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June 28, 2002

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

RE: Docket No. 001305-TP (Supra)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to Supra Telecommunications & Information System, Inc.'s Motion to Strike BellSouth's Letter of October 31, 2001; Strike BellSouth's Post-Hearing Position/Summary with Respect to Issue B; and to Alter/Amend Final Order Pursuant to F.R.C.P. 1.540(B), which we ask that you file in the captioned docket.

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

Sincerely,

James Meza III (KA)

James Meza III

Enclosures

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

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 28th day of June, 2002 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Supra Telecommunications & Information System, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996.	)	Docket No. 001305-TP
	)	Filed: June 28, 2002

BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION TO STRIKE BELLSOUTH'S LETTER OF OCTOBER 31, 2001; STRIKE BELLSOUTH'S POST-HEARING POSITION/SUMMARY WITH RESPECT TO ISSUE B; AND TO ALTER/AMEND FINAL ORDER PURSUANT TO F.R.C.P. 1.540(B)

Bellsouth Telecommunications, Inc. ("BellSouth") opposes Supra Telecommunications & Information Systems, Inc.'s ("Supra") Motion to Strike BellSouth's Letter of October 30, 2001, to Blanca Bayo; Strike BellSouth's Post-Hearing Position/Summary with Respect to Issue B; and to Alter/Amend Final Order Pursuant to F.R.C.P. 1.540(B) ("Motion" or "Motion to Strike").[1] For the reasons discussed below, the Florida Public Service Commission ("Commission") should reject Supra's Motion, which is nothing more than Supra's latest attempt to game the regulatory process and to delay operating under the new Interconnection Agreement.

INTRODUCTION

With this motion, Supra is attempting to (1) strike BellSouth's October 30, 2001, letter correcting an unintentional scrivener's error in its post-hearing brief

[1] Supra filed the instant motion on June 17, 2002, and served BellSouth via U.S. mail. Accordingly, under Rules 28-106.24 and 28-106.103, Florida Administrative Code, BellSouth's response is due in twelve (12) days or by July 1, 2002.

as well as the portion of BellSouth's brief relating to Issue B[2] – which agreement template shall be used as the base agreement into which the Commission's decision on the disputed issues will be incorporated; and (2) substantively alter/amend Order No. PSC-02-0413-FOF-TP ("Final Order"). Supra filed the instant motion more than seven months after BellSouth filed its post-hearing brief and its October 30, 2001, letter, over three and one-half months after the Commission issued its final vote on March 5, 2002, two and one-half months after the Commission issued the Final Order on March 26, 2002, and after the Commission resolved all post-hearing motions at the June 11, 2002 agenda conference.

Stripped of its rhetoric, illogical analysis, and misstatements of the law, Supra is essentially asking this Commission to, once again, revisit its decision regarding Issue B and its finding that BellSouth's template agreement and not Supra's will be used in implementing the Commission's decision. The Commission has rejected Supra's position on Issue B twice – once in the Final Order and once again in denying Supra's motion for reconsideration at the June 11, 2002, agenda conference.

Consistent with Supra's previous nineteen post-hearing motions, Supra's latest Motion, as will be established below, is based on pure fiction and devoid of any legitimate legal support or analysis. The Commission should not tolerate

[2] Supra repeatedly refers to this issue in its motion as "Issue B." However, in its Final Order, the Commission identified Issue A as the issue relating to "which agreement template shall be used as the base agreement into which our decisions on the disputed issues will be incorporated." The Final Order identified Issue B as the issue relating to the appropriate forum for submission of disputes under the new agreement. Based on the substance of Supra's Motion, BellSouth presumes that Supra is actually referring to Issue A and not Issue B in the Motion. Nevertheless,

Supra's latest attempt to abuse the regulatory process and should summarily deny the Motion.

I. Supra Waived any Objection to the October 30, 2001, Letter and the Equities Dictate that Supra's Motion Be Denied.

Assuming arguendo that Supra had a right to object to BellSouth's omission of a summary position statement in its post-hearing brief or its correction of this unintentional scrivener's error with its October 30, 2001, letter, there is no question that Supra has waived any such right. The doctrine of waiver has been long recognized in Florida and is defined as "the intentional relinquishment of a known right or the voluntary relinquishment of a known right, or actions or conduct, which warrants an inference of the relinquishment of known right." 22 Florida Jur. 2nd, Estoppel and Waiver at §§ 111, 112; see also, Arbogast v. Bryan, 393 So. 2d 606, 607 (Fla. 4th DCA 1981).

There is no question that Supra received BellSouth's October 26, 2001, post-hearing brief and BellSouth's October 30, 2001, letter. There is also no question that, instead of timely objecting to this letter, Supra did not bring this motion until (1) more than seven months after Supra received the post-hearing brief and the October 30, 2001, letter; and (2) after Staff issued its recommendation on February 2, 2002, the Commission voted on all the relevant issues on March 5, 2002, the Commission issued its March 26, 2002 Final Order, and the Commission voted on Supra's post-hearing motions, including two motions for reconsideration, at the June 11, 2002 agenda conference. During

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to avoid any confusion, BellSouth will refer to the issue in question as Issue B for the purposes of this Opposition.

this same time period, Supra raised at least 19 post-hearing motions, including a request that the Commission reconsider its decision on Issue B.

Consequently, by waiting more than seven months after BellSouth corrected the scrivener's error to raise this argument and until after the Commission resolved all of Supra's post-hearing motions, Supra waived any objection it may have had to BellSouth's October 30, 2001, letter or to BellSouth's post-hearing brief.[3] Supra's Motion to Strike is nothing more than an untimely request for the Commission to reconsider and reverse itself on Issue B and thus should be summarily rejected.

Moreover, the inequities in granting Supra's request now, after the proceedings have completed and without BellSouth having an opportunity to cure any purported procedural defect are insurmountable. Supra could have raised this argument seven months ago but chose to remain silent. Now, after the proceeding is closed, Supra is asking the Commission to strike BellSouth's position and to adopt Supra's position on Issue B solely because of an alleged hyper-technical filing error, which is denied. This error could have been easily cured, if necessary, had Supra raised the issue or objected to BellSouth's filings in a timely fashion. Supra should not benefit from this intentional delay. Thus, in addition to waiving any right to object to BellSouth's post-hearing brief or to BellSouth's October 30, 2001, letter, the equities dictate that Supra's Motion to Strike be denied.

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[3] Supra's allegation that it did not obtain information from its public records request until May 2002 to support the instant motion does not remedy Supra's waiver of its right to object to BellSouth's post-hearing brief and its October 30, 2001, letter. This is so because Supra could have raised the same arguments as to why BellSouth's October 30, 2001, letter and its brief are

II. BellSouth Did Not Violate the Procedural Order or Otherwise Waive Its Right to Assert a Position on Issue B.

Even if Supra did not waive its right to object, Supra's argument fails on the merits (or lack thereof). Supra's tenuous argument appears to be that BellSouth waived its right to present a position on Issue B in the now-completed arbitration proceeding because BellSouth unintentionally failed to include a summary position statement for Issue B in its brief. Supra makes this argument even though (1) BellSouth submitted a post-hearing statement on all issues in the arbitration, including Issue B; (2) BellSouth submitted a summary position statement for all other issues; and (3) BellSouth corrected this unintentional scrivener's error with its October 30, 2001, letter. In support of this erroneous argument, Supra cites to the Procedural Order in this docket and to two Commission Orders. However, consistent with its previous mischaracterizations of Commission precedent and rules, the cited authority does not support Supra's Motion.

First, contrary to Supra's arguments, the Procedural Order, Order No. PSC-01-1401-PCO-TP, does not support any argument that a party waives its right to argue an issue when it submits a post-hearing statement on an issue but inadvertently fails to include a summary position statement. Rather, the Procedural Order provides that a party is required to file a post-hearing statement of issues and positions pursuant to Rule 28-106.215 and that the failure to file this post-hearing statement results in a party's waiver of all issues and potential dismissal from the proceeding:

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improper without any additional information. The simple fact is that Supra received BellSouth's

> Each party shall file a post-hearing statement c 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 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.

Indeed, Rule 28-106.215, Florida Administrative Code, which is the rule that parties must comply with in providing post-hearing statements, makes no mention of summary position statements. This rule simply provides, in relevant part, that the "[p]arties may submit proposed findings of fact, conclusions of law, orders, and memoranda on the issues within a time designate by the presiding officer. . . ."

Consequently, nothing in Rule 28-106.25 or the Procedural Order supports Supra's argument that the failure to file a summary position statement alone constitutes a waiver of the issue. At best, the above-cited authority supports a finding that the failure to file a post-hearing statement, not a summary, constitutes a waiver. In the instant matter, BellSouth filed a post-hearing statement on all issues, including Issue B. Thus, BellSouth complied with the Procedural Order and Supra's argument is facially deficient.

Second, the authority cited by Supra actually supports BellSouth's position that it did not waive its right to assert a position on Issue B. For instance, Supra cites to Staff's recommendation on a specific issue – Issue L -- in the

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October 30, 2001, letter but did not object to it until June 17, 2002, more than seven months later.

