petitioner owes BellSouth "between \$50 and \$70 million" and that this information was provided to Commissioner Palecki, upon his request through his assistant, Ms. Tew. (Pet. App., Tab 15.)

25. These figures, "\$50 to \$70 million," are not part of any record or claim in either of the dockets which were under consideration and, in fact, these amounts are grossly disproportionate to the amounts actually in dispute.

26. On March 26, 2002, the FPSC issued a Final Order in Docket 001305. On March 28, 2002, the FPSC issued a Revised Final Order correcting scrivener's errors in the Final Order dated March 26, 2002. (Pet. App., Tabs 5 and 6.)

27. On or about April 10, 2002, Petitioner filed its Motion for Reconsideration of the FPSC's denial of its motion for rehearing in Docket 001305. (Pet. App., Tab 16.)

28. On or about April 17, 2002, Petitioner filed its 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 this Motion, Petitioner seeks disqualification of Commission staff, the FPSC Commission Panel assigned to consider Docket 001305, specifically Commissioners Jaber and Palecki, and the FPSC Commission, for bias. Petitioner filed supplemental verified motions on or about April 26, 2002, and June 5, 2002. (Pet. App., Tabs 17, 18 and 19.)

29. Since Petitioner's filing of the initial motion to disqualify, the FPSC has continued to issue additional orders without resolving the pending motion to disqualify. Specifically, the FPSC entered Order No. PSC-02-0637-PC-TP on May 8, 2002, and Order Nos. PSC-02-700-PCO-TP, PSC-02-701-PCO-TP, and PSC-02-702-PCO-TP on May 23, 2002, pertaining to various issues in this docket. (Pet. App., Tab 20.)



30. On or about May 31, 2002, Petitioner received a copy of FPSC's General Counsel's Memorandum Recommendation regarding Petitioner's motions to disqualify. (Pet. App., Tab 21.) The memorandum notes that Commissioners Jaber and Palecki have already advised staff of their orders declining recusal in regard to this docket. Mr. Bellak, author of the document, has confirmed this fact to counsel for Petitioner but has indicated that such orders will not be made available until the afternoon of Friday, June 7, 2002. The memorandum indicates, through its tone and argument, that FPSC staff refuse to consider Petitioner's motion objectively and without bias. (Id.)

31. On or about May 31, 2002, Petitioner received a copy of the Memorandum Recommendation of the FPSC's General Counsel and its Division of Competitive Services (telecommunications staff) recommending against reconsideration of Petitioner's Motion for Reconsideration of the FPSC's Order Denying a Rehearing of Docket 001305. (Pet. App., Tab 22.)

32. Based upon FPSC staff recommendations, the FPSC apparently intends to rule on the Petitioner's outstanding substantive motions at the same time it rules on Petitioner's motions to disqualify - Tuesday, June 11, 2002.

33. Petitioner has no other recourse to obtain a fair hearing than to have this Court intervene via issuance of extraordinary writs and staying the proceedings below.

### III. RELIEF REQUESTED

Petitioner respectfully requests the following relief:

1. An Order to Show Cause requiring the FPSC to show cause why the relief requested herein should not be granted.
2. A Writ of Mandamus directing the FPSC to rule upon the Motion to Disqualify filed by Petitioner on April 17, 2002, the Supplemental Motion to Disqualify filed on April 26, 2002, and the Second Supplemental Motion to Disqualify dated June 5, 2002.
3. A Writ of Prohibition as to Commissioners Jaber and Palecki. These two Commissioners purportedly issued orders declining disqualification, though the orders have not been provided to Petitioner. A Writ of Prohibition is the appropriate remedy where the lower tribunal refuses to grant legally sufficient motions for disqualification.

### IV. ARGUMENT

#### A. Standard of Review

1. As a threshold matter, the Court must determine whether a Writ of Mandamus should issue requiring the FPSC to rule on pending motions for disqualification. The function of a writ of mandamus is to force a government official, or in this case, an agency, to perform a legal obligation. Moody v. Moody, 705 So. 2d 708 (Fla. 1st DCA 1998). Mandamus will appropriately issue where a judicial, or a quasi-judicial officer fails to render an order on a motion for disqualification in a timely manner. Id.; Bay Bank, 634 So. 2d at 676. The writ of mandamus

is sought, not to compel a particular decision, but rather to require that a decision be made. Kramp v. Fagan, 568 So. 2d 479 (Fla. 1st DCA 1990).

2. In the event orders denying the motions were previously entered or will be entered later today as Petitioner was advised, Petitioner requests this Court to treat this Petition as seeking a writ of prohibition to require the FPSC to disqualify itself from all further proceedings in the underlying matter. A petition for writ is an original proceeding, and this Court is charged to "determine, not whether the judicial or quasi-judicial officer involved should be disqualified for bias or other reasons, but whether such an officer has exceeded the jurisdiction of the office by denying a clearly valid motion for disqualification." Bay Bank & Trust Co. v. Lewis, 634 So. 2d 672, 678 (Fla. 1st DCA 1994.) This Court reviews the materials presented to the FPSC de novo to determine whether Petitioner alleged sufficient facts to objectively establish a sufficient ground for fear of bias and prejudice. Id. Neither the lower administrative tribunal, nor this Court, can resolve the issues of fact, but rather, all allegations of fact must be taken as true. Id. See also Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). If this Court determines, based upon a review of the record before the agency, that the Motions for Disqualification are legally sufficient, this Court may declare that the FPSC is disqualified from any further proceedings on Docket 001305 and may, by use of its power of mandamus, compel the FPSC to refer Docket 001305 to the Division of Administrative

Hearings for a formal hearing in accordance with section 350.125, Florida Statutes.

