IN THE SUPREME COURT OF THE STATE OF FLORIDA

SUPRA TELECOMMUNICATIONS AND
INFORMATION SYSTEMS, INC.

Appellant S. Ct. Case No._____

v. L.T. No.: 001305-TP

BELLSOUTH TELECOMMUNICATIONS, INC.

Appellee

_____/

SUPRA'S MOTION TO REVIEW FLORIDA PUBLIC SERVICE COMMISSION'S DENIAL OF SUPRA'S MOTION TO STAY COMMISSION ORDER

Appellant, Supra Telecommunications and Information Systems, Inc. ("Supra"), moves this Court to review the Florida Public Service Commission's ("FPSC") denial of Supra's Motion to Stay Commission Order pending appeal and to stay this matter, and states as follows:

1. Supra has filed its Notice of Appeal of the final order of the Florida Public Service Commission rendered on July 1, 2002, from an arbitration proceeding relating to the terms of an agreement for telephone service and rates.

2. In anticipation of the filing of this appeal, Supra filed its Motion to Stay Commission Order with the Florida Public Service Commission. (A copy of that

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motion is attached hereto as Exhibit A.)[1]

3. On July 23, 2002, the FPSC voted to deny Supra's Motion for Stay. (A copy of the FPSC Vote Sheet and Commissioners' Signatures is attached hereto as Exhibit B.)

4. The attached Motion to Stay submitted to the FPSC (Exhibit A) fully explains the basis for the relief requested by Supra, and Supra will not repeat the details of that motion here, but will refer the Court directly to that paper for the substance of its argument. In essence, however, Supra seeks to avoid being forced into the execution of the Follow-On Agreement and the termination of the existing agreement, pending this appeal and pending review by the United States District Court for the Northern District of Florida of certain aspects of the FPSC's Order (as to which there is exclusive federal jurisdiction) for compliance with federal law, including the Telecommunications Act of 1996 and federal due process.

5. In addition to the matters stated in Exhibit A, a stay is warranted to prevent the FPSC from taking further steps beyond its authority. On July 25, 2002, two days after the FPSC voted to deny Supra's Motion for Stay, the FPSC considered

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[1] Exhibit "A" is a redacted version of the Motion to Stay. The Motion was redacted pursuant to the confidentiality provisions of the FPSC, redacting most of paragraph 54, the ruling of the commercial arbitrators in a separate arbitration proceeding between the parties pursuant to the currently existing interconnection agreement. Should this Court desire to review the unredacted version, Supra will provide the same.

BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Expedited Commission Action. The FPSC's staff recommended that if the parties do not agree to sign an agreement within ten (10) days of the Agenda Conference (presently scheduled for Tuesday, August 6, 2002), the parties' current agreement, under which the parties' existing interconnection agreement shall be deemed terminated and declared null and void. (A copy of the FPSC staff's Analysis and Recommendation, dated July 25, 2002, is attached hereto as Exhibit C.)

6. The parties' present business relationship is governed by the existing interconnection agreement ("Current Agreement"). This Current Agreement includes an evergreen provision, under Section 2.3, which reads in part: "The parties further agree that if the FPSC does not issue its order prior to the expiration date of this Agreement . . . Until the Subsequent Agreement becomes effective, the Parties shall continue to exchange traffic pursuant to the terms and conditions of this Agreement." This section is contractual, governed by Florida contract law.

7. The FPSC is authorized to conduct an arbitration, pursuant to § 252 of the Federal Telecommunications Act (the "Act"), for the purpose of resolving disputed issues between parties who wish to enter into an interconnection agreement. 47 U.S.C. § 252(b)(1). The FPSC's authority for approving or rejecting an interconnection agreement is limited in scope. Walker v. Luther, 830 F. 2d 1208, 1211 (2d Cir. 1987) ("as a matter of statutory construction, statutes granting power

to administrative agencies are strictly construed as conferring only those powers granted expressly or by necessary implication.") § 252(e) of the Act reads in part:

> (1) **APPROVAL** REQUIRED - Any interconnection agreement **adopted** by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an **agreement** is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

47 U.S.C. § 252(e)(1) (emphasis supplied)

8. By its terms, the Act permits the FPSC only to approve or reject an agreement. Before the FPSC can act the parties must first submit an "agreement." An interconnection agreement that is the product of an arbitration, under § 252, does not become an "agreement" until the parties have executed the document as a consequence of a meeting of the minds. The first sentence of § 252 (e) reads in part: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval. . ." The plain language of the Act demonstrates that an interconnection agreement that is the product of an arbitration does not automatically become an agreement until it is adopted by each party. Once this contract is agreed upon by both parties, it is submitted to the FPSC for approval.

9. The parties Current Agreement contains language that dictates that the parties shall continue to operate pursuant to the terms and conditions of the Current Agreement until the new follow-on interconnection agreement ("Follow-On

Agreement") has been submitted to the FPSC for approval and the FPSC has issued an order approving the agreement. In the event a dispute arises, Section 16 of the General Terms and Conditions of the Current Agreement confers exclusive jurisdiction upon a panel of commercial arbitrators to determine whether the Follow-On Agreement has become effective pursuant to Section 2.3 of the Current Agreement. Therefore, pursuant to the terms of the Current Agreement, the FPSC cannot unilaterally determine that the contract is null and void.

10. Not only is the FPSC not authorized by the Current Agreement to determine this issue, but the failure of the FPSC to act within its authority would also deprive Supra of its right to procedural due process with respect to the potential disposition of its property interest.