BellSouth/AT&T arbitration (Docket No. 000731-TP) in support of its argument. In the AT&T/BellSouth arbitration, Staff found that that AT&T waived its position for Issue L because it failed to "present any evidence on this issue at hearing or in its brief." Staff Rec. at 122. Unlike AT&T, BellSouth did present evidence on Issue B at the hearing, and BellSouth did include a post-hearing statement on Issue B in its brief. Thus, Staff's recommendation in the AT&T/BellSouth arbitration is distinguishable from the instant matter and actually supports BellSouth's position – that the failure to file a post-hearing statement on an issue, not a summary position, results in a waiver of that issue.

Similarly, Supra cites to Order No. PSC. 01--0824-FOF-TP in the MCI/BellSouth arbitration (Docket No. 000649-TP) to support its argument. However, as with Staff's recommendation in Docket No. 000731-TP discussed above, this decision is distinguishable from the instant situation and actually supports BellSouth's argument. In that case, unlike the case at hand, BellSouth failed to address three issues in its post-hearing brief. Several months later, BellSouth filed a letter with the Commission wherein it addressed the issues. However, the Commission refused to consider the arguments set forth in the letter in its Final Order. See Order No. PSC-01-0824-FOF-TP at 6. Importantly, BellSouth's failure to file a summary position statement was not at issue in the MCI/BellSouth arbitration.

Accordingly, the Commission's decision in Order No. PSC-01-0824-FOF-TP is inapplicable to the instant matter and does not support Supra's argument.

Unlike the MCI arbitration, BellSouth addressed Issue B in its post-hearing brief and the Commission addressed BellSouth's arguments in its Final Order.

In sum, Supra has provided no legitimate support for its ludicrous proposition that BellSouth waived its position on Issue B by failing to initially include a summary position statement on that issue in its brief. Supra relies on inapplicable Commission precedent, mischaracterizations of previous Commission action, and misinterpretation of Commission orders and rules to create this facially deficient argument. For these reasons, the Commission should summarily deny Supra's Motion to Strike.

III. BellSouth's October 30, 2001, Letter Was Procedurally Proper.

Next, Supra argues that BellSouth's October 30, 2001, letter should be stricken because it is not a motion in compliance with Rule 28-106.204(1), Florida Administrative Code and thus is as an unauthorized filing. See Motion at 6-7. Rule 28-106.204(1), requires that "[a]ll requests for relief shall be made by motion. All motions shall be in writing . . . ." The Commission should reject this argument for the following reasons.

First, as discussed in Section 1 above, Supra has waived its right to object to BellSouth's correction of the oversight. Second, as a matter of practice before the Commission, parties submit letters to the Commission to correct scrivener errors or other errors that do not affect the substance of an argument. For instance, on June 18, 2002, the Florida Cable Telecommunications Association, Inc. ("FCCA") and Time Warner Telecom of Florida, L.P. ("Time Warner"), identical to BellSouth in this proceeding, filed a letter with the Commission to

include a corrected post-hearing brief that specifically included their summary position statements for the issues in Docket No. 000075-TP. See FCCA and Time Warner's June 18, 2002, Letter and Corrected Brief, attached hereto as Exhibit A. Like BellSouth regarding Issue B, Time Warner and the FCCA inadvertently omitted their summary position statements in their original post-hearing brief due to a scrivener's error. Id.

Similarly, on June 21, 2002, AT&T Communications of the Southern States, LLC ("AT&T), MCI WorldCom, Inc. ("WorldCom"), and Florida Digital Network, Inc. ("FDN") filed a letter in Docket No. 990649B-TP to correct a typographical error in their post-hearing brief. See AT&T's, WorldCom's, and FDN's June 21, 2002 filing, attached hereto as Exhibit B. Furthermore, in this very proceeding, Supra filed a letter instead of a motion to correct errors in one of its previous filings. Specifically, on May 8, 2002, Supra filed a letter with the Commission asking the Commission to substitute the signature pages of the affidavits for Olukayode Ramos, Supra's CEO, and Brian Chaiken, Supra's general counsel, which were attached to its Second Supplemental Motion to Recuse and which were signed by someone other than Messrs. Ramos and Chaiken. See Supra's May 8, 2002 Letter, attached hereto as Exhibit C.

Identical to the FCCA and Time Warner, and like AT&T and Supra, BellSouth submitted its October 30, 2001, letter to correct an inadvertent scrivener's error, which did not affect or modify any of the substantive arguments that BellSouth made in its post-hearing brief. In fact, the summary position statement simply summarized the more detailed argument that BellSouth set

forth in its brief regarding Issue B.[4] Accordingly, BellSouth's October 30, 2001, letter was proper and should not be stricken.

Third, even if the Commission found that BellSouth's request to correct a scrivener's error needed to comply with Rule 28-106.204(1), the October 30, 2001 letter should not be stricken because it actually complies with the rule. Namely, to the extent the October 30, 2001, letter seeks affirmative relief, it is in writing and thus complies with Rule 28-106.204(1). It is well settled that "courts should look to the substance of a motion and not to the title alone." Mendoza v. Board of County Commissioners/Dade County, 221 So. 2d 797, 798 (Fla. 3rd DCA 1969). Accordingly, Supra's argument should be rejected because the October 30, 2001, complies with Rule 28-106.204(1).

Ironically, this argument establishes that Supra's instant Motion to Strike, which it filed more than seven months after BellSouth submitted its October 30, 2001, letter, is time-barred by Rule 28-106.204, Florida Administrative Code. This rule requires that any response to a motion must be submitted within seven days of service.[5] This very fact highlights the self-serving, inconsistent, and circular aspect of Supra's argument. Specifically, Supra argues that BellSouth's letter should be stricken because it is not styled as a motion. However, if BellSouth's letter is construed as a motion, then Supra's current motion would be time-barred.

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[4] Because of this fact, the Commission's decision in the MCI/BellSouth arbitration decision (Order No. PSC-01-0824-FOF-TP) is inapplicable to the instant matter. This is so because unlike the letter submitted in the MCI/BellSouth arbitration, the October 30, 2001, letter summarized BellSouth's previously set forth position and thus only corrected a minor scrivener's error.

[5] Of course, depending on how a party was served, the time to respond may be extended by up to five additional days pursuant to Rule 28-106.103, Florida Administrative Code.

Moreover, in this very docket, Supra has filed letters with the Commission to request specific relief. For instance, on February 12, 2002, Supra filed a letter requesting that the Commission defer a vote on the arbitration proceeding. Most recently, on June 7, 2002, Supra filed a letter requesting a deferral of the Commission's vote on Supra's motions for reconsideration and motions to recuse. In each instance, Supra did not frame the letters as motions.[6] Thus, under Supra's logic, its own letters constituted impermissible filings. Apparently, the filing of a letter with the Commission is only procedurally proper if Supra files the letter.

For all of these reasons, Supra's Motion to Strike BellSouth's October 30, 2001, letter should be denied.

IV. Supra's Request for a Modified Order Pursuant to Rule 1.540(b) Should Be Denied.

Supra requests that, pursuant to Rule 1.540(b) of the Florida Rules of Civil Procedure, the Commission modify/amend the Final Order "to reflect Supra's position on [Issue B] (i.e. that the current Interconnection Agreement be used as the template for all subsequently [sic] rulings by the Commission in this arbitration docket)." Motion at 9. Supra premises its request to amend/modify the Final Order pursuant to Rule 1.540(b)(2) and (3), which provides:

> the court may relieve a party or a party's representative from a final judgment, decree, order, for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or

[6] Notwithstanding the fact that Supra filed its request for relief via letters rather than a motion, BellSouth filed letters in opposition to Supra's requests, which is exactly what Supra could have done in response to BellSouth's October 30, 2001, letter.

> rehearing; (3) fraud . . ., misrepresentation, or other misconduct of an adverse party.

Specifically, Supra claims that relief is warranted because of newly discovered evidence that purportedly establishes misconduct between Staff counsel and BellSouth. Supra's claim of misconduct is solely based on Staff counsel informing BellSouth that it failed to include a summary position on Issue B in its post-hearing brief. Motion at 9. The Commission should reject Supra's request to amend/modify the Final Order pursuant to Rule 1.540(b) for the following reasons.

A. Supra Does Not Meet Standard to Obtain Relief for Newly Discovered Evidence.

First, Supra does not meet the standard to obtain relief under Rule 1.540(b) for newly discovered evidence. The requirements for obtaining relief from a judgment based on newly discovered evidence are: (1) that the evidence will probably change the result if a new trial is granted; (2) that the evidence was discovered after the time for serving a motion for new trial or for rehearing; (3) that the evidence could not have been discovered before then by due diligence; and (4) that the evidence is material and not cumulative. Henry P. Trawick, Jr., Florida Practice & Procedure, § 26-8 at 466 (2001); see also, Morhaim v. State Farm Fire & Cas. Co., 559 So. 2d 1240, 1241 (Fla. App. 3rd DCA 1990); Fla. R. Civ. P. 1.540(b)(2) (stating that relief from a judgment can be given for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing"). Further, it is well-settled that "'a new

trial based on newly discovered evidence must be cautiously granted and is looked upon with disfavor.'" Morhaim, 559 So. 2d at 1241 (quot. omitted).