**B. Mandamus is an Appropriate Remedy in this Case**

3. Petitioner filed its motions to disqualify on April 17, 2002; April 26, 2002; and June 5, 2002 ("Second Supplemental Motions"). On May 30, 2002, Richard Bellak of the FPSC General Counsel's office, issued several memoranda, including Document Number 05726 ("Revised Bellak Memorandum"), recommending denial of Petitioner's Motion to Disqualify and Supplemental Motions. (Pet. App., Tab 23.) This memo is significant for two reasons. First, Bellak attempts to dispute the factual allegations of Petitioner's motion. Florida law is well settled that the facts in a motion for disqualification must be taken as true. See MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978) (noting that "a judge who is presented with a motion for his disqualification 'shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.'") The mere fact that the FPSC comments upon or attempts to refute Petitioner's allegations of fact, is sufficient in itself to support disqualification.<sup>5</sup>

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<sup>5</sup> Although Bellak is not a Commissioner, the purpose of his memorandum is to advise the FPSC on the legal sufficiency of Petitioner's motions and one can, therefore, assume the Commission will give consideration to Bellak's recitation of the facts. Bellak evaluates the facts, at one point referring to Petitioner's analysis as "strangely one-sided." (Pet. App., Tab 23, p. 7.) In the original version of the memorandum, Document Number 05708, Bellak accuses Petitioner of forum shopping. (Pet. App., Tab 21,

4. Both Bellak's initial Memorandum and the Revised Bellak Memorandum -- both issued on May 30, 2001 -- are important because they incorporate by reference two non-existent orders. Bellak writes: "Although both the Motion and Supplemental Motion seek the recusal of the Commission staff, allegations of fact are directed against Chairperson Jaber and Commissioner Michael A. Palecki concerning their communications with staff. Their respective Orders Declining to Recuse From Docket 001305 are therefore incorporated by reference herein." (Id. at pp. 1-2.) Bellak goes on to quote from Commissioner Jaber's Order:

The origin of Supra's claim that Commission staff should be recused is found in the incident described at length by Chairman Jaber in her Order Declining to Recuse From Docket No. 001305. Therein Chairman Jaber notes Supra's statement on p. 21 of the Motion that she "directed an inquiry into Kim Logue's ex parte communications with BellSouth's Director of Regulatory Affairs" also described by Supra as "Logue's misconduct." . . . The characterizations "ex parte" and "misconduct" appear to be Supra's conclusions, rather than facts as determined by Inspector General Grayson.

(Id. at 5.) Significantly, the docket reflects that as of May 30, 2002, the date of Bellak's memorandum and, moreover, as of the date of this filing, no orders declining recusal are part of the FPSC record.

5. Notwithstanding, even if the Orders referenced in Bellak's memorandum exist somewhere, they fail to address the full scope of the relief sought by the motions for disqualification as evidenced by

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p. 6.)

Bellak's explanation of the Orders in his memorandum. Specifically, Petitioner seeks disqualification of "the Commission Staff from participating in the drafting and filing of a recommendation with respect to Supra's Motion for Reconsideration" and 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." (April 17, 2002 Mot. to Disqual., Pet. App., Tab. 17, p. 1.) Here, although Bellak refers to purported orders from only Chairperson Jaber and Commissioner Palecki, there is no indication that orders as to the remaining panel members, the rest of the Commission, or the staff members, are forthcoming. In this instance, a Writ of Mandamus is the appropriate relief. Bay Bank & Trust Co. v. Lewis, 634 So. 2d 672, n.3 (Fla. 1st DCA 1994).

6. Petitioner therefore respectfully requests the Court issue a Writ of Mandamus, ordering the FPSC to immediately issue Orders on Petitioner's pending motions for disqualification.

**C. Motion for Recusal Must Be Ruled Upon Before Other Pending Motions**

7. As a matter of procedure, the FPSC was required to address and resolve Petitioner's motions for disqualification prior to ruling on any other substantive matters. The Commissioners, who adjudicate issues in administrative proceedings much like a judge would in a trial, should not wait to decide motions for recusal, but rather must rule upon them immediately. See Fuster-Escalona v. Wisotsky, 781 So. 2d. 1063 (Fla.

2000) (trial judge must rule upon motion for recusal immediately and with dispatch); Stimpson Computing Scale Co., Inc. v. Knuck, 508 So.2d. 482 (Fla. 3d DCA 1987) (a judge faced with a motion for recusal should first resolve that motion before making additional rulings in a case).

8. In Loevinger v. Northrup, 624 So. 2d. 374, 375 (Fla. 1st DCA 1993), this Court reiterated the long-standing rule that "[a] judge faced with a motion for recusal should first resolve that motion before making any other rulings in a case." In Loevinger, Judge Davey of the Second Judicial Circuit ruled upon a motion to disqualify one of the party's attorneys prior to ruling on the defendant's motion to disqualify the judge. Judge Davey received and ruled upon the motion to disqualify counsel before he received the motion for his own disqualification, despite the fact that the motion for disqualification was filed with the clerk's office first. This Court explained that once the motion to disqualify Judge Davey was filed with the clerk, the Judge was without authority to rule on any other pending matters, even though he was not personally aware of the motion seeking his disqualification. Id.

9. Similarly, the FPSC was without authority to rule on any other pending matters once the motions for disqualification were filed on April 17, 2002. Despite this, the FPSC issued Order PSC-02-637-PCO-TP on May 8, 2002; and Orders PSC-02-700-PCO-TP, PSC-02-701-PCO-TP, and PSC-02-702-PCO-TP on May 23, 2002. As of the date of this filing, Petitioner's motions for disqualification are still pending before the FPSC.

**D. Petitioner's Motions for Disqualification are Legally Sufficient**

10. Petitioner submits that it is appropriate for the Court to consider the merits of Petitioner's motions for disqualification at this time. The Bellak memorandum suggests that orders of Recusal have been entered by Commissioners Palecki and Jaber. These orders are subject to review here via this petition for writ of prohibition. Further, to the extent Petitioner has been advised that the Palecki and Jaber orders denying the motions are forthcoming, the orders will be immediately filed with this Court as a supplement to Petitioner's Appendix and, therefore, are subject to review. Because Petitioner's motions for disqualification are legally sufficient, they should be granted as a matter of law.

11. As a general matter, the Florida Administrative Procedures Act, Chapter 120, Florida Statutes, governs the procedural aspects of the underlying administrative proceeding in Docket 001305. Section 120.665, Florida Statutes, addresses the procedure for disqualification of an agency official sitting in a quasi-judicial capacity, and provides, in pertinent part:

any individual serving 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.

Fla. Stat. § 120.665 (2001).