11. "Procedural due process rights derive from a property interest in which the individual has a legitimate claim." Metropolitan Dade County v. Sokolowski, 439 So.2d 932, 934 (Fla. 3rd DCA 1983) citing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)." A property interest may be created by statute, ordinance or contract." Id. "Once acquired, a property interest falls within the protections of procedural due process." Id. The current interconnection agreement, adopted on October 5, 1999, is a property interest in which Supra holds a legitimate claim.

12. "It is well established that an administrative agency may not deprive a

person of a right or benefit without due process of law." Gtech Corporation v. State, Dept of Lottery, 737 So.2d 615, 620 (Fla. 1st DCA 1999), citing Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). "Procedural due process includes the right to reasonable notice and an opportunity to be heard...as well as a right to a decision by an impartial tribunal." Id. (citations omitted) "Due process envisions a law that hears before it condemns, proceeds upon inquiry, and renders a judgment only after proper consideration of issues advanced by adversarial parties." Miami Dade County v. Reyes, 772 So.2d 24, 29 (Fla. 3rd DCA 2000) (internal citation omitted).

13. The FPSC staff, on page 22 of its Recommendation, cited to Commission Order PSC-02-0878-FOF-TP issued on March 26, 2002. In that Order the FPSC outlined the only remedy as to which the FPSC placed the parties on notice – and the *only* remedy available to the Commission if one of the two parties willfully refuses, in bad faith, to sign the new Follow-On interconnection agreement. That remedy is to issue a show cause. As the FPSC stated in the Order:

> As noted by Supra, we have the authority to show cause a party which fails to sign an arbitrated interconnection agreement in the event there is no good cause for failing to execute the agreement. *We now place the parties on notice* that if the parties or a party refuses to submit a jointly executed agreement as required by Order No. PSC-02-0637-PCO-TP and Order No. 02-0143-FOF-TP within fourteen (14) days of the issuance of a final order on Supra's Motion for Reconsideration, we may impose a

> $25,000 per day penalty for each day the agreement has not been submitted thereafter in accordance with Section 364.285, Florida Statutes.

(Exh. C, p. 22, citing Order at p. 65)(emphasis supplied) (The July 1, 2002 Order is attached to the Notice of Appeal filed contemporaneously with this Motion.)

14. As noted above, the FPSC has authority to issue a show cause order against Supra. Therefore, at the conclusion of an evidentiary hearing before the FPSC or DOAH, the FPSC is authorized to begin to impose fines if a party has acted in bad faith in refusing to execute the contract. No such evidentiary hearing has taken place. What the law does not authorize the FPSC to do is to deprive a party of its property rights in the present contract by declaring the parties' Current Agreement null and void.

15. The FPSC Staff, without citing to any governing authority, wrote the following:

> "While staff believes that the Commission clearly has the authority to sanction or fine Supra for its failure to sign an agreement . . . in this circumstance, staff believes that the best remedy is simply to impose BellSouth's primary request for relief, which is . . the existing agreement will be considered terminated, null and void."

(Ex. C, p. 22)

16. Aside from the lack of governing authority, the FPSC staff's suggestion does not follow logically. The staff acknowledges that the FPSC may issue a show

cause against Supra and then impose a fine if the refusal to sign is found to be bad faith. However, the staff then suggests that these procedural due process safeguards can be ignored in this instance. The FPSC staff suggests that even without an evidentiary hearing, the FPSC can forego the show cause requirement and potential imposition of a fine and "simply" issue an order allowing BellSouth to consider the existing Current Agreement null and void. (Ex. C, p. 22)

17. Finally, in making its recommendation, the FPSC staff has accepted BellSouth's assertions without inquiry. The staff ignored Supra's pleading regarding BellSouth's intentional bad faith negotiation tactics with respect to issues properly placed before the FPSC. The FPSC staff acknowledged that the Act provides that "a State commission shall resolve each issue set forth in the petition and response." Here, many issues that had been set forth in the petition and response were subsequently withdrawn by the parties. After Supra relied upon BellSouth's claim that these issues had been agreed to, BellSouth has now refused to even discuss language necessary to implement the agreed upon issues. BellSouth's position is that Supra should accept language BellSouth has unilaterally chosen to implement the issues. The Act contemplates that the parties can ask the FPSC to arbitrate these

issues. The failure of the FPSC to grant the parties an evidentiary hearing to arbitrate these issues rewards the Incumbent Local Exchange Company for this inappropriate tactic.

18. The FPSC has no authority for adopting the position recommended by the FPSC staff. Nevertheless, the FPSC has repeatedly followed its staff's recommendations in Docket No. 001305-TP. The FPSC is likely to do the same this time. Therefore, for the additional reason stated above, a stay is necessary to prevent the FPSC from acting inconsistent with Florida contract law as well as § 252 of the Act.

WHEREFORE, for the reasons expressed in the attached Motion to Stay Commission Order and above, Supra moves this Court to stay the final order of the Florida Public Service Commission pending this appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to **Nancy B. White, Esq. and Michael Twomey, Esq.**, BellSouth Telecommunications, Inc., c/o Nancy Sims, 150 South Monroe Street, Suite 400, Tallahassee, FL 32301; **Wayne Knight, Esq.**, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850, on this 27th

day of July, 2002.