1. Evidence Would Not Change Result in New Trial.

Regarding the first requirement – that the evidence will probably change the result in a new trial – Supra has presented no legitimate argument or any evidence to establish that the new evidence would result in the Commission finding that Supra's template agreement should be used instead of BellSouth's. Rather, Supra's argument appears to be that BellSouth waived its position on Issue B by not submitting a summary position and thus the Commission would be forced to adopt Supra's position on Issue B. Indeed, Supra presumptively and conclusory states that "the undisputed evidence demonstrates that BellSouth had failed to comply with a substantive deadline. Further, that Wayne Knight communicated with BellSouth to inform them of this failure; and that had Mr. Knight not communicated with BellSouth, Supra would have prevailed on the issue." Motion at 9. This speculative and wholly conclusory argument is insufficient to satisfy Supra's burden.

Further, as stated in Sections II and III above, it is clear that (1) BellSouth's failure to initially include a summary position statement in its brief for Issue B did not result in BellSouth's waiver of that issue; and (2) BellSouth's October 30, 2001, letter was not an improper filing. Accordingly, Supra's argument that the Commission would reach a different conclusion if this new evidence is presented at a new hearing is erroneous and a product of wishful thinking.

In addition, contrary to Supra's suggestion, the Commission is not obligated to select among the options presented to it by the parties in deciding an issue. Rather, "the Florida Public Service Commission is required by [Florida's] statutes and case law to reach its own independent findings and conclusions based upon the record before it." International Minerals & Chemical Corp. v. Mayo, 217 So.2d 563, 566 (Fla. 1969); see also Kimball v. Hawkins, 264 So.2d 463, 465 (Fla. 1978) (noting "legislative intent to extend broad discretion to the Public Service Commission in making its decision"); Insurance Co. of North America v. Morgan, 406 So.2d 1227, 1229 (Fla. Ct. App. 5th Dist. 1981) (same).

In resolving Issue B in this case, the Commission was entitled to take into consideration all of the evidence and applicable law and decide the matter as it sees fit, as long as the Commission's decision was neither arbitrary nor capricious (which it was not). The Commission's decision is not tied to the positions set forth by the parties. Accordingly, even on rehearing and assuming arguendo that BellSouth waived its position on Issue B (which is denied), the Commission could still reject Supra's position on Issue B. Indeed, in the Final Order, the Commission recognized that "BellSouth [was] the only party that produced a complete agreement in the record – in other words, an agreement which represents the current state of the industry and interpretation of the Act." Order No. PSC-02-0413-FOF-TP at 27-28.

Thus, instead of establishing that the Commission's decision would change on rehearing in light of this new evidence, Supra relies on a hyper-technical procedural argument, which is incorrect and insufficient to satisfy its

burden to obtain relief under Rule 1.540(b). Consequently, Supra's Motion should be denied.

2. Supra's Motion Is Untimely.

Similarly, Supra's Rule 1.540(b) motion is untimely because (1) Supra did not file the motion prior to the time to file a motion for rehearing; and (2) Supra could have discovered the evidence prior to that time by exercising due diligence. As stated by the learned commentator Trawick, "[n]ewly discovered evidence means evidence . . . that was discovered after the time for serving a motion for new trial or for rehearing, that could not have been discovered before then by due diligence . . . ." Florida Practice & Procedure, § 26-8 at 466; see also, Fla. R. Civ. P. 1.540(b)(2) (stating that relief from a judgment can be given for "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing").

Under Rule 1.530(b), a motion for new trial or rehearing must be filed within 10 days of the filing of a judgment. See Fla. R. Civ. P. 1.530(b). Thus, in order to be entitled to relief under Rule 1.540(b) for newly discovered evidence, Supra must prove that, through the exercise of due diligence, it could not have discovered this new evidence prior to the time to file a motion for rehearing under Rule 1.530(b) or by April 6, 2002. See Brown v. McMillian, 737 So. 2d 570 (Fla. 1999) (It is the movant's burden under rule governing motion to set aside judgment based on newly discovered evidence to establish the exercise of due diligence.).

In the instant matter, Supra claims that the newly discovered evidence – emails indicating a procedural conversation in October 2001 between Staff

counsel and BellSouth's counsel – was not received by Supra until May 2002. Motion at 3. Supra claims that it obtained this email as a result of its March 2002 public records request, but that, because it did not receive the email until May 2002 from the Commission, it could not file a motion for rehearing. Id. at 3, 9. Importantly, however, Supra provides no evidence or explanation as to why it did not issue its public records request prior to March 2002.

Blaming the Commission for delaying the production of documents requested in a public records request cannot constitute due diligence. This is so because Supra waited over four months – October 2001 to March 2002 – and until after the Commission's final vote in the arbitration proceeding before issuing its public records request. Indeed, it is undisputed that Supra knew as of October 2001 that BellSouth failed to include a summary position statement for Issue B in its brief and that BellSouth subsequently corrected this unintentional scrivener's error with its October 30, 2001, letter. Further, it is undisputed that Supra had an absolute right to issue a public records request at any time under Section _____, Florida Statutes. Despite these facts, Supra did nothing for four months. Accordingly, it is clear that Supra did not exercise due diligence in attempting to obtain this alleged new evidence (and Supra has provided no evidence or argument to the contrary). Therefore Supra's Rule 1.540(b) Motion is untimely.

B. Supra Does Not Meet the Standard to Obtain Relief for Misconduct.

In addition, Supra claims that the Commission should modify/amend the Final Order pursuant to Rule 1.540(b) because of purported misconduct between

BellSouth and Staff counsel. Under Rule 1.540(b), a court may relive a party from a judgment for "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other conduct;" Fla. R. Civ. P. 1.540(b)(3). In deciding these types of motions, Florida courts have routinely looked at federal decisions for guidance. As stated by the court in Wilson v. Charter Marketing Co., 443 So. 2d 160, 161 (Fla. 1st DCA 1983):

> . . . because the Florida Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure, federal decisions are highly persuasive in ascertaining the intent and operative effect of various provisions of the rules. In order to be successful under a Federal Rule 60(b)(3) motion, the moving party must establish by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense.

(cit. omitted). Supra's allegation of misconduct is solely based on the fact that Staff counsel informed BellSouth's counsel that BellSouth failed to include a summary position statement for Issue B in its brief. The Commission should reject this argument for the following reasons.

1. No Misconduct Occurred.

First, Staff counsel's communication with BellSouth does not constitute misconduct. Rule 25-22.033, Florida Administrative Code, does not prohibit communications between parties and Staff regarding procedure or matters not concerned with the merits of the case. Advising an attorney that a summary position is missing from a party's brief is purely procedural in nature, particularly

when the brief contained argument by BellSouth on the substance of the issue. BellSouth had merely neglected to include its thirteen word summary position.

Supra apparently wants this Commission to believe that BellSouth was somehow saved from certain loss on Issue B by Staff counsel pointing out an oversight on BellSouth's part. BellSouth's thirteen word sentence would certainly not have caused BellSouth's brief to exceed the page restriction. Moreover, when BellSouth filed its amendment to the brief on October 30, 2001, Supra could certainly have objected but did not.

Supra claims that the only reasonable conclusion from these e-mails is that the Staff is biased and that Staff assisted "BellSouth in litigating this docket." These allegations are totally unfounded and constitute nothing more than Supra's latest "conspiracy theory". To make an attorney aware of a mistake or of a procedural issue is not bias; it is merely courteous notice that Staff provides to both parties.

In fact, in reviewing the information produced in response to Supra's public records request, BellSouth has discovered that Staff counsel made a similar contact with Supra's counsel regarding questions Staff had with Supra's post-hearing brief. These procedural questions included questions as to Supra's citation method and apparent improper use of confidential information in the brief. See October 30, 2001, email of Laura King; October 30, 2001, email of Wayne Knight, collectively attached hereto as Exhibit D. Thus, there can be no question that staff counsel extended the same courtesies to both parties regarding

procedural issues that arose in the parties' post-hearing briefs. Accordingly, Supra's Motion should be denied because no misconduct occurred.

2. The Commission Has Previously Determined that No Misconduct Occurred.

Second, Supra's Motion should also be denied because the Commission previously determined in Order No. PSC-02-0807-PCO-TP that Staff counsel's communication with BellSouth was not improper. Specifically, on June 5, 2002, Supra filed its Verified Second Supplemental Motion to Disqualify and Recuse. In this motion, Supra argued that recusal of the Commission and Staff was proper because the Commission was allegedly biased in favor of BellSouth. In support of this wholly fictitious claim, Supra cited to the same communication and series of emails that Supra now relies on in its current Rule 1.540(b) Motion. Namely, Supra argued that, among other things, recusal was warranted because Staff counsel informed BellSouth that it failed to include a summary position statement for Issue B in its brief.

On June 14, 2002, the Commission issued Order No. PSC 02-0807-PCO-TP, wherein it denied Supra's Second Supplemental Motion to Disqualify and Recuse and found that "the facts alleged in the Second Supplemental Motion, as opposed to Supra's fanciful, tenuous and wholly conclusory conjecture about them, are legally insufficient to support recusal." Order No. PSC-02-0807-PCO-TP at 2.