12. A motion for disqualification is legally sufficient and establishes "just cause" under 120.665, Florida Statutes, when the facts alleged, if taken as true, would prompt a reasonably prudent person to fear that he could not get a fair and impartial consideration by the tribunal. See Bay Bank & Trust Co v. Lewis, 634 So. 2d. 672, 678 (Fla. 1st DCA 1994); see also Enterprise Leasing Co. v. Jones, 789 So. 2d 964 (Fla. 2001); Wicklund v. Schoff, 755 So. 2d. 192 (Fla. 1st DCA 2000); Pelham v. School Bd. of Wakulla County, Fla., 451 So. 2d 1004, 1005 (Fla. 1st DCA 1984). If the moving party has alleged sufficient facts to demonstrate a reasonable, well-grounded fear that they will not receive a fair and impartial hearing, disqualification is mandatory. Martin v. Carlton, 470 So. 2d. 875 (Fla. 1st DCA 1985). Where the motion for disqualification is legally sufficient, it is not for the judicial or quasi-judicial officer to resolve whether the allegations are true. Bay Bank, 634 So. 2d at 678.

13. Kim Logue, an FPSC senior supervisor, engaged in improper communications with Nancy Sims ("Ms. Sims"), the Director of Regulatory Affairs for BellSouth, as early as May 2, 2001. Ms. Logue provided Ms. Sims with an advance copy of draft cross-examination questions prior to an FPSC evidentiary hearing, but failed to provide those questions to Petitioner. (Pet. App., Tab 1.) The text of these questions and the fact that the questions were provided to BellSouth supports Petitioner's well-grounded fear of bias. Ms. Logue and Ms. Sims also traded e-mail on May 2, 2001 regarding the merits of Docket 1097. No such e-mail

dialogue was initiated by Ms. Logue with Petitioner, nor was Petitioner advised of these additional ex parte communications.

14. Rule 25-22.033, Florida Administrative Code, adopted by the FPSC for its employees, governs communications between FPSC staff and parties to docketed proceedings before the agency. Specifically; it provides, in subsection (2), that notice of any written communications between FPSC employees and parties shall be transmitted to all other parties at the same time as the written communication, whether by U.S. Mail or other means. Fla. Admin. Code R. 25-22.033(2) (2002).

15. Ms. Logue never provided Petitioner with a copy of the draft cross-examination questions she furnished to BellSouth prior to the evidentiary proceeding on May 3, 2001 in Docket 1097. Ms. Logue never furnished Petitioner with of any of the e-mail correspondence between herself and Ms. Sims, despite the requirements of Rule 25-22.033(2), Florida Administrative Code. Petitioner, just as any other party participating in an administrative proceeding before the FPSC, expected Ms. Logue, as a senior official of the FPSC, to abide by the Agency's own rules.<sup>6</sup>

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<sup>6</sup> Moreover, because Ms. Logue disseminated information that was available to her due to her senior supervisory position with the FPSC, such disclosure may also be a violation of section 112.313(8), Florida Statutes, which prohibits the disclosure of information not available to members of the general public.

16. FPSC Chairperson Jaber herself acknowledged the inappropriateness of Ms. Logue's behavior during the March 5, 2002, agenda conference for Docket 1097 wherein she stated:

I know that what Ms. Logue did . . . was completely inappropriate, and for that I want to publicly apologize to [Petitioner]. . . because it was completely wrong to send cross examination questions prior to the hearing.

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.

(Pet. App., Tab 14.)

17. Through public records requests, Petitioner obtained information about additional improper, prejudicial conduct by Ms. Logue. An October 29, 2001, e-mail between two FPSC employees, Stephanie Cater and Beth Salak, references a conversation between Ms. Cater and Ms. Sims, the Director of Regulatory Affairs for BellSouth. Ms. Sims indicated to Ms. Cater that Petitioner had allegedly failed to pay BellSouth for over a year. (Pet. App., Tab 9.) Such allegation was incorrect and Petitioner was never advised of this discussion or given an opportunity to dispute it.

18. Ex parte communication "violates the concept and appearance of impartiality." Love v. State of Fla., 569 So. 2d 807, 810 (Fla. 1st DCA 1990). See also Martin v. Carlton, 470 So. 2d 875 (Fla. 1st DCA 1985). When the FPSC, whether through its Commissioners or through Commission

staff, engages in substantive communications with only one party, the concept and appearance of impartiality are sacrificed. The actions of Ms. Logue and other FPSC staff are sufficient to support an objectively reasonable, well-grounded fear of bias or prejudice against Petitioner.

19. Plainly, the documented free flow of information in both dockets between BellSouth, a party whose interests are adverse to Petitioner, and key FPSC staff who are providing recommendations to the FPSC with respect to Petitioner and BellSouth, would prompt a reasonably prudent person to fear that he or she cannot receive a fair and impartial hearing before the FPSC.

**E. Petitioner's Motion for Recusal was Timely Filed**

20. Section 120.665, Florida Statutes, provides that motions for disqualification are to be filed "within a reasonable period of time prior to the agency proceeding." Neither "reasonable time" nor "agency proceeding," as used in this statute, is specifically defined in chapter 120, Florida Statutes.

21. Petitioner submits that an "agency proceeding" remains active until all administrative remedies associated with that proceeding are exhausted. Therefore, a motion for disqualification is timely provided some issue remains pending on the docket. See e.g., Bay Bank & Trust Co. v. Lewis, 634 So. 2d 672, 678 (Fla. 1st DCA 1994) (refusing to declare a motion for disqualification untimely based on the length of time between initiation of administrative action and filing of motion.)

22. Petitioner anticipates that BellSouth and the FPSC will argue that Petitioner's motions for disqualification were untimely because the motions were required to be filed prior to the evidentiary hearing in this matter on September 26-27, 2001.<sup>7</sup> Petitioner could not, however, have filed its motions prior to that time inasmuch as it was unaware that Ms. Logue engaged in the improper communications with BellSouth until after the hearing was concluded.<sup>8</sup> Petitioner was advised of the improper conduct on October 5, 2001, several days after the hearing. (Pet. App., Tab 7.) In addition, the FPSC initiated an investigation and Petitioner justifiably relied on General Counsel to advise of the progress of the investigation, as indicated in Petitioner's October 8, 2001 letter. (Pet. App., Tab 27.)

