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October 22, 2002

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 323099-0850

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COMMISSION
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**RE: Docket No. 021062-TP Supra's Motion for Reconsideration of Order
No. PSC-02-1454-PCO-TL**

Dear Mrs. Bayo:

Enclosed is the original and 7 Copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Motion for Reconsideration of Order No. PSC-02-1454-PCO-TL in the above captioned docket.

I have enclosed a copy of this letter, please mark it to indicate that the original was filed, and thereupon return to me.

Sincerely,

Brian Chaiken/ATS
Brian Chaiken
General Counsel

Enclosures

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CERTIFICATE OF SERVICE
Docket No. 021062-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery, First Class U.S. Mail and/or Facsimile this 22nd day of October, 2002 to the following:

Wayne Knight
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Nancy B. White
James Meza III
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E. Earl Edenfield
Douglas Lackey
BellSouth Telecommunications
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SUPRA TELECOMMUNICATIONS &
INFORMATION SYSTEMS, INC.
2620 S.W. 27th Avenue
Miami, Florida 33133
Telephone: 305/476 – 4228
Facsimile: 305/443 – 9516

By: 
BRIAN CHAIKEN, ESQ.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination)
as to whether sufficient justification)
exists to implement Emergency Service) Docket No. 021062-TL
Continuity Plan Tariff and, if so,) Order No. PSC-02-1454-PCO-TL
for emergency waiver of Rule 25-4.118,) Filed: October 22, 2002
F.A.C., by BellSouth Telecommunications)
Inc.)
_____)

**SUPRA’S MOTION FOR RECONSIDERATION OF
ORDER NO. PSC-02-1454-PCO-TL**

Supra Telecommunications & Information Systems, Inc. (“Supra”) files this Motion for Reconsideration of Order No. PSC-02-1454-PCO-TL issued on October 21, 2002, by Michael A. Palecki, Commissioner, of the Florida Public Service Commission (“Commission”), in his capacity as Prehearing officer in a Petition filed by BellSouth on October 21, 2002. The Motion is necessitated because the Prehearing Officer’s Order was issued on an ex-parte basis, without the consideration of any facts and applicable law which would necessitate a denial of BellSouth’s Petition, and because the order is in fact ultra-vires as being in violation of the Florida Administrative Procedures Act (“Florida APA”) and other statutory and constitutional law.

STANDARD OF REVIEW

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering an Order. *See Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981); and *In re: Complaint of Supra Telecom*, 98 FPSC 10, 497, at 510 (October 28, 1998) (Docket No. 980119-TP, Order No. PSC-98-1467-FOF-TP). This standard necessarily includes any mistakes of either fact or law made by the Commission in its order. *In re:*

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

Investigation of possible overearnings by Sanlando Utilities Corporation in Seminole County, 98 FPSC 9, 214, at 216 (September 1998) (Docket No. 980670-WS, Order No. PSC-98-1238-FOF-WS) ("It is well established in the law that the purpose of reconsideration is to bring to our attention some point that we overlooked or failed to consider or a mistake of fact or law"); see e.g. In re: Fuel and purchase power cost recovery clause and generating performance incentive factor, 98 FPSC 8, 146 at 147 (August 1998) (Docket No. 980001-EI, Order No. PSC-98-1080-FOF-EI) ("FPSC has met the standard for reconsideration by demonstrating that we may have made a mistake of fact or law when we rejected its request for jurisdiction separation of transmission revenues"). Moreover, an ultra-vires order which was entered without authority under the Florida APA, is clearly a mistake of law which mandates a reversal.

Factual background

On October 21, 2002, BellSouth filed a Petition For Implementation Of BellSouth's Emergency Service Continuity Tariff and Emergency Rule Waiver ("Petition and Emergency Waiver"). The Certificate of Service attached to this Petition demonstrates that this Petition and Emergency Waiver was served via "Federal Express" on Ann Shelfer (Supra's Vice-President of Regulatory Affairs), Esther A. Sunday (Supra's Registered Agent) and Brian Chaiken (Supra's General Counsel). The Certificate of Service, at best, contemplates service of the Petition and Emergency Waiver, on October 22, 2002. BellSouth's Petition and Emergency Waiver cites to Section 120.542, Florida Statutes, as well as Rule 28-104.004, Florida Administrative Code, as authority for the relief sought.