In denying Supra's Second Supplemental Motion to Disqualify and Recuse, the Commission rejected any argument that the acts complained of were improper or rose to the level of misconduct. Accordingly, because the

Commission previously found that Staff counsel's communication with BellSouth was not improper, Supra's Motion should be summarily rejected.[7] Consistent with Supra's pattern of filing frivolous motions in an attempt to delay operating under the new Interconnection Agreement and to abuse the regulatory process, Supra was aware of the Commission's decision in Order No. PSC-02-0807-PCO-TP rejecting its claim of misconduct and impropriety but filed the instant motion anyway.

3. Conduct Complained of Did Not Prevent Supra from Presenting Its Case.

Third, in order to obtain relief under Rule 1.540(b) for purported misconduct, the party seeking relief must prove by clear and convincing evidence that "the conduct complained of prevented the losing party from fully and fairly presenting his case or defense." Wilson, 443 So. 2d at 161 (citing Bunch v. United States, 680 F.2d 1271 (9th Cir. 1982)). Supra has presented no evidence or argument establishing how the communication complained of prevented Supra from "fully or fairly" presenting its case or defense. Indeed, there is no question that (1) Supra presented evidence at the hearing on Issue B; (2) Supra filed a post-hearing brief on Issue B; and (3) the Commission rejected Supra's position on Issue B twice.

[7] This fact also supports an argument that Supra's motion is arguably barred by the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, "is a judicial doctrine, which in general terms, prevents identical parties from relitigating issues which have been already decided." See Rice-Lamar v. City of Ft. Lauderdale, 2002 WL 985439 *5 (Fla. 4th DCA 2002). The elements of collateral estoppel are (1) the parties and the issues are identical; (2) the particular matter is fully litigated and determined in a contest, which results in a final decision of a court of competent jurisdiction. Id. "Courts have emphasized that collateral estoppel precludes relitigation of issues actually litigated in a prior proceeding. Collateral estoppel does not require prior litigation of an entire claim, only a particular issue." Id. (cit. omitted).

Rather, Supra's argument consists entirely of a hyper-technical procedural argument that had no bearing whatsoever on Supra's ability to present its case. Simply put, Supra argues that BellSouth waived Issue B and thus the Commission would have had to adopt Supra's position on that issue. Such an argument is insufficient to establish by clear and convincing evidence that the acts complained of prevented Supra from presenting its case.

C. Supra's Requested Relief Cannot Be Granted Under Rule 1.540(b).

Supra requests that the Commission alter/amend the Final Order to reflect Supra's position on Issue B. Motion at 9. Such relief, however, is not available under Rule 1.540(b). Assuming arguendo that Supra is entitled to relief under Rule 1.540(b) (which is denied), the Commission could not alter/amend its Final Order in such a fashion. The most the Commission could do would be to vacate the Final Order as to Issue B (which BellSouth vehemently objects to).[8] See Zwakhals v. Senft, 206 So. 2d 62, 63 (Fla. 4th DCA 1968) ("The procedure for vacating judgments under Rule 1.38 (Now 1.540), F.R.C.P., 31 F.S.A., does not contemplate disposition on the merits. . . The effect is to return the parties to the position they occupied before the judgment was entered.")

With this Motion, Supra is attempting to submit a second motion for reconsideration on Issue B. Supra originally asked the Commission to reconsider its decision on Issue B in its April 1, 2002 Motion for Reconsideration.

[8] A rehearing, however, would not be warranted because the Commission previously found in Order No. PSC-02-0807-PCO-TP that the acts complained of did not warrant recusal of the Commission and Staff and thus were not improper or rise to the level of misconduct. In addition, as established in Section IV(D), infra, Supra's instant request for Rule 1.540(b) relief is arguably barred by res judicata.

The Commission denied Supra's request at its June 11, 2002 agenda conference. Not satisfied with this result, Supra has fashioned this Rule 1.540(b) Motion as another request for the Commission to reconsider its substantive decision on Issue B, which is impermissible. See Rule 25-22.060(1)(a) ("The Commission will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration."); see also, Trawick, Florida Practice & Procedure, § 26-8 at 467 ("A second motion for relief raising the same issues or raising the same issues as a prior motion for new trial or for rehearing is improper . . . .").

Accordingly, because the relief requested by Supra is not available under Rule 1.540(b) and because Supra's Motion is nothing more than an impermissible second motion for reconsideration on Issue B, the Commission should deny Supra's Motion.

D. Supra's Recent 1.540(b) Motion Is Barred by the Doctrine of Res Judicata.

"Under Rule 1.540(b), a party is generally precluded from bringing a successive motion which merely alleges matters which were or could have been alleged in the initial motion for post-judgment relief." State v. Bailey, 603 So.2d 1384, 1386 (Fla. 1st DCA 1992). Res judicata bars a second motion for relief under Rule 1.540(b) if the grounds asserted are identical to "those incorporated in the first motion for relief . . . or relate to matters of evidence and procedure which with due diligence could have been included in such motion as grounds for the relief prayed." Perkins v. Salem, 249 So. 2d 466, 466 (Fla. 1st DCA 1971).

In the case at hand, Supra filed a motion for reconsideration on April 10, 2002, wherein it asked the Commission to reconsider its decision to deny Supra's request for a rehearing. In that motion, Supra stated that reconsideration and a new hearing was warranted under Rule 1.540(b): "As such there is evidence of 'misrepresentation' as well as 'misconduct of an adverse party' – in this case BellSouth. Accordingly, Rule 1.540(b), Florida Rules of Civil Procedure, allows the Commission to order a new hearing upon the facts that have been presented in this Motion." See Supra's April 10, 2002 Motion for Reconsideration.[9]

On May 30, 2002, Staff issued a recommendation, wherein it recommended that the Commission deny Supra's motion, including Supra's argument that a new hearing was warranted under Rule 1.540(b). The Commission voted to adopt Staff's recommendation at the June 11, 2002 agenda conference. Notwithstanding this fact, Supra filed the instant Rule 1.540(b) Motion on June 17, 2002.

Under Florida law, this second Motion appears to be barred by res judicata. This is so because, as stated above, Supra could have discovered and thus raised the grounds set forth in its second Rule 1.540(b) Motion (communication between Staff counsel and BellSouth regarding post-hearing brief) in its first request for Rule 1.540(b) relief had it exercised due diligence. Supra did not exercise due diligence because it inexcusably waited over four months and after the Commission's final vote to issue its public records request.

[9] Supra stated in it s Motion that Supra was not seeking relief from the Final Order with its Motion for Reconsideration. This statement constitutes pure "lip service", however, as Supra cited to and relied upon Rule 1.540(b) as grounds for a rehearing in its Motion for Reconsideration.

Therefore, the instant Motion is barred by res judicata as an impermissible successive motion for Rule 1.540(b) relief.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission refuse to consider and deny Supra's Motion to Strike BellSouth's Letter of October 30, 2001, to Blanca Bayo; Strike BellSouth's Post-Hearing Position/Summary with Respect to Issue B; and to Alter/Amend Final Order Pursuant to F.R.C.P. 1.540(B).

Respectfully submitted this 28th day of June 2002.

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452433v1

Florida Cable Telecommunications Association

VIA HAND DELIVERY

June 18, 2002

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: Docket No. 000075-TP (Phase IIA)

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and 15 copies of the Florida Cable Telecommunications Association, Inc.'s and Time Warner Telecom of Florida, L.P.'s Corrected Joint Posthearing Brief, and a diskette in Word Perfect format. The Corrected Joint Posthearing Brief includes the brief position statements which were inadvertently omitted due to a scrivener's error from the subparts to Issue 17.

Copies of the Corrected Joint Posthearing Brief have been served on the parties of record pursuant to the attached certificate of service. Please acknowledge receipt of filing of the above by stamping the duplicate copy of this letter and returning the same to me.

Thank you for your assistance in processing this filing. Please contact me with any questions.

Sincerely,

Michael A. Gross
Vice President, Regulatory Affairs &
Regulatory Counsel

MAG/mj

Enclosure

cc: All Parties of Record

Exhibit A

246 East 6th Avenue • Tallahassee, Florida 32303 • (850) 681-1990 • FAX (850) 681-9676 • www.fcta.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Cable Telecommunications Association's and Time Warner Telecom's Corrected Joint Posthearing Brief in Docket 000075-TP has been furnished by U.S. Mail delivery this 19th day of June, 2002:

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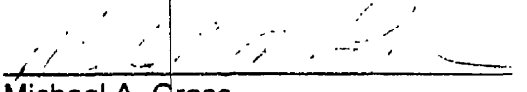

Michael A. Gross

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunications Act of 1996.	Docket No. 000075-TP (Phase IIA) Filed: June 18, 2002

CORRECTED
JOINT POSTHEARING BRIEF OF THE FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC. AND TIME WARNER TELECOM OF FLORIDA, L.P.

The Florida Cable Telecommunications Association, Inc. (FCTA) and Time Warner Telecom of Florida, L.P. (TimeWarner), pursuant to Rule 28-106.2 Florida Administrative Code, and Order No. PSC-02-0139-PCO-TP, issued January 31, 2002, (Second Order on Procedure, Schedule and Issues, Phase II) hereby file their Corrected Joint Posthearing Brief.