23. Commissioner Jaber's sua sponte order in Docket 1097 was issued on January 31, 2002. Within two weeks, Petitioner advised it was investigating whether any irregularities similar to those found in Docket 1097 were present in this Docket. On February 13, 2002, Petitioner requested an extension of time to brief the impact of a recent Eleventh Circuit decision. The following day, Petitioner amended its prior request and asked that the Commission defer further consideration of Docket 001305 "because of the appearance of serious irregularities that

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<sup>7</sup> The Revised Bellak Memorandum proposes that the FPSC deny Petitioner's motions for disqualification on this basis. (Pet. App., Tab 23, pp. 2-4.)

<sup>8</sup> BellSouth was aware of the improper conduct as early as May 2, 2001, the date it occurred.

requires further investigation." (Pet. App., Tab 12.) Commissioner Palecki, the Prehearing Officer, granted additional time "to allow the parties to file legal briefs narrowly tailored to address the impact of the Eleventh Circuit's decision in BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., et al." (Order on Mot. for Additional Briefing, Pet. App., Tab 24.) The Order was silent as to the irregularities referenced in Petitioner's February 14, 2002, letter and Petitioner's request for time to investigate further. Petitioner diligently continued its investigation, but the Commission entered a final order on March 26, 2002, before Petitioner concluded its investigation.

24. Petitioner's investigation continued and its public records requests revealed additional improper communications that were not previously disclosed. The totality of these communications, and the realization that the bias reflected in those communications impacted not only Docket 1097, but this Docket as well, prompted Petitioner to file the Motion to Disqualify on April 17, 2002. At the time Petitioner's Motion was filed, there were still several matters pending in the Docket, including a Motion for Reconsideration of the Denial of Petitioner's Motion for Rehearing, filed on April 10, 2002.

25. The FPSC's suggestion that an "agency proceeding" ends at some point before the post-hearing motions are fully considered leads to the untenable result that a regulated entity is deprived of the right to challenge impropriety where, as here, it is not discovered prior to the

final hearing.<sup>9</sup> Moreover, contrary to the suggestion by FPSC staff (Bellak Memo., Pet. App., Tab 21, p. 4), Petitioner did not wait until the Docket was concluded and adjudicated. Petitioner requested that the FPSC delay consideration of this Docket on February 14, 2002 - prior to the date the Final Order on Arbitration was issued. The only alternative was for Petitioner to move forward with a motion for disqualification prior to completing a good faith investigation. Petitioner submits that this procedure is neither compelled nor approved by the rules that govern administrative proceedings.

26. Petitioner appropriately waited to file a motion alleging irregularities until those irregularities could be confirmed. Although the FPSC would have been obligated to accept Petitioner's allegations as true even if Petitioner filed a motion for disqualification prior to conclusion of its investigation, Petitioner correctly waited until the facts could be substantiated and the motion could be filed in good faith.

**F. Prohibition is an Appropriate Remedy in this Case**

27. The purpose of a writ of prohibition is to prevent a lower tribunal from acting in excess of its power. Lorenzo v. Murphy, 32 So. 2d. 421 (Fla. 1947). Moreover, although prohibition is an extraordinary remedy to be used only when a party is without other adequate means of redress, the Florida Supreme Court in Bundy v. Rudd recognized that a

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<sup>9</sup> Petitioner was not advised of that potential improprieties occurred until six business days after the final hearing in this Docket.

writ of prohibition is an appropriate remedy to prevent further consideration of a pending matter after the wrongful denial of a legally sufficient motion to disqualify. Bundy v. Rudd, 366 So. 2d. 440 (Fla. 1978); Mobile v. Trask, 463 So. 2d. 389 (Fla. 1st DCA 1985).

28. As noted on pages 2 and 5 of Bellak's Revised Memorandum, Commissioners Jaber and Palecki, two of the three FPSC Commissioners who heard the evidence in Docket 001305 have already entered orders declining to disqualify themselves from Docket 001305.

29. Notwithstanding, the FPSC has denied repeated requests for copies of these orders made by Petitioner's counsel. Inasmuch as these orders were expressly referenced by title in Bellak's memorandum and, therefore, must exist despite the FPSC's refusals to provide copies, this Court is vested with the authority to issue a writ of prohibition.

30. Additionally, given that the Petitioner has been advised that an order denying the motions will be issued by the FPSC in the immediate future which, once received, will be filed with this Court for review, any prematurity in seeking the issuance of a writ of prohibition will be cured such that this Court can rule on the Petition.

#### V. CONCLUSION

Petitioner's principal request for relief is for issuance of an Order to Show Cause why a Writ of Mandamus ordering the FPSC to rule on the pending motions for disqualification should not issue.



In the alternative, in the event the Court determines that Bellak's reference to orders declining disqualification is a sufficient basis for concluding orders have been entered or that the forthcoming order vests jurisdiction in this Court to consider the Petition for Writ of Prohibition, Petitioner requests a Writ of Prohibition to disqualify the FPSC from proceeding further in Docket 001305.

WHEREFORE, Petitioner requests the Court issue a Writ of Mandamus, or, alternatively, a Writ of Prohibition as outlined hereinabove.

*Elizabeth G. Demme*

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Attorneys for Petitioner, Supra  
Telecommunications & Information Systems,  
Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the persons listed below by hand delivery or U.S. mail this 7<sup>th</sup> day of June, 2002.

Elizabeth H. Demme  
Attorney

Lila A. Jaber, Chairperson  
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Division of Legal Services  
Florida Public Service  
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General Counsel for BellSouth  
Telecommunications, Inc.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Response to Petition For Writ of Prohibition complies with the font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure.

Elizabeth G. Demme  
Attorney

IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

SUPRA TELECOMMUNICATIONS AND  
INFORMATION SYSTEMS, INC.

Petitioner,

v.