GUNSTER, YOAKLEY & STEWART, P.A.
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By: _____
JACK J. AIELLO
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REDACTED

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.	)	Docket No. 001305-TP Filed: July 8, 2002

SUPRA'S MOTION TO STAY COMMISSION ORDER NOS. PSC-02-0413-FOF-TP AND PSC-02-0878-FOF-TP PENDING APPEAL PURSUANT TO RULE 25-22.061, FLORIDA ADMINISTRATIVE CODE

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel and pursuant to Rule 25-22.061(2), Florida Administrative Code, hereby files this its motion to stay the final orders previously entered in this docket, namely Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP, and in support thereof states as follows:

I. BRIEF INTRODUCTION

Supra is seeking review of Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP before the Florida Supreme Court. Pending the appeal in the Florida Supreme Court, Supra seeks a stay of Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP, on the following grounds:

a. Likelihood of prevailing on appeal.

b. Likelihood of Irreparable harm.

c. Delay will not cause substantial harm or be contrary to public interest.

II. 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

EXHIBIT A

Agreement having been approved by the Commission. The Current Agreement also was reviewed by the United States Federal District Court for the Northern District of Florida for compliance with federal law, and found to be in such compliance. The Current Agreement provides for the term of the agreement, a termination date, and a process for the negotiations of a "Follow-On Agreement." The Current Agreement also 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. The basis for the review to be sought in the Florida Supreme Court involves issues regarding state law, including grounds that Supra's procedural due process rights were violated in Docket No. 001305-TP. Supra is also seeking review of Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP before the United States District Court for the Northern District of Florida, for compliance with federal law, including the Telecommunications Act of 1996 and federal due process.

3. 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.

4. 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.

5. On May 2, 2001, on the eve of the evidentiary hearing in Docket No. 001097-TP, Kim Logue (the Commission's Supervisor for Carrier Services) improperly provided Nancy Sims (BellSouth's Director of Regulatory Affairs) with cross-examination questions to be asked of both BellSouth and Supra witnesses at the next day's evidentiary hearing. Supra was neither advised of this incident at the time, nor was consulted about these questions. In fact, Supra was not advised of this incident until five (5) months later, after the two evidentiary hearings on both pending matters, Docket Nos. 001097-TP and 001305-TP, had taken place.

6. On July 31, 2001, the Commission, by unanimous vote, entered a final order in Docket No. 001097-TP, which denied Supra any credits. 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. On September 20, 2001, the Staff filed a recommendation denying Supra's Motion for Reconsidertaion.

7. On August 20, 2001, a confidential source informed Beth Salak (the Commission's Assistant Director, Division of Competitive Markets and Enforcement), that Kim Logue had sent cross-examination questions to BellSouth.

8. On August 20, 2001, a meeting of the Division of Competitive Markets and Enforcement was called to discuss ethics in dealing with regulated companies.

9. Beth Salak informed Walter D'Haeseleer (the Commission's Division Director of Competitive Markets and Enforcement) and Sally Simmons (the Commission's Bureau Chief, Market Development) of Kim Logue's actions.

10. Walter D'Haeseleer informed Mary Bane (Deputy Executive Director of the Commission) of Kim Logue's actions.

11. D'Haeseleer wished to handle the situation "**internally.**" Inspector General John Grayson's personal notes state: "Walter/Beth > **minimize damage.**"

12. Prior to September 6, 2001, Mary Bane asked Salak to conduct a search of Logue's computer e-mails going back to November 2000.

13. Salak made her initial request for a CD-ROM of Logue's e-mails on September 6, 2001, from Karen Dockham (the Commission's Systems Project Administrator). On September 12, 2001,[1] Karen Dockham provided Salak with the CD-ROM.

14. 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.

15. On September 20, 2001, Dockham provided Salak a second CD-ROM containing more Logue e-mails.

16. On or before September 21, 2001, Mary Bane had a "**conversation**" with Marshal Criser (BellSouth, Vice-President Regulatory Affairs) regarding Kim Logue's actions in sending cross-examination questions to BellSouth.

17. On Friday, September 21, 2001, a meeting took place between Mary Bane (Deputy Executive Director), Walter D'Haeseleer (Division Director, Competitive Markets and Enforcement), Beth Salak (Assistant Director, Division of Competitive Markets and Enforcement) and Sally Simmons (Bureau Chief, Market Development) –

[1] The 5:39 pm e-mail on May 2, 2001, is contained in this first CD-ROM; this CD also contains the other transmissions between Logue and Sims that Supra was never told about.

these individuals discussed (a) "how to handle the situation"[2] and (b) what to do about Kim Logue.[3]

19. There is a large volume of e-mails demonstrating that Logue continued to act in the same supervisory capacity as she had been on all her dockets – including Docket No. 001305-TP - despite the September 21, 2001, meeting taking place.

20. The decision to allow Logue to continue to act in the same capacity in all of her dockets – including Docket No. 001305-TP – is in stark contrast to the public comments of John Grayson, Commission Inspector General. John Grayson was quoted by the South Florida Business Journal, on June 7, 2002, as stating the following:

> "**For a while** it was a mistake that happened – no damage was done, it was going to be **handled internally**," Grayson recalled Simmons saying [during her interview]. "**After that [Sept. 21st] meeting**, it appears there was a **heightened level of importance**, which is what she [Simmons] is telling me." (Bold and underline added for emphasis).

21. Despite this admitted "heightened level of importance" felt by the participants in the September 21, 2001, meeting, Logue would not be reassigned or removed from any of her responsibilities – including Docket No. 001305-TP. More importantly, Supra would not be notified of Logue's actions until October 5, 2001.

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[2] D'Haeseleer's and Salak's admitted to John Grayson that they wished to handle Logue's actions "internally" and with the goal to "minimize damage." The idea of notifying Supra *prior* to the evidentiary hearing in Docket No. 001305-TP scheduled for the following week was rejected. Supra would not be notified of Logue's actions for another fourteen (14) days.