STATEMENT OF BASIC POSITION

The Commission is seeking to establish the most appropriate compensation mechanism to govern the transport and delivery of traffic subject to Section 251 of the Telecommunications Act of 1996 ("the 1996 Act") in the event that carriers cannot successfully negotiate an agreement. Phase I of this docket focused on issues concerning the establishment of an intercarrier compensation mechanism for the delivery of ISP-bound traffic. An Administrative Hearing regarding issues delineated for Phase I of this docket was conducted on March 7-8, 2001. On March 27, 2002, the parties filed a Joint Stipulation, wherein the parties suggested that the Commission defer action on the issues raised in Phase I of the docket based upon the FCC's ruling on April 27, 2001, in *Implementation of the Local Competition Provisions in the Telecommunication Act of 1996, CC*

Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131, rel. April 27, 2001 (ISP Remand Order). On May 7, 2002, the Commission entered Order No. PSC-02-0634-AS-TP approving the stipulation. In its order, the Commission agreed that the ISP Remand Order classified ISP-bound traffic as interstate, and therefore, under the jurisdiction of the FCC. The Commission found that the FCC's intent to preempt a state commission's authority to address reciprocal compensation for ISP-bound traffic was clear. Accordingly, the Commission approved the stipulation and deferred ruling on the issues delineated in Phase I. Furthermore, the Commission found that the proposal and the stipulation provided a reasonable means to reinstate consideration of the subject issues in the event that the FCC's decision is modified or overturned.

On May 3, 2002, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion upon review of the FCC's Order on Remand. *WorldCom, Inc. v The FCC, No. 01-1218 (D.C. Cir. May 3, 2002)*. The FCC, while showing a preference for bill-and-keep, but without fully committing itself to it, adopted several interim cost-recovery rules lowering the amounts and capping the growth of ISP-related intercarrier payments. The transitional rules, according to the FCC, will take effect on the expiration of existing interconnection agreements. Further, the FCC carved ISP-bound calls out of Section 251(b)(5) under Section 251(g) and established an interim compensation regime under its general authority to regulate the rates and terms of interstate telecommunications services and interconnections between carriers under Section 201 of the Act. As a result, the state regulatory commissions would no longer have jurisdiction over ISP-bound traffic as part of their power to resolve LEC interconnection issues under Section 251(e)(1) of the Act. The D.C. Circuit found that Section 251(g) does not provide a basis for the FCC's action, but the Court made no

further determinations. Consequently, the Court did not vacate the order, but simply remanded the case to the FCC for further proceedings. Thus, it appears that, pending further proceedings, the FCC's interim cost-recovery rules remain intact. It also appears that the Court did not disturb the FCC's intent to preempt state commissions' authority to address reciprocal compensation for ISP-bound traffic. In any event, the establishment of an intercarrier compensation mechanism for the delivery of ISP-bound traffic is a Phase I issue, and it is not necessary for the Commission to address this issue in this phase of the proceedings.

The Commission should require that a reciprocal compensation mechanism be used to govern intercarrier compensation for the non-ISP local exchange traffic that clearly remains under its jurisdiction.[1] The reciprocal compensation, using symmetrical rates, should be based upon the forward-looking costs of the incumbent local exchange carriers ("the ILECs") as approved by the

---

[1] The BellSouth and Verizon witnesses also reference the uniform intercarrier compensation Notice of Proposed Rulemaking that has been initiated by the FCC. *In the matter of developing a unified intercarrier compensation regime, Notice of Proposed Rulemaking, FCC 01-132, CC Docket No. 01-92, rel. April 27, 2001 (Intercarrier Compensation NPRM).* Verizon's witness, Dennis B. Trimble, recommends: "To avoid potentially conflicting rulings and subsequent revisions to the state scheme, Verizon has recommended that the Commission retain the record in this case, but defer any ruling until the FCC rules." (Trimble, Tr. 112). Elizabeth R.A. Shiroishi, on behalf of BellSouth, states "[w]hile this Notice by the FCC seeks comments beyond the scope of this issue (i.e. bill-and-keep for local usage elements), the outcome of such proceeding will address this issue." (Shiroishi, Tr. 28).

Sprint states that it has already opted in to the FCC's interim compensation regime for the delivery and termination of ISP-bound traffic. As a result of its decision, the company must agree to exchange all other local traffic (i.e. non-ISP-bound traffic) at the same rates. (Hunsucker, Tr. 196). The FCTA and Time Warner agree with Sprint in this case where an ILEC has adopted the FCC's interim compensation mechanism for ISP traffic. If an ILEC has opted in to the FCC's interim compensation mechanism, then a reciprocal compensation mechanism will apply to the rest of the local traffic by default. In such a case, the need for a default billing mechanism in this docket would be moot.

Accordingly, the Commission could require that a reciprocal compensation arrangement, as a default mechanism, be implemented at this time. However, it would be understandable if the Commission elected to await the outcome of the rulemaking at the federal level before establishing a default mechanism.

Commission.

The benefits of implementing reciprocal compensation as a default mechanism far outweigh the consideration of a bill-and-keep regime as an alternative. Bill-and-keep may be a suitable arrangement only in limited circumstances; namely where the traffic flow between carriers is approximately even and the cost structures are essentially the same. The potential pitfalls of bill-and-keep are numerous. The introduction of bill-and-keep can foster market uncertainty, as the financial impact upon alternative local exchange carriers ("ALECs") remains unknown until it is in effect. Bill-and-keep may also encourage new forms of regulatory gamesmanship in the form of network configuration and in the attempt to disguise the nature of traffic.

Most significantly, the use of bill-and-keep as a default compensation mechanism allows the ILECs to exercise their superior bargaining strength. The establishment of bill-and-keep as a default mechanism provides the ILECs the opportunity to capitalize upon their strong preference for bill-and-keep. The arms-length negotiations that should characterize the agreements between ILECs and ALECs will be undermined as the ILECs can hold steadfast, secure in the knowledge that a bill-and-keep regime is the ultimate regulatory remedy to resolve any impasse between the parties.

ISSUE 13:

How should a "local calling area" be defined, for purposes of determining the applicability of reciprocal compensation?

a) What is the Commission's jurisdiction in this matter?

b) Should the Commission establish a default definition of local calling area for the purpose of intercarrier compensation, to apply in the event parties cannot reach a negotiated agreement?

c) If so, should the default definition of local calling area for purposes of

intercarrier compensation be: 1) LATA-wide local calling, 2) based upon the originating carrier's retail local calling area, or 3) some other default definition/mechanism?

FCTA and Time Warner:

Restructuring local calling zones can be addressed independently in this proceeding for intercarrier compensation purposes, and any adverse impact on universal service is speculative and can be addressed in a separate proceeding.[2]

Verizon witness Dennis B. Trimble and BellSouth witness Elizabeth R. A. Shiroishi stated in their prefiled testimony that restructuring or expanding the local calling area will have an adverse impact on universal service. They also suggest that a policy shift toward LATA-wide reciprocal compensation payments is beyond the scope of the current proceeding and should be considered in another proceeding. (Trimble, Tr. 88, 90-91, 101, 123, 132; Shiroishi, Tr. 38). Witness Shiroishi, on cross-examination by the FCTA at the hearing, acknowledged that BellSouth has available a mechanism already in place if BellSouth can demonstrate a bona fide need for universal service relief. (Shiroishi, Tr. 62). Further, Ms. Shiroishi conceded that any contention as to what the impact would be if the local calling area were restructured is speculative. (Shiroishi, Tr. 63).

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[2] The FCTA did not initially take a position on Issue 13. However, Page 6 of the Second Order on Procedure, Order No. PSC-02-0139-PCO-TP, issued January 31, 2002, discussing prehearing procedure, provides, "[when] an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement." In this instance, Verizon witness Trimble and BellSouth witness Shiroishi raised the issue in their prefiled testimony regarding the adverse impact which restructuring the local calling area would have on universal service, as well as the implication that the local calling area issue and its impact on universal service should be taken up in a separate proceeding. (Trimble, Tr. 88, 90-91, 101, 123, 132; Shiroishi, Tr. 38). Additionally, AT&T witness Cain, in his prefiled testimony, responded to the contentions of witnesses Trimble and Shiroishi. (Cain, Tr. 231-232). Moreover, the FCTA cross-examined witness Shiroishi at the hearing on May 8, 2002 regarding this subsidiary issue subsumed by Issue 13. (Tr. 62-67).

Significantly, Ms. Shiroishi accepted the proposition that restructuring local calling zones can be addressed independently in the present proceeding for intercarrier compensation purposes, and any universal service issues can be addressed in a separate proceeding. (Shiroishi, Tr. 64) Ms. Shiroishi also conceded that if BellSouth were able to quantify any net impact on revenues due to loss of billed access charges, that loss would not necessarily translate into a dollar-for-dollar need for universal service relief. (Shiroishi, Tr. 67). Consistent with Shiroishi's testimony, witness Trimble testified on cross-examination by Staff at the hearing, that there would be very little impact on universal service in the short-term as a result of any restructuring or expansion of the local calling area. (Trimble, Tr. 146-147).

It is clear that the issue of restructuring or expanding the local calling area for reciprocal compensation purposes can be addressed in the present proceeding independently, and any action by the ILECs to seek universal service relief can be addressed in a separate proceeding.[3] Conversely, universal service relief should not be considered in the present proceeding. As stated earlier, witnesses Shiroishi and Trimble have testified that any adverse impact on universal service resulting from a restructuring of the local calling area is speculative and without any short-term effect. Accordingly, the Commission should not be deterred from addressing the issue of restructuring the local calling area for reciprocal compensation purposes on the basis of the universal service implications raised by BellSouth and Verizon.