CASE NO. \_\_\_\_\_  
L.T. 001305-TP

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

MOTION FOR EMERGENCY STAY

Petitioner, Supra Telecommunications and Information Systems, Inc., by and through its undersigned counsel, files this Motion for Emergency Stay, to request an Order pursuant to 9.190(e)(2), Florida Rules Appellate Procedure, staying all proceedings in the Florida Public Service Commission ("FPSC") associated with Docket Number 00-1305-TP ("Docket 1305"), except entry of an Order on Petitioner's pending Motions for Disqualification. Petitioner states in support as follows:

1. A Petition for Writ of Mandamus, Writ of Prohibition, and Other Relief, is being filed simultaneously with this Motion. The "Facts" as alleged in that Petition are incorporated here by reference.

2. The Public Service Commission is scheduled to consider a number of pending issues at its next regularly scheduled meeting on

Tuesday, June 11, 2002. (See Agenda, Exh. A) With respect to the present parties, the FPSC is scheduled to consider a number of issues, including, Petitioner's Motions for Disqualification and Petitioner's Motion for Reconsideration of Denial of its Motion for Rehearing of Order No. PSC-02-0413-FOF-TP. (Id.)

3. Petitioner filed three motions for disqualification,<sup>1</sup> none of which has been ruled upon at this time.<sup>2</sup> The FPSC has, however, issued Orders on other matters in this proceeding since the time the first motion for disqualification was filed. This is the subject of Petitioner's Petition for Writ of Mandamus, filed simultaneously with this Motion.

4. Rule 9.190(e), Florida Rules of Appellate Procedure, provides that a "party seeking to stay administrative action may

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<sup>1</sup> Petitioner filed a Motion for Disqualify and Recuse Commission Staff and Commission Panel From All Further Consideration of This Docket and Refer This Docket to The Division of Administrative Hearings For All Further Proceedings ("Motion to Recuse") on April 17, 2002; a Verified Supplemental Motion to Disqualify and Recuse FPSC From All Further Consideration of this Docket and to Refer This Docket To the Division of Administrative Hearings For All Further Proceedings ("Supplemental Motion to Recuse") on April 26, 2002; and a Verified Second Supplemental Motion to Disqualify and Recuse FPSC From All Further Consideration of This Docket and Refer This Docket to the Division of Administrative Hearings For All Further Proceedings ("Second Supplemental Motion to Recuse") filed on June 5, 2002. These motions are referred to collectively as "Petitioner's Motions for Disqualification."

<sup>2</sup> Petitioner has been advised that Chairperson Jaber and Commissioner Palecki have already executed orders denying their recusal, but these will not be released until late today. These motions will not, however, resolve the disqualification of staff members or the other commissioners.

file a motion either with the lower tribunal or, for good cause shown, with the court to which the notice or petition has been filed." Petitioner has filed a petition for writ with this Court and Petitioner submits that good cause exists to justify a stay of the FPSC proceedings pending a ruling from this Court on the Petition for Writ of Mandamus.

5. The FPSC Agenda for Tuesday, June 11, 2002, indicates that Petitioner's motions for disqualification will be considered immediately preceding the Petitioner's motion for reconsideration. This procedure will foreclose Petitioner's ability to seek timely review of any order declining disqualification.

6. Petitioner's initial motion for disqualification has been pending with the FPSC for more than seven weeks. During this seven weeks, the FPSC has issued at least four orders on other matters, without issuing any order either granting or declining disqualification. Despite this, the FPSC intends to consider Petitioner's substantive motions immediately after the motions for disqualification, leaving no time for appellate review of the orders on the motions for disqualification prior to the ruling on Petitioner's other motions.

WHEREFORE, Petitioner requests this Court immediately issue an Order Staying FPSC Proceedings in Docket 1305.

*Elizabeth G. Demme*

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Attorneys for Petitioner, Supra  
Telecommunications & Information  
Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the persons listed below by hand delivery or U.S. mail this 7<sup>th</sup> day of June, 2002.

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Elizabeth M. Demme  
Attorney

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# FLORIDA PUBLIC SERVICE COMMISSION

## COMMISSION CONFERENCE AGENDA

**CONFERENCE DATE AND TIME:** June 11, 2002, 9:30 a.m.

**LOCATION:** Room 148, Betty Easley Conference Center

**DATE ISSUED:** May 31, 2002

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### NOTICE

Persons affected by Commission action on certain items on this agenda for which a hearing has not been held (other than actions on interim rates in file and suspend rate cases) may be allowed to address the Commission when those items are taken up for discussion at this conference. These items are designated by double asterisks (\*\*) next to the agenda item number.

Included in the above category are items brought before the Commission for tentative or proposed action which will be subject to requests for hearing before becoming final. These actions include all tariff filings, items identified as proposed agency action (PAA), show cause actions and certain others.

To obtain a copy of staff's recommendation for any item on this agenda, contact the Division of the Commission Clerk and Administrative Services at (850) 413-6770. There may be a charge for the copy. The agenda and recommendations are also accessible on the PSC Homepage, at <http://www.floridapsc.com>, at no charge.

Any person requiring some accommodation at this conference because of a physical impairment should call the Division of the Commission Clerk and Administrative Services at (850) 413-6770 at least 48 hours before the conference. Any person who is hearing or speech impaired should contact the Commission by using the Florida Relay Service, which can be reached at 1-800-955-8771 (TDD). Assistive Listening Devices are available in the Division of the Commission Clerk and Administrative Services, Betty Easley Conference Center, Room 110.

**EXHIBIT A**

Video and audio versions of the conference are available and can be accessed live on the PSC HomePage on the day of the Conference. The audio version is available through archive storage for up to three months afterward.

1

Approval of Minutes  
 April 23, 2002 Regular Commission Conference  
 April 26, 2002 Special Commission Conference  
 May 8, 2002 Special Commission Conference

2\*\*

Consent Agenda

PAA A) Applications for certificates to provide alternative local exchange telecommunications service.

DOCKET NO.	COMPANY NAME
020341-TX	Talk Unlimited Now, Inc.
020431-TX	Utilities Commission, New Smyrna Beach

PAA B) Applications for certificates to provide interexchange telecommunications service.

DOCKET NO.	COMPANY NAME
020299-TI	Choice Telco, LLC
020321-TI	Arizona Telephony Brokers, L.L.C.
020440-TI	con-next Site Solutions, Inc.

PAA C) Applications for certificates to provide pay telephone service.