[3] E-mail communications from Sally Simmons to Kim Logue on October 18, 2001, demonstrate that Logue was expected to resign if her active duty orders were not submitted to the Commission by October 10, 2001. Simmons writes: "**On 10/10**, we did receive your orders, which covered a period of two weeks. I know you indicated that the orders would be coming in two parts. **Walter advised me to hold your letter of resignation and the copies** until we receive your second orders. **We are otherwise proceeding according to plan**." *See also* e-mail sent on On October 29, 2001, at 3:24 pm, from Simmons to Logue: "Thanks for the fax and your explanation re. 10/26, 10/29, and 10/30 (my oversignht). **Your letter and copies** went out in this afternoon's mail, to your parent's address."

22. Commissioner Jaber in Order No. PSC-02-0773-PCO-TP, argued that: "the events of September 11, 2001 removed this employee [Logue] entirely from the PSC sphere." The totality of the voluminous amounts of e-mails later obtained by Supra via its public records requests demonstrate by any reasonable standard that Kim Logue was **not** "removed entirely from the PSC sphere."

23. On September 21, 2001, Bane, D'Haeseleer, Salak and Simmons, all had actual knowledge (1) that Logue had not been called to active duty, (2) that Logue might not be called to active duty anytime soon, (3) that Logue had provided BellSouth with cross-examination questions, and (4) that Marshall Criser, III (BellSouth's Vice-President for Regulatory Affairs) had discussed Logue's actions with Bane.

24. On September 26 - 27, 2001, the Commission held an evidentiary hearing in Docket No. 001305-TP.

25. On the morning of October 5, 2001, Harold McLean sent an e-mail to Mary Bane at approximately 9:29 am – which Bane opened at 9:43 am - attaching a "draft" of the letter McLean intended on sending to Supra that afternoon. In this "draft," there is no mention of "when" Logue's actions were first discovered – despite Bane's actual knowledge that Logue's actions were uncovered well in advance of the evidentiary hearing in Docket No. 001305-TP.

26. At approximately 4:37 pm, on October 5, 2001, Harold McLean sent his "official" letter to Supra regarding Logue's actions, via facsimile. The final version of the McLean's October 5, 2001 letter makes no mention of "when" Logue's actions were uncovered.

27. On October 29, 2001, over one month after the evidentiary hearing in Docket 001305-TP, 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 meet a substantive deadline by failing 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.

28. 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. At the time Supra filed its Motion, Supra was still unaware that all of Logue's superiors had actual knowledge of her wrongdoing well in advance of the evidentiary hearing in Docket No. 001305-TP.

29. Supra filed three separate motions for Recusal and Disqualification on April 17, 2002; April 26, 2002; and June 5, 2002. The motion for recusal involved two Commissioners and the motion for disqualification involved the Commission staff.

III. MEMORANDUM OF LAW

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

30. Supra seeks a stay of Order Nos. PSC-02-0413-FOF-TP (issued on March 26, 2002) and PSC-02-0878-FOF-TP (issued on July 1, 2002), 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). Additionally, 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

31. Supra will be seeking review of this Commission Order before the Florida Supreme Court and believes that this Commission's Orders denying Supra's request for a new hearing based upon violations of Supra's procedural due process rights as well as this Commission's other Orders denying Recusal and Disqualification will be reversed.

32. Supra believes that it will prevail on the appeal with respect to a new hearing on the issue of violations of Supra's procedural due process rights.

33. The undisputed facts demonstrate that Senior Management of the Commission had actual knowledge of Logue's actions in advance of the evidentiary hearing in Docket No. 001305-TP and concealed this information from Supra. Quasi-judicial bodies have a duty to safeguard against violation of procedural due process. The United States Supreme Court has stated that: "A fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision maker **constitutionally unacceptable** but our system of law has always endeavored to prevent even the probability of unfairness." *Hithrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). (Emphasis added).

34. Florida has a plethora of case law also providing that a fair trial in a fair tribunal is a basic requirement of due process. *See Rucker v. City of Ocala*, 684 So.2d

836, 841 (1st DCA 1996) (It is well established that "[i]t is fundamental that the constitutional guarantee of [procedural] due process, . . . extends to every proceeding," also for an administrative hearing "[t]o qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive"). Administrative agencies sitting in a quasi-judicial capacity have a duty not to "shut its eyes to constitutional issues that arise in the course of administrative proceedings it conducts." *Communications Workers of America, Local 3170 v. City of Gainesville,* 697 So.2d 167, 169 (1st DCA 1997). The "notion that the constitution stops at the boundary of an administrative agency's jurisdiction does not bear scrutiny." *Id. See* also *Jennings v. Dade County* 589 So. 2d 1337, 1340, (3d DCA 1991) ("Certain standards of basic fairness must be adhered to in order to afford due process"); *See also Miami-Dade County v. Reyes*, 772 So.2d 24, 29 (3d DCA 2000) ("Due process envisions a law that hears before its condemns, proceeds upon inquiry, and renders a judgment only after proper consideration of issues advanced by adversarial parties") (Emphasis added).

35. Supra also believes that it will prevail on the appeal of the recusal orders. If the Court determines, based upon a review of the record before the agency, that the Motions for Disqualification were legally sufficient, the Court will declare that the Commission was disqualified from hearing any matters in Docket 001305-TP.

36. Supra filed its motions to disqualify on April 17, 2002; April 26, 2002; and June 5, 2002. The only issue for the Commission's determination with respect to Recusal and Disqualification was whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair or impartial hearing. *See* Rogers v. State, 630 So.2d 513, 515-16 (Fla. 1993).