[3] The FCTA and Time Warner expressly deny that either BellSouth or Verizon could make the requisite showing for entitlement to universal service relief, and the FCTA and Time Warner would vigorously oppose any action seeking such relief. The FCTA is simply making the point that mechanisms exist for BellSouth and Verizon to seek relief if they make the requisite showing.

ISSUE 17:

Should the Commission establish compensation mechanisms governing the transport and delivery or termination of traffic subject to Section 251 of the Act to be used in the absence of the parties reaching an agreement or negotiating a compensation mechanism? If so, what should be the mechanism?

FCTA and Time Warner:

Yes. The Commission should continue its policy of requiring reciprocal compensation for the local traffic (i.e. non-ISP-bound traffic) that remains under its jurisdiction. The Commission's current rules require that symmetrical rates, based upon the ILECs' Commission-approved unbundled network element rates, serve as the default reciprocal compensation mechanism.

Since it appears that the FCC's interim cost-recovery rules for ISP-bound traffic remain in effect even after the recent opinion of the D.C. Circuit, it is important to discuss those transitional cost-recovery rules at this juncture. The FCC has implemented a transitional cost-recovery mechanism based upon declining rate caps and volume caps. For the first six months following the effective date of its Order, intercarrier compensation for ISP-bound traffic is capped at a rate of $.0015 per minute-of-use. For the subsequent eighteen months, the rate is capped at $.0010 per minute-of-use. Starting in the twenty-fifth month and continuing through the thirty-sixth month, the rate will be capped at $.0007 per minute-of-use. (Barta, Tr. 245). A volume cap will also be imposed on total ISP-bound minutes for which a local exchange carrier may receive the transitional compensation levels. The FCC established a ceiling for 2002 on the ISP-bound minutes-of-use eligible for compensation. The ceiling reflects a ten-percent growth factor based upon the number of ISP-bound minutes recorded by the carrier during the first quarter of 2001. In 2003, a carrier may

receive compensation for ISP-bound minutes up to the level of the 2002 minutes-of-use ceiling (Barta, Tr. 245). The FCC arbitrarily defined ISP-bound traffic under the rebuttable presumption where any traffic exchanged between carriers that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the transitional compensation scheme. (Barta, Tr. 245).

The Commission should require that a reciprocal compensation mechanism be used to govern intercarrier compensation for the local exchange traffic that remains under its jurisdiction in the event carriers do not successfully negotiate an agreement for the transport and termination of such traffic. The reciprocal compensation arrangement should be based upon symmetrical rates that reflect the incumbent LEC's costs; specifically, the rates found in the Total Element Long Run Incremental Cost studies approved by the Commission. 47 C.F.R. 51.711. (Barta, Tr. 246).

ISSUE 17(a)

Does the Commission have jurisdiction to establish bill-and-keep?

FCTA and Time Warner

The Commission has jurisdiction to establish bill-and-keep for non-ISP-bound local traffic under certain circumstances. The Commission can establish bill-and-keep if neither carrier has rebutted the presumption of symmetrical rates and if the flow of traffic between the carriers' networks is approximately equal.

The Commission has jurisdiction to establish bill-and-keep, but only with respect to non-ISP-bound local traffic. State regulatory authorities may order a bill-and-keep arrangement under certain circumstances for non-ISP-bound local traffic. The Commission can establish bill-and-keep if neither carrier has rebutted the presumption of symmetrical rates and if the flow of traffic between the carriers' networks is approximately equal (and is expected to remain so). 47 C.F.R 51.713. It is noteworthy that under a State imposed bill-and-keep regime, compensation obligations of the

parties must be revisited and adjusted in the event the flow of traffic between the carriers' networks becomes significantly out of balance. Thus, the Commission's authority to implement a bill-and-keep arrangement does not appear to extend to those circumstances where the exchange of traffic is not balanced between the interconnecting carriers' networks. (Barta, TR. 246-247).

ISSUE 17(b)

What is the potential financial impact, if any, on ILECs and ALECs of bill-and-keep arrangements?

FCTA and Time Warner

ILECs should receive a substantial stream of cash flow, because they no longer have the obligation to compensate the ALECs for terminating calls that are originated on their networks. ALECs will not recover the revenue earned for transporting and terminating the local traffic that is originated by the ILECs' customers.

The FCC's interim cost-recovery rules have at least two implications for the Commission's discretion to impose a bill-and-keep arrangement on non-ISP-bound traffic. First, the rules create a presumption that all traffic exchanged between carriers up to a 3:1 ratio of terminating to originating traffic is non-ISP-bound traffic. Whatever "roughly balanced" means, it cannot mean that a carrier who terminates three times as many minutes as it originates is in rough balance with its interconnecting carrier. A carrier who provides three million minutes of terminating service per month, but receives only one million minutes of terminating service from its interconnection carrier, must be compensated for the additional two million minutes it terminates. In this situation, bill-and-keep is not an equitable system for compensation, as it leaves one carrier bearing highly disproportionate costs which it has no way to recover except through increasing charges to its end users. Second, the FCC conditioned an ILEC's right to make payment for ISP-bound traffic at the

FCC-established interim rates to situations in which the ILEC offers to exchange all traffic, including non-ISP-bound traffic, at the same rate. *ISP Remand Order* ¶89. To the extent an ILEC makes this offer, and an ALEC accepts it, there is no authority for a state-imposed bill-and-keep mechanism. Aside from the unnecessary additional administrative and marketing costs that the change to a bill-and-keep arrangement would likely introduce, such a compensation mechanism fails to recognize that the costs an ALEC incurs to transport and terminate a call are very real. The shift to a bill-and-keep arrangement will not relieve the ALEC of the responsibility to terminate a call that the ILEC's customer originates. More importantly, the shift to a bill-and-keep arrangement does not mean the ALEC's cost of terminating the traffic that has been originated on the ILEC's network has decreased or disappears simply because there is no explicit compensation for the carriage of traffic between the carriers. (Barta, TR. 247). As long as the cost of terminating traffic is positive, a bill-and-keep arrangement will not adequately provide for the recovery of an ALEC's costs unless the flow of traffic between the carriers' networks is approximately equal. The potential financial impact upon an ALEC could be materially detrimental, as it will no longer receive the revenue earned for transporting and terminating the local traffic originated by the ILEC's customer. (Barta, Tr. 247).

BellSouth witness, Elizabeth R. A. Shiroishi, in her prefiled direct testimony, cited Section 252(d)(2)(B)(i) to support the proposition that the 1996 Act does not preclude mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery, such as bill-and-keep arrangements. (Shiroishi, Tr. 27-28). Rule 51.711(a) provides for symmetrical rates for transport and termination of telecommunications traffic, and subsection (b) authorizes a state commission to establish asymmetrical rates for transport and termination of telecommunications traffic under certain circumstances. Rule 51.713(b) authorizes a state commission to impose bill-and-keep arrangements if the state commission determines that the

amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction, and is expected to remain so. Accordingly, it would be fair to conclude that in the event the traffic flows are not balanced, the FCC's rules require that symmetrical rates based upon the ILEC's approved forward-looking cost studies are to be used for reciprocal compensation. Ms. Shiroishi also concluded that the *FCC's ISP Remand Order* provides the foundation for the definition of roughly balanced traffic by establishing a precedent that traffic below a 3:1 ratio of originating to terminating traffic is roughly balanced. (Shiroishi, Tr. 29-30). Contrary to Ms. Shiroishi's contention, the 3:1 ratio was established in order to limit disputes and avoid costly efforts to identify ISP-bound traffic. *ISP Remand Order* ¶ 79. Consequently, the FCC did not treat non-ISP traffic as roughly balanced if it falls below the 3:1 threshold. It would be inherently unfair for one party to provide up to three times the service to a second party without being compensated for its service.

A move from a reciprocal compensation arrangement to a bill-and-keep mechanism would impose a major change in intercarrier compensation rules for both the ILECs and the ALECs. One should expect such a change to be accompanied by a new set of costs. These costs may very well include, but are not limited to, the expense of participating in more intercarrier compensation proceedings, the need to renegotiate (and possibly arbitrate) interconnection agreements, and the effort to develop and implement new retail pricing programs that are in response to regulatory, not competitive, market forces. (Barta, Tr. 248).

The ILECs can expect to enjoy an immediate stream of cash flow because they no longer have the obligation to compensate the ALECs for terminating calls that are originated on their networks. Depending upon the magnitude of the terminating traffic imbalance, the savings realized by the ILEC could be substantial. (Barta, Tr. 248).

Verizon witness, Dennis B. Trimble, in his prefiled rebuttal testimony, expressed his belief that the Florida Commission views simplicity as a principal advantage of bill-and-keep. (Trimble, Tr. 141). In this regard, Mr. Trimble concluded that it is apparent from the testimony of Verizon and other parties that designing an appropriate bill-and-keep mechanism will likely be more complicated than perhaps the Commission anticipated. (Trimble, Tr. 141). Moreover, Mr. Trimble observed that even among the parties that could conditionally support bill-and-keep, there is not any real consensus about how the ideal mechanism should be structured. (Trimble, Tr. 141). It follows from Mr. Trimble's testimony that designing the appropriate bill-and-keep arrangement is problematic, and the straightforward reciprocal compensation mechanism based on symmetrical rates is a much better alternative.