DOCKET NO.	COMPANY NAME
020383-TC	Glenn Pollack
020392-TC	Todd Eric Mooney d/b/a TEM Communications
020401-TC	590 Petroleum, Inc.
020416-TC	Paul Chang
020418-TC	North Coast Payphones, Inc.
020393-TC	Spearman Distributors, Inc.

PAA D) Request for cancellation of alternative local exchange telecommunications certificate.

DOCKET NO.	COMPANY NAME	EFFECTIVE DATE
020450-TX	Everest Connections Corporation	4/15/02

PAA E) DOCKET NO. 020430-TP - Request for cancellation of IXC Certificate No. 7590 and ALEC Certificate No. 7386 by CoreComm Florida, Inc., and of IXC Certificate No. 4047 by OCOM Corporation d/b/a Cellular Long Distance, effective April 15, 2002.

PAA F) DOCKET NO. 020374-TP - Request for cancellation of STS Certificate No. 7649 and IXC Certificate No. 7650 by Travelers Media, Inc., effective 12/31/01.

RECOMMENDATION: The Commission should approve the action requested in the dockets referenced above and close these dockets.

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3\*\*

Docket No. 011374-TP - Complaint by BellSouth Telecommunications, Inc. against VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services.

Critical Date(s): None

Commissioners Assigned: Full Commission  
Prehearing Officer: Baez

Staff: GCL: Fudge  
CMP: J. Brown

ISSUE 1: Should the Commission acknowledge BellSouth's withdrawal of its Complaint against VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications and close the docket?

RECOMMENDATION: Yes. The Commission should acknowledge BellSouth's withdrawal of its Complaint against VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications, find that the Voluntary Dismissal renders any and all outstanding motions moot, and close this Docket.

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4\*\*PAA

Docket No. 020399-TI - Joint petition by AT&T Communications of the Southern States, LLC d/b/a AT&T, d/b/a Lucky Dog Phone Co., d/b/a ACC Business, d/b/a SmarTalk, d/b/a Unispeaksm Service, d/b/a www.prepaidserviceguide.com, d/b/a CONQUEST ("AT&T"), and AT&T Broadband Phone of Florida, LLC d/b/a AT&T Digital Phone ("AT&T Broadband") for waiver of carrier selection requirements in Rule 25-4.118, F.A.C., to facilitate transfer of certain long distance customers from AT&T to AT&T Broadband.

Critical Date(s): None

Commissioners Assigned: Full Commission  
Prehearing Officer: Administrative

Staff: CMP: Pruitt  
GCL: Fordham

ISSUE 1: Should the Commission relieve AT&T Broadband in this instance of the carrier selection requirements in Rule 25-4.118, *Florida Administrative Code*?

RECOMMENDATION: Yes.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.

5\*\*

Docket No. 011073-WS - Application for rate increase in Broward County by Ferncrest Utilities, Inc.

Critical Date(s): 6/11/02 (60-day suspension date)

Commissioners Assigned: Full Commission  
 Prehearing Officer: Deason

Staff: ECR: Fletcher, Greene, Merchant, D. Draper  
 GCL: Harris

ISSUE 1: Should the utility's proposed final rates be suspended?

RECOMMENDATION: Yes. Ferncrest's proposed final water and wastewater rates should be suspended. The docket should remain open pending the Commission's final action on the utility's requested rate increase.

ISSUE 2: What is the appropriate interim test year?

RECOMMENDATION: The simple average test year ended December 31, 2001, is the appropriate test year for interim purposes. ISSUE 3: Should an interim revenue increase be approved?

RECOMMENDATION: Yes. On an interim basis, the utility should be authorized to collect annual water and wastewater revenues as indicated below:

	<u>Revenues</u>	<u>\$ Increase</u>	<u>% Increase</u>
Water	\$599,644	\$70,341	13.29%
Wastewater	\$687,003	\$12,734	1.89%

ISSUE 4: What are the appropriate interim water and wastewater rates?

RECOMMENDATION: Ferncrest's requested interim rates are appropriate, which represent interim rate increases of 13.69% for water and 1.95% for wastewater. The approved rates should be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), *Florida Administrative Code*, provided the customers have received notice. The utility should provide proof to staff of the date notice was given within 10 days after the date of notice.

ISSUE 5: What is the appropriate security to guarantee the interim increase?

RECOMMENDATION: The utility should be required to open an escrow account, file a surety bond, or secure a letter of credit to guarantee any potential refund of revenues collected under interim conditions. If the utility chooses to open an escrow account, it should deposit 13.69% of water interim revenues and 1.95% of wastewater interim revenues collected each month. The surety bond or letter of credit should be in the amount of \$48,712. Pursuant to Rule 25-30.360(6),

*Florida Administrative Code*, the utility should provide a report by the 20th of each month indicating the monthly and total revenue collected subject to refund. Should a refund be required, the refund should be with interest and undertaken in accordance with Rule 25-30.360, *Florida Administrative Code*.

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6

Docket No. 000028-TL - Petition by BellSouth Telecommunications, Inc. for waiver of Rules 25-4.107, 25-4.108, and 25-4.113, *F.A.C.*, which require provision of basic telecommunications service to certain locations and persons.

Critical Date(s): None

Commissioners Assigned: Jaber, Deason, Palecki  
Prehearing Officer: Jaber

Staff: CMP: M. Watts  
GCL: Christensen

**(Participation is limited to Commissioners and staff.)**

ISSUE A: What is the Commission's jurisdiction in this matter?

RECOMMENDATION: Section 120.542, *Florida Statutes*, authorizes the Commission to grant variances and waivers to requirements of its rules.

ISSUE 1: In the event that BellSouth Telecommunications, Inc. is granted a waiver of Rules 25-4.107, 25-4.108, and 25-4.113, *Florida Administrative Code*, as set forth in its petition, will the purpose of the underlying statutes be achieved by other means?

RECOMMENDATION: Yes. Staff believes that BellSouth Telecommunications, Inc. will achieve the underlying purpose of the statute by other means and with conditions imposed.

ISSUE 2: Does the application of Rules 25-4.107, 25-4.108, and 25-4.113, *Florida Administrative Code*, as set forth in BellSouth Telecommunications, Inc.'s petition, create a substantial hardship for BellSouth Telecommunications, Inc. or violate principles of fairness?