37. On June 7, 2002, Chairman Jaber and Commissioner Palecki issued orders declining to recuse themselves from this docket. The problem with the two Commission Orders is that the Commissioners attempt to dispute the factual allegations of Supra's motion. This Commission was under a duty to accept the allegations as true and to view the allegations from Supra's perspective. *See* Rogers, 630 So.2d at 515, and Smith v. Santa Rosa Island Auth., 729 So.2d 944, 946-47 (Fla. 1st DCA 1998) (where the court writes: "It is not a question of how the judge feels; it is a question of what feelings resides in the movant's mind, and the basis of such feelings."). 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.**

38. 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).

39. 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.

40. 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. Accordingly, Supra is very likely to prevail on appeal.

ii. Likelihood of Irreparable Harm

41. 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 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.

42. The evergreen provision governs the terms and conditions of the parties' business relationship until the Follow-On Agreement is approved by this Commission. Once a new hearing is ordered, BellSouth will argue that the prior agreement has completely expired and the parties at best can only operate under the new Follow-On Agreement while a new hearing is arbitrated. In order to maintain the status quo and the most equitable position for the parties, it is necessary to require the parties to continue to operate under the evergreen provision of the current agreement until the Supreme Court decides whether a new hearing is warranted.

43. The evergreen language is contained in a contract negotiated by BellSouth at arms length. This provision allows the parties to continue to operate under the status quo until the issue of a new hearing is resolved. BellSouth is not prejudiced by temporarily continuing to operate under a provision freely negotiated by the company itself.

44. The parties' interconnection agreement governs the highly complex way in which the parties interconnect and conduct business. If the Florida Supreme Court finds that a new hearing is warranted, then the parties can continue to operate under the current agreement pursuant to the "evergreen" provision. The status quo can be maintained while the parties conduct another evidentiary process. The interconnection agreement arbitrated in the new evidentiary process can then be implemented seamlessly.

45. It is incalculable how a Follow-On Agreement that is the product of a fair and impartial process will differ from the present Follow-On Agreement ordered by the Commission in Docket No. 001305-TP.

46. Forcing Supra into the present Follow-On Agreement with the prospect that the Florida Supreme Court will likely order a new hearing, places Supra in an untenable position. No amount of money damages could adequately compensate Supra since the extent of such damage inflicted by this Commission – in forcing Supra to operate under a new agreement that the Supreme Court found is the product of an unfair and biased process - would be impossible to measure accurately. See Spiegel v. City of Houston, 636 F.2d 997 (5th 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 (11th Cir. 1990) (injury to a business' reputation and revenues equated to irreparable injury).

47. For example, unlike the new Follow-On Agreement, the Current Agreement requires BellSouth to provide Supra direct access to its Operational Support Systems (OSS).[4] This requirement was based upon the finding made by a panel of independent Commercial Arbitrators on June 5, 2001, pursuant to the dispute resolution process contained in the parties' Current Agreement. It is the electronic OSS which allows a telephone company to order and provision services to customers. If one company is able to provision services in a more timely fashion than another company, such is a competitive advantage.

[4] While the 1996 Federal Telecommunications Act ("FTA") does not mandate direct access to BellSouth's OSS, the FTA, also, does not prohibit Incumbent Local Exchange Companies ("ILEC") from agreeing to provide direct access to its OSS. Likewise, nothing in the FTA prohibits a state utilities commission from ordering direct access to an ILEC's OSS. Allowing competitive carriers direct access to the same electronic OSS that BellSouth's own retail division utilizes is the only true way to implement the spirit of the 1996 FTA – anything less is to leave a competitive advantage in the hands of the former monopoly.

48. The Order of the Commercial Arbitrators was affirmed in Federal Court on October 31, 2001 in the Southern District of Florida in Civil Action No. 01-3365-CIV-KING. The proceedings before the Southern District were conducted under seal with the exception of the Court's October 31, 2001 Order. In this publicly filed Order, Judge King wrote the following with respect to Supra's right to direct access to BellSouth's OSS:

> "Defendant BellSouth challenges the portion of the arbitration award in which the Arbitral Tribunal ordered BellSouth to provide Supra with non-discriminatory **direct access** to its **Operational Support System ("OSS")** and **to cooperate with and facilitate Supra's ordering of services** by no later than **June 15, 2001**. The Arbitral Tribunal found that **BellSouth did not provide Supra with OSS that is equal to or better than the OSS BellSouth provides to itself or customers in non-compliance with its contractual obligations**." (Emphasis added). *See* Oct. 31st Order attached hereto as Exhibit A.

49. As Judge King noted, BellSouth was ordered to provide Supra direct access to its OSS no later than June 15, 2001. Despite this explicit Order, as of this writing, BellSouth has refused to allow Supra direct access to its OSS. It is incalculable the number of customers Supra has lost and will continue to lose, because of BellSouth's intentional and willful refusal to allow direct access to the same OSS utilized by BellSouth's retail division for provisioning service to customers. Moreover, Supra's nearly four hundred thousand Florida customers are denied the same level of customer service and satisfaction as BellSouth's customers.

51. BellSouth is now racing to implement the new Follow-On Agreement – which is the product of the unfair and biased hearing process – to avoid implementing what was previously ordered.

50. If a new hearing is ordered, the most equitable position in which to leave the parties would be the present status quo: the present way in which the parties conduct business.