ISSUE 17(c)

If the Commission imposes bill-and-keep as a default mechanism, will the Commission need to define generically "roughly balanced?" If so, how should the Commission define "roughly balanced?"

FCTA and Time Warner

Yes. Non-ISP-bound local traffic must be measured for "roughly balanced" traffic loads. A percentage or dollar threshold could be established where an obligation to compensate the interconnecting carrier would arise when the net minutes-of-use for terminating traffic exceeded the threshold.

The provisions of the FCC's interim cost-recovery rules have complicated the task of determining traffic flow balances or imbalances between interconnecting carriers. Notwithstanding that it is not currently possible to reliably or accurately identify ISP-bound calls from other forms of local traffic, the FCC has arbitrarily defined the ISP-bound calls for which compensation is due

under its transitional reciprocal compensation scheme. It is the carriers' remaining non-ISP-bound local traffic that the Florida Commission must measure for "roughly balanced" traffic loads. (Barta, Tr. 248-249).

One approach to defining a "roughly balanced" exchange of traffic between interconnecting carriers is to place a percentage threshold on the difference in traffic flows in the two directions. An alternative approach would be to establish a dollar threshold where a carrier would not be obligated to compensate the interconnecting carrier unless the net minutes-of-use for terminating traffic resulted in a dollar amount that exceeded the prescribed threshold. (Barta, Tr. 248).

However, working with a materiality threshold has proven to be a daunting challenge in practice. Some interconnecting ALECs and ILECs have entered into bill-and-keep arrangements that included a percentage or dollar threshold as part of the agreement. Experience has shown that the administrative burden of keeping up with the flow of traffic and calculating offsetting payments has outweighed the costs of each carrier billing for actual minutes-of-use. (Barta, Tr. 249).

Furthermore, in response to the FCC's rules and the ILECs' preference for a reciprocal compensation regime, most ALECs have invested in and implemented billing systems in order to track and bill for actual minutes-of-use. Since sophisticated billing systems are already in existence, it would seem to make little sense now to abandon their capability. (Barta, Tr. 249).

In the event that the Florida Commission elects to adopt a bill-and-keep arrangement, the non-ISP-bound local traffic flows between interconnecting carriers should be measured as accurately as possible for each six month period the interconnection agreement remains in effect. If large traffic imbalances between the carriers persist, the Commission may wish to reconsider its decision to adopt a bill-and-keep regime or implement a true-up mechanism to alleviate the financial burden of the disadvantaged carrier. (Barta, Tr. 250).

The advantages of a bill-and-keep regime are limited to those circumstances where payments between the interconnecting carriers are expected to be offset as a result of a balance in the exchange of traffic and/or the respective costs that the carriers incur in transporting and terminating traffic. That is, if the carriers exhibit the same cost structures (an unlikely occurrence), then a balanced traffic flow between the interconnecting networks should result in an offset of payments from one party to the other. An uneven flow of traffic can still result in offset of payments provided it happens that just the exact differential between the carriers' costs exists (yet another unlikely coincidence). Bill-and-keep arrangements, under these limited circumstances, may reduce each carrier's transaction costs. The probability of maintaining such a perfect balance between each carrier's traffic patterns and cost structures for any duration is most likely remote. (Barta, Tr. 250).

One would expect that the carriers would recognize where a bill-and-keep arrangement is more efficient and would reach such an agreement without the need for regulatory intervention. Therefore, it seems that the most logical default intercarrier compensation mechanism continues to be reciprocal compensation. (Barta, Tr. 251).

ISSUE 17(d)

What potential advantages or disadvantages would result from the imposition of bill-and-keep arrangements as a default mechanism, particularly in comparison to other mechanisms already presented in Phase II of this docket?

FCTA and Time Warner

Several disadvantages would result from imposition of a bill-and-keep arrangement. There would be market uncertainty, and new administrative and marketing costs will be borne by ILECs and ALECs. Bill-and-keep is also likely to promote regulatory gamesmanship and enhancement of the superior bargaining power of the ILECs.

Several disadvantages are likely to stem from a Commission decision to rely upon a bill-and-keep arrangement as a default mechanism. As noted earlier, there will be new administrative and marketing costs for the ILECs and ALECs. A shift to a bill-and-keep regime will also foster market uncertainty that carries its own set of cost burdens. In addition, a bill-and-keep arrangement creates a new incentive to engage in regulatory gamesmanship in the form of inefficient network design. But most importantly, bill-and-keep arrangements play right into the hands of the superior bargaining power that the dominant industry players – the incumbent LECs – hold. (Barta, Tr. 251).

The move to a bill-and-keep arrangement can contribute to market uncertainty because the magnitude of the decision's impact upon the ALECs' financial viability cannot be determined until the regime is in effect. If competitive carriers are unable to timely and successfully react to a regulatory mandated change in the traditional form of compensation for the exchange of traffic, then there will be fewer competitors left to participate in this segment of the market. Although there are no guarantees of financial success in the competitive telecommunications markets, the strength and versatility of the competition emerging in these markets depends upon regulators to consistently send the right pricing and investment signals to the industry participants. (Barta, Tr. 251-252).

Also, complex regulatory and market issues must be addressed as part of the process to implement a bill-and-keep arrangement. A properly structured bill-and-keep mechanism must ensure that alternative carriers are not penalized because they cannot readily attain the economies of scale and scope, and the diversity in customer base, that the incumbent local exchange carriers have long enjoyed. If the Commission desires to use bill-and-keep as a default mechanism, then the Commission should initiate a separate proceeding in order to craft an equitable bill-and-keep arrangement that seeks to balance the interests of the dominant carriers (i.e. the ILECs) and the new entrants. (Barta, Tr. 260).

A reciprocal compensation mechanism using symmetrical rates based upon the incumbent LECs' forward-looking costs is the appropriate regulatory tool to encourage competition and innovation. The FCC recognized the merits of this pricing standard and wisely adopted it to establish the rates for interconnection and unbundled elements:

> **Because a pricing methodology based on forward-looking costs simulates the conditions in a competitive marketplace, it allows the requesting carrier to produce efficiently and to compete effectively, which should drive retail prices to their competitive levels. We believe that our adoption of a forward-looking cost-based pricing methodology should facilitate competition on a reasonable and efficient basis by all firms in the industry by establishing prices for interconnection and unbundled elements based on costs similar to those incurred by the incumbents, which may be expected to reduce the regulatory burdens and economic impact of our decision for many parties, including both small entities seeking to enter the local exchange market and small incumbent LECs.**

In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, FCC 96-325, CC Dockets 96-98, rel. August 8, 1996, ¶ 679 ("(Local Competition Order"). The competitive philosophy embraced in the FCC's TELRIC pricing standards has been borne out as ALECs have introduced efficient network designs to lower the costs of terminating traffic and have found innovative ways to satisfy the communications needs of customers. This competitive outcome should be applauded as a marketplace success and not held out as an example of inefficient regulatory arbitrage. The Florida Commission should continue its sound reasoning to implement a reciprocal compensation mechanism for interconnection using symmetrical rates based upon the ILECs' forward-looking costs. (Barta, Tr. 252-253).

Under a bill-and-keep arrangement, carriers will search for ways to unload the traffic originating on their networks as quickly as possible and to accept terminating traffic as late as possible. For instance, the strategic placement of central offices further out in the network can affect a carrier's costs under bill-and-keep regardless of whether it represents efficient network design

practices. In addition, the concern over regulatory arbitrage may shift from carriers seeking an imbalance in terminating traffic to one where carriers target large net originators of traffic. Not only may bill-and-keep influence the carrier to base its network strategy upon concerns for regulatory treatment rather than concerns for the most economically efficient configuration, such an arrangement may invite new opportunities for regulatory arbitrage. (Barta, Tr. 253).

There should be little argument that arms-length contracts negotiated between two private parties offer far greater benefits and advantages than commercial relationships mandated through government regulation. In fact, key sections of the 1996 Act are geared towards encouraging negotiations between private parties over State and/or federal rate regulation. (Barta, Tr. 254).

However, the ALECs' ability to fairly negotiate rates for the exchange of local traffic with the incumbent carriers is compromised because of the ILECs' status as the dominant players in the industry. These concerns over the ILECs' bargaining strength cannot simply be dismissed as the unfounded fears of a group of small carriers seeking regulatory relief for their own competitive shortcomings. (Barta, Tr. 254).

Indeed, the FCC recognized the incumbent LECs' superior bargaining power in the *Local Competition Order* when it comes to the matter of establishing rates for interconnection with competitive carriers:

> **Negotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires. Under section 251, monopoly providers are required to make available their facilities and services to requesting carriers that intend to compete directly with the incumbent LEC for its customers and its control of the local market. Therefore, although the 1996 Act requires incumbent LECs, for example, to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations. The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional**

markets.

Local Competition Order ¶ 55. In order to deter the ability of the ILECs from engaging in anti-competitive behavior by exercising their superior bargaining position in their negotiations with ALECs, the Commission should adopt an equitable reciprocal compensation mechanism based upon symmetrical rates. (Barta, Tr. 254-255).