RECOMMENDATION: The Commission should find that the application of Rules 25-4.107, 25-4.108, and 25-4.113, *Florida Administrative Code*, as set forth in BellSouth Telecommunications, Inc.'s petition, creates a substantial hardship for BellSouth Telecommunications, Inc. in this limited circumstance.

ISSUE 3: Should BellSouth Telecommunications, Inc. be granted a waiver of Rules 25-4.107, 25-4.108, and 25-4.113, *Florida Administrative Code*, as set forth in its petition?

RECOMMENDATION: Yes. The Commission should grant BellSouth Telecommunications, Inc.'s petition for waiver of Rules 25-4.107, 25-4.108, and 25-4.113, *Florida Administrative Code*, with the condition that BellSouth will make a determination whether an applicant is attempting to obtain service on Mr. Parks' behalf prior to denying service based on the location's association with Mr. Parks.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes. This docket should be closed.

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7

Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.

Critical Date(s): None

Commissioners Assigned: Jaber, Baez, Palecki  
Prehearing Officer: Palecki

Staff: GCL: Bellak

**(Participation is limited to Commissioners and staff.)**

ISSUE 1: Are Supra's Motion and Supplemental Motion timely filed pursuant to applicable legal standards for disqualification motions?

RECOMMENDATION: No. Supra's Motion and Supplemental Motion are void for lack of timeliness.

ISSUE 2: Are Supra's Motion and Supplemental Motion legally sufficient to support recusal of the Commission panel from Docket No. 001305?

RECOMMENDATION: No. Supra's Motion and Supplemental Motion are not legally sufficient to support recusal of the Commission panel.

ISSUE 3: Should this docket remain open?

RECOMMENDATION: Yes. The docket should remain open.

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8

Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.

Critical Date(s): None

Commissioners Assigned: Jaber, Baez, Palecki  
Prehearing Officer: Palecki

Staff: GCL: Bellak

**(Participation is limited to Commissioners and staff.)**

ISSUE 1: Are Supra's Motion and Supplemental Motion timely filed pursuant to applicable legal standards for disqualification motions?

RECOMMENDATION: No. Supra's Motion and Supplemental Motion are void for lack of timeliness.

ISSUE 2: Are Supra's Motion and Supplemental Motion legally sufficient to support recusal of the Commission staff from Docket No. 001305?

RECOMMENDATION: No. Supra's Motion and Supplemental Motion are not legally sufficient to support recusal of the staff. ISSUE 3: Should this docket remain open?

RECOMMENDATION: Yes. The docket should remain open.

9

Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.

Critical Date(s): None

Commissioners Assigned: Jaber, Baez, Palecki  
Prehearing Officer: Palecki

Staff: GCL: Bellak

**(Participation is limited to Commissioners and staff.)**

ISSUE 1: Is Supra's Motion to Strike an authorized motion?

RECOMMENDATION: No. Supra's Motion to Strike is unauthorized and cannot be considered.

ISSUE 2: Is Supra's Reply to BellSouth's Opposition authorized by the administrative rule?

RECOMMENDATION: No. Supra's Reply is unauthorized by Rule 28.106-204 and cannot be considered.

ISSUE 3: Should this docket remain open?

RECOMMENDATION: Yes. The docket should remain open.

10

Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.

Critical Date(s): None

Commissioners Assigned: Jaber, Baez, Palecki  
Prehearing Officer: Palecki

Staff: GCL: Knight, B. Keating, Christensen  
CMP: Simmons, Barrett, Brown, J-E. Brown, King, Schultz, Turner

**(Post hearing decision - Motions for reconsideration/Motions to strike - Oral argument not requested - Participation limited - Participation at the Commissioners' discretion.)**

ISSUE A: Should the Commission grant BellSouth's Motion for Leave to File Supplemental Authority?

RECOMMENDATION: Yes.

ISSUE 1: Should the Commission grant Supra's Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion for Reconsideration for a New Hearing in Docket No. 001305-TP and/or Supra's Motion for Leave to File Reply to BellSouth's Opposition to Motion to Motion to Strike, or in the Alternative, to Strike New Issues Raised in BellSouth's Opposition?

RECOMMENDATION: Staff recommends that Supra's Motion to Strike, as it pertains to Section



VI of BellSouth's Opposition to Supra's Motion for Reconsideration for a New Hearing in Docket No. 001305-TP, be denied. As for Supra's Motion for Leave to File Reply to BellSouth's Opposition to Motion to Strike, or in the Alternative, to Strike New Issues Raised in BellSouth's Opposition, staff recommends that the Motion for Leave to File Reply be denied, but that the Motion to Strike New Issues Raised in BellSouth's Opposition, specifically those pertaining to BellSouth's request for sanctions, be granted.

ISSUE 2: Should the Commission grant Supra's Motion for Reconsideration of Denial of its Motion for Rehearing of Order No. PSC-02-0413-FOF-TP?

RECOMMENDATION: No. Supra has not identified a point of fact or law which was overlooked or which the Commission failed to consider in rendering its decision on these issues. Staff, therefore, recommends that the Motion be denied.

ISSUE 3: Should the Commission grant Supra's Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP?

RECOMMENDATION: The Commission should grant, in part, and deny, in part, Supra's Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP, as more specifically outlined in the analysis portion of staff's May 30, 2002 memorandum.

ISSUE 4: Should BellSouth's Motion for Reconsideration of Order No. PSC-02-0637-PCO-TP be granted?

RECOMMENDATION: No. BellSouth has failed to identify a mistake of fact or law in the Prehearing Officer's decision. Therefore staff recommends that the Commission deny BellSouth's Motion for Reconsideration of Order No. PSC-02-0637-PCO-TP.

ISSUE 5: Should BellSouth's May 24, 2002, Motion for Reconsideration of Order No. PSC-02-0663-CFO-TP be granted?

RECOMMENDATION: No. BellSouth has not identified a mistake of fact or law in the Prehearing Officer's decision. Therefore, the Motion should be denied. However, in accordance with Rule 25-22.006(10), *Florida Administrative Code*, and Order No. PSC-02-0700-PCO-TP, issued May 23, 2002, the information should continue to retain confidential treatment through judicial review.