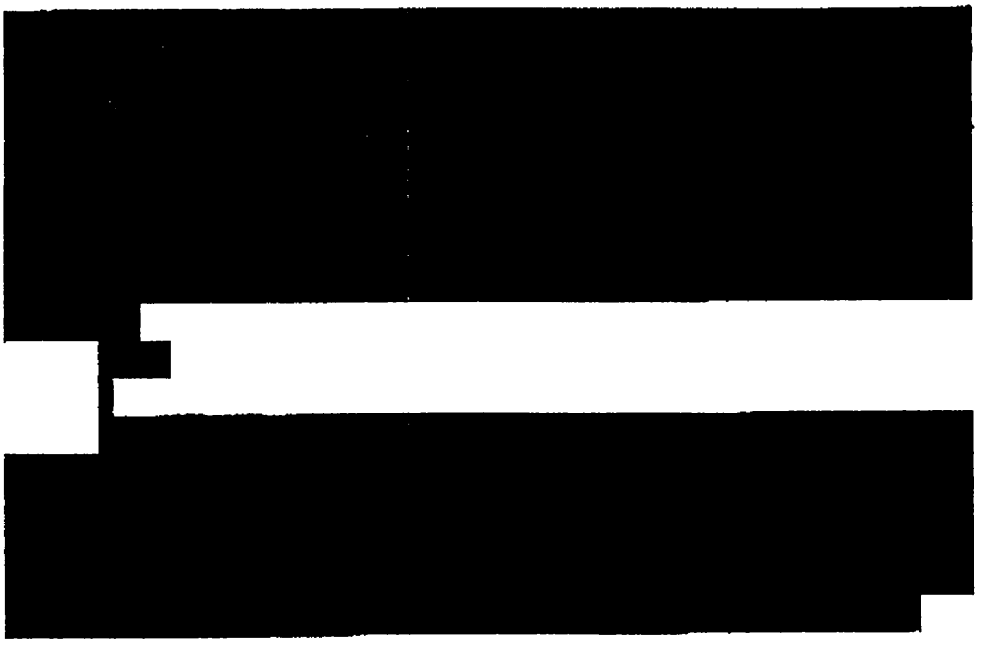
51. Another provision in the Current Agreement that the parties continue to operate under requires BellSouth to provide Supra with meet point billing in the UNE-combination environment. This provision allows Supra to bill third parties for access revenues. The new Follow-On Agreement does not contain this same provision. If the status quo is not maintained, upon the ordering of a new hearing, Supra will be denied millions of dollars that it otherwise would have been permitted to bill for under the Current Agreement.

52. Another provision in the Current Agreement that the parties continue to operate under prohibits BellSouth from disconnecting the services to Supra's nearly four hundred thousand Florida customers during a pending billing dispute. The new Follow-On Agreement does not contain this same provision. Under BellSouth's reading of the new agreement, BellSouth is allowed to disconnect the public's telecommunications service if Supra does not pay disputed bills. BellSouth's reading of the new agreement, would also allow BellSouth to disconnect the public's telecommunications service even while BellSouth, itself, refuses – as it has done for the past two years - to provide Supra with essential billing data. It must also be noted that the current dispute resolution process was the product of "negotiation" by BellSouth. These new contract provisions are a product of an arbitration process at the Florida Public Service Commission. It is incalculable the number of customers Supra will lose as a result of BellSouth's newly conferred power to unilaterally disconnect services. See Spiegel v. City of Houston, 636

F.2d 997 (5th 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 (11th Cir. 1990) (injury to a business' reputation and revenues equated to irreparable injury). The above noted circumstances describe precisely the type of irreparable harm a stay is designed to protect against, as defined by the standards set forth in the case law noted herein.

53. If a stay is not granted and the status quo is **not** maintained while the parties arbitrate a new interconnection agreement, BellSouth will be permitted to renew, once again, its anti-competitive efforts against Supra and its customers.

54. On June 5, 2001, an independent panel of three (3) Commercial Arbitrators made the following findings:



55. As already noted at the outset, the evergreen provision of the Current Agreement between the parties governs the terms and conditions of the parties' business

relationship until the Follow-On Agreement is approved by this Commission. Once a new hearing is ordered BellSouth will argue that the prior agreement has completely expired and the parties at best can only operate under the new Follow-On Agreement while a new hearing is arbitrated. In order to maintain the status quo and the most equitable position for the parties, it is necessary to require the parties to continue to operate under the evergreen provision of the current agreement until the Supreme Court decides whether a new hearing is warranted.

iii. A Stay Will Not Cause Substantial Harm or Be Contrary to Public Interest

56. Staying this Commission's Order will not cause substantial harm to either Supra or BellSouth or be contrary to public interest. There simply is no harm to the public should the status quo be maintained.

57. Section 112.311(6), Florida Statutes, reads that public officials "are bound to observe, in their official acts, the highest standards of ethics . . . regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern." Consistent with this express legislative duty, requiring the parties to continue to operate under the status quo – pursuant to a contract freely negotiated by BellSouth - while the Supreme Court decides if a new hearing is warranted can only be characterized as an act which demonstrates that promoting the public interest and maintaining the respect of the people in their government is of the foremost concern of this Public Service Commission.

iv. A Bond Is Not Required

58. 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.

59. For all the above reasons discussed herein, Supra requests that the Commission stay Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP.

WHEREFORE, Supra respectfully requests the following:

A. The Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP be stayed.

B. For all such further relief as is deemed equitable and just.

RESPECTFULLY submitted this 8th day of July, 2002.