BellSouth and Verizon overwhelmingly support the change from reciprocal compensation to a bill-and-keep arrangement for the exchange of local traffic. Based upon the dominant firms' preference for a bill-and-keep arrangement, any characterization that the mechanism is merely a "default" regime ignores the reality of negotiations where the parties' objectives are clearly conflicting. In the end, one would expect the incumbent LECs to be tough "negotiators" and resist the offers of the ALECs to craft more equitable and efficient interconnection agreements, based upon the LECs' knowledge that a default bill-and-keep arrangement is the regulatory remedy to resolve the impasse. (Barta, Tr. 255).

Respectfully submitted this 13th day of June, 2002.

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June 21, 2002

BY HAND DELIVERY
Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket 990649B-TP

Dear Ms. Bayó:

The post hearing brief of AT&T Communications of the Southern States, LLC, MCI WorldCom, Inc, and Florida Digital Network, Inc. filed on May 28, 2002, in the above referenced proceeding contains a minor typographical error in the table on page eight of the brief. Enclosed for filing are an original and fifteen copies of a replacement page that shows the appropriate correction in type and strike format.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing. If you have any questions, please do not hesitate to contact me at (850) 425-5209.

Sincerely yours,

Tracy W. Hatch

TWH/amb
Enclosures
cc: Parties of Record

Exhibit B

II. . .nd State	Statewide Average Voice Grade Loop Rate[1]
Verizon New Jersey	$9.53
SBC California	$9.93
Verizon New York	$11.49
~~ALEC Proposed~~ BellSouth-FL Current	$13.97
Verizon Proposed	$26.19

In fact, Verizon's proposal for statewide average voice grade loop rate in this proceeding is more than double the statewide average rate in other states. Similarly, Verizon proposes significantly higher rates for DS1 loops, DSO port, and end office switch usage. (Exh. 61, AHA-4)

Verizon's proposal does not even come close to passing the "red-face" test. For example, the Commission established a switching port rate for BellSouth Florida of $1.17. (Tr. 1259) The Commission did not deaverage ports in BellSouth's vast Florida territory because the cost of switching generally should cost the same. Yet, if Verizon placed the same switch in Tampa, it proposes that a port cost of $3.30 – three times higher! Incredible, considering the switch would be in a similar building, operated by the same types of telecommunications technicians, and central office technicians. Something is clearly wrong.

[1] (Exh. 61, AHA-4); CA DN 01-02-024, *Interim Opinion Establishing Interim Rates for Pacific Bell Telephone Company's Unbundled Loops and Unbundled Switching Network Elements*, issued May 16, 2002; *Order on Unbundled Network Elements Rates*, Case 98-C-1357, issued January 28, 2002, NYPSC; *Order Instituting Verizon Incentive Plan*, Cases 98-C-1357, 00-C-1945, issued

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May 8, 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

Dear Mrs. Bayo:

On April 26, 2002, Supra Telecom filed a Verified Supplemental Motion to Disqualify and Recuse FPSC from all Futher Consideration of this Docket and to Refer this Docket to the Division of Administrative Hearings for all Further Proceedings. The signature pages of Brian Chaiken, General Counsel, and Olukayode Ramos, CEO, were provided in the filing and signed by an authorized employee Ann H. Shelfer.

Ms. Shelfer believed that the original signatures of Mr. Chaiken and Mr. Ramos were filed from the Miami office. Due to a misunderstanding, the original signature pages were Fedex'd on April 30, 2002, to the Tallahassee Regulatory Office for filing. Unfortunately, the filings were never received. See Exhibit A and B of this letter.

Supra Telecom respectfully requests that the original signatures be accepted. As evidenced by the Fedex form, Supra did attempt to file the original signatures in a timely manner.

We have enclosed a copy of this letter, and ask that you mark it to indicate that the original was filed, and thereupon return it to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Brian Chaiken/ATS

Brian Chaiken
General Counsel

Exhibit C

CERTIFICATE OF SERVICE
Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery and/or Federal Express 8th day of May, 2002 to the following:

Wayne Knight, Esq.
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Nancy B. White, Esq.
James Meza III, Esq.
c/o Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL. 32301
(850) 222-1201 (voice)
(850) 222-8640 (fax)

T. Michael Twomey, Esq.
R. Douglas Lackey, Esq.
E. Earl Edenfield Jr., Esq.
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0710

SUPRA TELECOMMUNICATIONS
& INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: (305) 476-4248
Facsimile: (305) 443-9516

By: Brian Chaiken/ATS
BRIAN CHAIKEN, ESQ.

AFFIDAVIT OF ESTHER SUNDAY

I, Esther Sunday, do solemnly swear that I am over the age of eighteen, competent to testify and have personal knowledge of the facts set forth herein.

1. My name is Esther Sunday.
2. I am an Administrative Assistant with Supra Telecommunications and Information Systems, Inc. ("Supra").
3. Supra is located at 2620 S.W. 27th Avenue, Miami, Florida 33133.
4. On April 30, 2002, I was handed two (2) original signature pages. The first page contained the original signature of Olukayode A. Ramos, Chief Executive Officer for Supra and was dated April 26, 2002. The second page contained the original signature of Brian Chaiken, General Counsel for Supra and was dated April 26, 2002.
5. I placed the above referenced pages into a Federal Express Envelope. The Sender's Copy is attached hereto as Exhibit A, and includes the tracking number 8329-0357-5069.
6. The Federal Express tracking information indicates that the package I sent, arrived in Tallahassee at approximately 9:37 am and was signed by an individual named "S. Lauren." This individual is not employed by Supra in its Tallahassee Office or any office. Tracking data is attached hereto as Exhibit B.

Further Affiant sayeth not.

Esther Sunday

STATE OF FLORIDA)
) SS:
COUNTY OF MIAMI-DADE)

The execution of the foregoing instrument was acknowledged before me this _____ day of May, 2002, by Esther Sunday, who [] is personally known to me or who [] produced _____ as identification and who did take an oath.

My Commission Expires:

Adenet Medacier
Commission # DD 078322
Expires June 20, 2005
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State of Florida at Large

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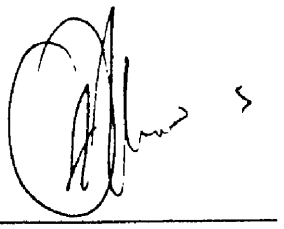
EXHIBIT A

V. CERTIFICATE OF GOOD FAITH BY COUNSEL

The undersigned counsel of record, Brian Chaiken, hereby certifies that this motion and the attached exhibits and affidavit are made in good faith and well grounded in both fact and law.

BRIAN CHAIKEN, ESQ.

Dated: 4/26/02



OLUKAYODE A. RAMOS

May 26, 2002

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EXHIBIT B

From: Laura King
Sent: Tuesday, October 30, 2001 6:12 AM
To: Michael Barrett; Todd Brown; Jason-Earl Brown; Tobey Schultz
Cc: David Dowds
Subject: FW: 001305-TP Supra Post-Hearing Statement

Just so you guys know Wayne has been made aware that it appears some conf. information may be unredacted in the redacted version of Supra's brief Also, please be aware that the way Supra cites to the record in their brief is incorrect! In your recommendation only use TR cites not DT or RT. If there are any questions, please ask. Thanks

Exhibit D

From: Wayne Knight
Sent: Tuesday, October 30, 2001 10:28 AM
To: Latesa Turner; Laura King
Subject: RE: 001305-TP Supra Post-Hearing Statement

I spoke with Paul Turner of Supra, who did most of the writing for the brief. We went over the abbreviations, which were pretty much as we thought HT=hearing transcript; DT=direct testimony; RT=rebuttal testimony. Beth did confirm that they may submit it in this form. The form we use in our briefs was internally developed, though others have used it. Supra's position on the references to Supra winning the right to non-discriminatory access to BellSouth's own OSS in OAR-3, is that this is outside the scope of the confidentiality agreement, because it is mentioned in the filing with the redline version of their agreement with BellSouth, which is not confidential, is already on our website, and is a public record. He said this was clear with BellSouth, and they have not had any calls from BellSouth challenging their language. Any further questions, give me a call.

-----Original Message-----
From: Latesa Turner
Sent: Monday, October 29, 2001 5:02 PM
To: Wayne Knight
Cc: Laura King
Subject: 001305-TP Supra Post-Hearing Statement

Wayne,

FYI - There are numerous instances where confidential findings of the Commercial Arbitration are divulged (See pps. 13, 24, 25, 32, 33, 34, & 35) Each time OAR-3 is referenced and specific details are given with regard to the Award.
From Wayne Knight
Sent: Tuesday, October 30, 2001 8:24 AM
To: Latesa Turner
Subject: RE: 001305-TP Supra Post-Hearing Statement

Thanks Latesa. I spoke with Beth about this. I will review the prehearing order to see if we are able to address this. If not, it may be up to BellSouth to address this in another forum. As of now, only the portions of the Post-Hearing Statement which are redacted are considered confidential. I am placing a call to Brian Chaiken shortly to get some clarification on their notation system, and will bring this matter up as well

-----Original Message-----
From: Latesa Turner
Sent: Monday, October 29, 2001 5:02 PM