ISSUE 6: Should Supra's Motion for Reconsideration of Order No. PSC-02-0700-PCO-TP be granted?

RECOMMENDATION: No. Supra has not identified a mistake of fact or law in the Prehearing Officer's decision.

ISSUE 7: Should this Docket be closed?

RECOMMENDATION: No. If the Commission approves staff's recommendations in Issues 2 and 4, the parties should be required to file their final interconnection agreement conforming with the Commission's arbitration decision within 14 days of the issuance of the Order from this recommendation. Thereafter, this Docket should remain open pending approval by the Commission of the filed agreement.

1 Approval of Minutes . . . . . 2

2\*\* Consent Agenda . . . . . 2

3\*\* Docket No. 011374-TP - Complaint by BellSouth Telecommunications, Inc. against VarTec Telecom, Inc. d/b/a VarTec Telecom and Clear Choice Communications regarding practices in the reporting of percent interstate usage for compensation for jurisdictional access services. . . . . 4

4\*\*PAA Docket No. 020399-TI - Joint petition by AT&T Communications of the Southern States, LLC d/b/a AT&T, d/b/a Lucky Dog Phone Co., d/b/a ACC Business,

d/b/a SmarTalk, d/b/a Unispeaksm Service, d/b/a www.prepaidserviceguide.com, d/b/a CONQUEST ("AT&T"), and AT&T Broadband Phone of Florida, LLC d/b/a AT&T Digital Phone ("AT&T Broadband") for waiver of carrier selection requirements in Rule 25-4.118, F.A.C., to facilitate transfer of certain long distance customers from AT&T to AT&T Broadband. . . . . 5

5\*\* Docket No. 011073-WS - Application for rate increase in Broward County by Ferncrest Utilities, Inc. . . . . 6

6 Docket No. 000028-TL - Petition by BellSouth Telecommunications, Inc. for waiver of Rules 25-4.107, 25-4.108, and 25-4.113, F.A.C., which require provision of basic telecommunications service to certain locations and persons. . . . . 8

7 Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc. . . . . 10

8 Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc. . . . . 11

9 Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc. . . . . 12

10 Docket No. 001305-TP - Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc. . . . . 13

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IN THE DISTRICT COURT OF APPEAL  
FIRST DISTRICT, STATE OF FLORIDA

SUPRA TELECOMMUNICATIONS &  
INFORMATION SYSTEMS, INC.

Petitioner,

v.

CASE NO. \_\_\_\_\_  
L.T. 001305-TP

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

AMENDMENT TO PETITION FOR EMERGENCY ISSUANCE OF WRIT  
OF MANDAMUS, WRIT OF PROHIBITION AND OTHER RELIEF

Petitioner amends its Petition filed on June 7, 2002, and files its Supplemental Appendix due the following circumstances. On or about 5:00 p.m. on Friday, June 7, 2002, Petitioner received Orders from FPSC Commissioners Jaber and Palecki declining recusal from Docket No. 1305-TP (Pet. Sup. App., Tabs 25 and 26). As can be seen, these Orders are virtually identical to the Memorandum Recommendation prepared by Richard Bellak on May 30, 2002, (Pet. Sup. App., Tab 21) and, apparently, were prepared in advance of May 30, 2002, since they are specifically referenced in Mr. Bellak's Memorandum at pages 2 and 5. (Id.) The fact that these Orders, by two of the three members of the FPSC who conducted the evidentiary proceedings in this matter, were not filed until late Friday, is yet another indication of the FPSC's intent to frustrate Petitioner's opportunity for relief. Further, it is clear that both of these Commissioners not only declined to disqualify

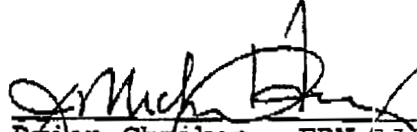
themselves but "defended" their actions. This is an additional reason, which alone, is sufficient for this Court to issue a notice to show cause to Commissioners Jaber and Palecki. See Fuster-Escalona v. Wisotsky, 781 So. 2d. 1063 (Fla. 2000); Valltos v. State of Florida, 707 So. 2d 343 (Fla. 2nd DCA 1997). In Valltos, the Court ruled:

When reviewing a Motion for Disqualification, the trial judge may look only at the facial sufficiency of the Motion, and attempts to refute the charges of partiality in an order denying the Motion exceed the proper scope of inquiry and on that basis alone establish grounds for disqualification.

See Bundy v. Rudd, 366 So. 2d. 440, 442 (Fla. 1978). See also Frost v. Ward, 622 So. 2d 597 (Fla. 4<sup>th</sup> DCA 1993). The Court went on to note, at the conclusion of its opinion, that the response filed on behalf of the trial judge created an "intolerable adversary atmosphere between the trial judge and the litigant." (Supra) Such intolerable adversarial atmosphere certainly exists between Petitioner and Commissioners Jaber and Palecki as documented by their Orders (Id.) and Petitioner requests that this Court immediately issue a notice to show cause to Commissioners Jaber and Palecki.

Further, Petitioner again requests this Court to mandate that the FPSC hear only the pending motions to disqualify at tomorrow's Agenda Conference and consider no other pending motions until Petitioner has the opportunity for the Commission's ultimate ruling

reviewed by this Court. Failure to halt the FPSC at this point will cause a new, onerous agreement proposed by BellSouth to be imposed upon Petitioner which will jeopardize Petitioner's ability to remain in the marketplace.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the persons listed below by hand delivery or U.S. mail this 10<sup>th</sup> day of June, 2002.



\_\_\_\_\_  
Attorney

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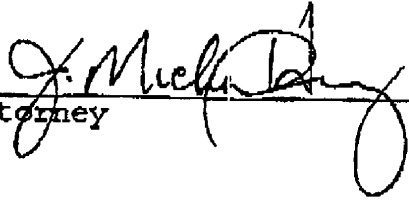
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Amendment to Petition for Emergency Issuance of Writ of Mandamus, Writ of Prohibition and Other Relief complies with the font requirements of Rule 9.100(1), Florida Rules of Appellate Procedure.

  
\_\_\_\_\_  
Attorney