SUPRA TELECOMMUNICATIONS &
INFORMATIONS SYSTEMS, INC.
2620 S. W. 27th Avenue
Miami, FL 33133
Telephone: 305/476-4248
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Brian Chaiken/ATS
BRIAN CHAIKEN, ESQ.

FLORIDA PUBLIC SERVICE COMMISSION

VOTE SHEET

JULY 23, 2002

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

ISSUE 1: Should the Commission grant Supra's Motion for Stay?
RECOMMENDATION: No.

APPROVED

ISSUE 2: Should this Docket be closed?
RECOMMENDATION: No. If the Commission approves staff's recommendation, this Docket should remain open pending approval by the Commission of an interconnection agreement.

APPROVED

COMMISSIONERS ASSIGNED: Jaber, Baez, Palecki

COMMISSIONERS' SIGNATURES

MAJORITY	DISSENTING
Braulio L. Baez	

REMARKS/DISSENTING COMMENTS:

EXHIBIT B

ISSUE 3: Should the Commission grant BellSouth's Motion for Expedited Commission Action?

RECOMMENDATION: The Motion should be granted, in part, and denied, in part, as set forth in the staff analysis. **(Keating)**

STAFF ANALYSIS:

Arguments

BELLSOUTH

BellSouth asserts that after two years, it is now time for a final resolution of this case. BellSouth emphasizes that the Commission has been to hearing, resolved the issues, addressed reconsideration, as well as numerous procedural motions, and now is presented with an interconnection agreement that complies with its decisions in the case. BellSouth contends that in keeping with its actions throughout this case, Supra has refused to reasonably participate in negotiations to prepare the final arbitrated agreement, in spite of numerous scheduled negotiation meetings, and has consequently refused to sign the version of the agreement prepared and submitted by BellSouth.

BellSouth notes that as of the morning of July 15, 2002, the date upon which the final signed agreement was due, Supra had only identified four arbitrated issues, Issues 1, 10, 11 A & B, and Issue 49, upon which it could not agree to final language with BellSouth. While discussions between the parties resulted in some modifications, disagreement still remains on these issues. BellSouth indicates that while Issue 19 is also at issue, Supra had stated that it simply needed more time to review BellSouth's proposed language to address this issue, but did not yet have any specific objection to the language. As of July 15, 2002, BellSouth asserts that Supra had not even mentioned 24 of the issues addressed through the Commission's arbitration.

BellSouth acknowledges Supra's contentions that engaging in the negotiation of a new interconnection agreement is a daunting, arduous task, but emphasizes that Supra has not used the considerable time available since the Commission's final arbitration decision to engage in the discussions necessary to develop the final agreement. BellSouth contends that the Commission established a very clear deadline for the filing of the parties' interconnection agreement; Supra has "made little effort to review an agreement that BellSouth worked hard to prepare" and has not been prepared to participate in scheduled negotiation meetings. Motion at p. 9.

EXHIBIT C

BellSouth claims that a new interconnection agreement must be approved expeditiously to prevent further harm to BellSouth. The company contends that Supra receives wholesale services from BellSouth for over 300,000 customers. According to BellSouth, Supra receives payment from its customers for the services rendered to them, but does not pay BellSouth for the wholesale services BellSouth has provided to Supra. BellSouth contends that this has an adverse effect on competition in the state, because Supra is able to obtain an advantage over other CLECs that do timely pay their bills. Due to this advantage, BellSouth believes that Supra is able to devote more resources to advertising than would a similarly-situated CLEC that pays its bills.

BellSouth notes that under the Reservation of Rights Clause in the new agreement, Section 25.1, execution of and operation under the new agreement does not waive either parties' rights to pursue appellate relief. Thus, BellSouth emphasizes that either party will be able to continue to seek relief through the appellate courts, and Supra will not be harmed because its appellate rights will not be affected.

For the foregoing reasons, BellSouth requests the following specific relief:

1. A decision by the Commission on its Emergency Motion for Expedited Commission Action at the first available Agenda Conference;

2. Supra should be required by the Commission to take one of the following actions within seven (7) days of the Agenda Conference decision:

> A. Sign the new agreement filed by BellSouth on July 15, 2002; or
>
> B. Pursuant to 252(i) of the Act, opt into an existing agreement entered into by BellSouth and approved by the Commission, subject to the requirements of 47 C.F.R. § 51.809.

3. The Commission should order that, if Supra does not take one of the actions identified above within 7 days of the Agenda Conference decision, the existing agreement between BellSouth and Supra is immediately deemed terminated and declared null and void. (Motion at p. 14.)

BellSouth also offers an alternative request for relief:

1. The Commission should order the parties to immediately begin operating under the agreement filed by BellSouth on July 15, 2002, as of the date of the Agenda Conference at which BellSouth's motion is decided; or

2. The Commission should order that BellSouth is relieved of the duty to provide services to Supra as of the date of the Agenda Conference.

In addition, BellSouth asks the Commission to sanction Supra for bad faith, award BellSouth attorneys' fees, and provide any other relief the Commission finds appropriate.

BellSouth notes that there is precedent for the action it requests. In an Order from the California Public Utilities Commission, Decision No. 01-06-073, 2001 Cal. PUC LEXIS 600, issued June 28, 2001, wherein the parties were directed to either sign PAC Bell's proposed agreement, terminate the existing agreement, or Supra was to opt into an existing agreement. The parties chose to terminate the agreement.

SUPRA

Supra contends that it has devoted hundreds of man-hours to reviewing BellSouth's proposed agreement, reviewing the parties' prior agreements, reviewing the Commission's orders, documenting problems with the proposed agreement, and attempting to negotiate with BellSouth. Supra contends that BellSouth's request to expedite approval of the unilaterally filed agreement is a "gaming tactic" designed to have the Commission force an unacceptable agreement upon Supra.

Supra further contends that BellSouth's request for expedited treatment is made in bad faith, because BellSouth has not even attempted to negotiate acceptable language with Supra and has failed to properly reflect the areas on which the parties did agree prior to arbitration. Supra contends that this motion is designed to avoid due process in an effort to quickly escape the parties' current agreement. Supra maintains that the July 15, 2002, version of the agreement is "riddled with mistakes, inaccuracies and other language. . . ." For these reasons, Supra asks that the Motion for Expedited Commission Action be denied.

Analysis

This Docket was opened on September 1, 2000. The Final Order on Arbitration was issued in this Docket on March 26, 2002. The

Order on the parties' various procedural motions and motions for reconsideration, Order No. PSC-02-0878-FOF-TP, was issued July 1, 2002. Therein, the Commission clearly stated:

> As noted by Supra, we have the authority to show cause a party which fails to sign an arbitrated interconnection agreement in the event there is no good cause for failing to execute the agreement. We now place the parties on notice that if the parties or a party refuses to submit a jointly executed agreement as required by Order No. PSC-02-0637-PCO-TP and Order No. 02-0143-FOF-TP within fourteen (14) days of the issuance of a final order on Supra's Motion for Reconsideration, we may impose a $25,000 per day penalty for each day the agreement has not been submitted thereafter in accordance with Section 364.285, Florida Statutes.

Order at p. 65. The parties have had ample time in which to reach an agreement on a final interconnection agreement. Based on the time that has passed, the exhibits attached to BellSouth's pleading, and the numerous procedural motions filed in this case by Supra, it appears to staff that Supra has devoted insufficient resources to the negotiation of a final agreement -- perhaps intentionally.

While staff believes that the Commission clearly has the authority to sanction or fine Supra for its failure to sign an agreement, or even to submit its own version of an agreement, by July 15, 2002, in this circumstance, staff believes that the best remedy is simply to impose BellSouth's primary request for relief, which is that Supra either sign the agreement proposed by BellSouth, opt into another existing, approved agreement, or the existing agreement will be considered terminated, null, and void. Staff does, however, recommend a slight extension of the seven day requirement requested by BellSouth. Staff believes that requiring the parties to file within 10 days would be more reasonable. Additional time would allow for some additional discussion between the parties, sufficient time to get the required signatures and have the agreement filed, or for Supra to make a determination as to which other existing agreement it may wish to adopt.

Staff emphasizes that the agreement the parties continue to operate under was approved by the Commission. Section 2.3 of that Agreement states that should the parties petition the Commission for arbitration of unresolved issues, the parties would encourage the Commission to resolve the disputed issues prior to the expiration of the current agreement. If that did not occur, the

parties agreed to continue to operate under the terms of the "current" terminated agreement until the subsequent agreement became effective. The agreement clearly contemplated that the current agreement would eventually terminate. But for the Supra's apparent failure to devote sufficient resources to negotiating a new agreement reflecting the Commission's arbitration decisions, there might very well be a subsequent, executed agreement for the Commission to approve. The "current" agreement also clearly contemplates that both parties would endeavor to resolve any outstanding issues in order to develop a subsequent agreement. That has not occurred in this case; therefore, staff believes it is within the Commission's authority to require that the "current" agreement be terminated, including the provisions of Section 2.3, which require that the parties continue to operate under the terms of the current agreement pending approval of a new agreement. As noted by BellSouth, the California Commission has taken similar action in a similar situation under the same federal Telecommunications Act.

While staff believes that the relief identified above is sufficient in this matter, staff notes that, if the Commission so chooses, it does have the ability to impose sanctions. In Order No. PSC-96-1320-FOF-WS, the Commission relied on Mercedes Lighting and Elec. Supply, Inc. v. State, Dep't of General Services, 567 So. 2d 272, 278 (Fla. 1st DCA 1990) in rendering its decision on a request for attorney's fees and costs. The Commission noted that in Mercedes Lighting, the court stated:

> The rule [against frivolous or improper pleadings contained in Rule 11, Federal Rules of Civil Procedure] is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories." The court further noted, that "a claim or defense so meritless as to warrant sanctions, should have been susceptible to summary disposition.

Order No. PSC-96-1320-FOF-WS at p. 21, citing Mercedes Lighting, 567 So. 2d at 276. The Commission also noted the court's determination that improper purpose in a pleading "may be manifested by excessive persistence in pursuing a claim or defense in the face of repeated adverse rulings, or by obdurate resistance out of proportion to the amounts or issues at stake." Id. at 278, Order No. PSC-96-1320-FOF-WS at 19. The Commission added that ". . . it is important to consider what was reasonable at the time the pleading was filed." Order No. PSC-96-1320-FOF-WS at p. 20. The Commission also stated that there must be some legal justification for the filing in question. Order No. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495, at p. 21.

Based on the foregoing, staff recommends that the parties be required to file a signed version of the interconnection agreement within 10 days of the Commission's decision at the Agenda Conference. If the parties file a signed agreement, staff recommends that the staff be allowed to review and administratively approve the final agreement if it complies with the Commission's Order and the Telecommunications Act. If the parties do not file a signed agreement within 10 days of the Agenda Conference, the existing agreement under which the parties' have continued to operate should be deemed terminated, and declared null and void. Supra may, however, adopt another existing, approved interconnection agreement with BellSouth, if it so chooses.