On October 21, 2002, Michael A. Palecki, Commissioner of the FPSC, sitting in the capacity of a Prehearing Officer issued Order No. PSC-02-1454-PCO-TL. Supra notes that as of October 22, 2002, the docket shows that no Prehearing Officer has yet been assigned to the

docket. In his Order, Commissioner Palecki characterizes all of BellSouth's claims as mere "allegations." Notwithstanding this legal conclusion, Commission Palecki nevertheless ordered that BellSouth is entitled to a waiver of Section 364.24(2), Florida Statutes and Rule 25-4.118, Florida Administrative Code. Supra was not afforded an opportunity to respond to BellSouth's mere allegations in the Petition and Emergency Waiver, as the Prehearing Officer issued his order within a few hours of BellSouth's filing and without any notice to Supra or public hearing. The waiver grants BellSouth access to Supra's customer record information so that BellSouth can immediately begin notifying Supra customers that BellSouth intends to disconnect these customers (without in fact allowing BellSouth to disconnect any customers). Apart from being a gross violation of the Florida APA and other applicable law, the Order purports to bless a BellSouth misrepresentation to Florida telephone consumers that their service will be interrupted in fourteen (14) days, even though no authority has yet been granted for that action.

The Decision Fails To Apply Any Applicable Law

Section 120.542(8), F.S., provides in part that "[t]he agency's decision to grant or deny the petition [for waiver] shall be supported by competent substantial evidence." Rule 28-104.004(2)(a) and (b), Florida Administrative Code, requires that the petitioner for an emergency waiver shall specify: "(a) the specific facts that make the situation an emergency, and (b) the specific facts that show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S." Furthermore, Rule 28-104.005(2), F.A.C., requires that "[t]he order [granting an emergency waiver] **shall** state the facts and reasons supporting the agency's action." (Emphasis added). Moreover, administrative decisions have held that a petition for an emergency waiver requires the pleading and proof of an immediate danger to the public health, safety and welfare

which requires immediate agency action. In re: Eagle-Picher Industries, Inc., Petition for Emergency Variance, 22 FALR 1278, 1990 WL 1034433 (Fla.Dept.Env.Prot. 1999). Absent such pleading and proof, an agency has no authority to employ the emergency provisions of both the statutory and administrative code sections of the Florida APA.

Order No. PSC-02-1454-PCO-TL is void of any facts or findings, particularly any such findings which are required to grant an emergency waiver. In Supra's case, the Prehearing Officer failed to hold an evidentiary hearing in order to determine whether or not Supra had failed to pay BellSouth any undisputed amounts under the parties' Present Agreement. Notwithstanding the obvious failures regarding Supra's right to notice and an opportunity to be heard, the Prehearing Officer failed to even identify any specific undisputed facts alleged by BellSouth – in contravention of Rules 28-104.004(2) and 28-104.005(2), F.A.C. - that would permit BellSouth to claim that Supra is in breach of the parties' Present Agreement. Ironically, the Prehearing Officer went so far as to determine that he specifically was not making any findings of fact; as Commissioner Palecki writes: “This Order . . . shall in no way be construed as a determination that sufficient circumstances exist to justify full implementation of BellSouth's Emergency Service Continuity Plan.”

The alleged emergency claimed by BellSouth can only exist by BellSouth's own making; i.e. the outright disconnection of Supra's end-use customers by BellSouth, regardless of whether it is made in compliance with the parties' Present Agreement. Thus BellSouth has created its own emergency in an obvious attempt to deny Supra due process of law. The Prehearing Officer expressly concluded that he was not making a determination one way or the other regarding BellSouth's “allegations.” If the Prehearing Officer was refraining from making specific findings, then on what basis did the Prehearing Officer conclude that BellSouth had met its

burden in identifying “specific facts that make the situation an emergency” which would justify a waiver of Section 364.24(2), Florida Statutes?

If the Prehearing Officer did in fact make findings of fact, contrary to his own words, then the Order is void as arbitrary and capricious since Supra has had no right whatsoever to counter the false allegations of the Petition and Emergency Waiver. If no findings of fact were made as stated, then the Order is void for failing to meet the standards set out in Rule 28-104.004 and 005, F.A.C.

BellSouth’s Petition Fails For Lack Of Specificity

Rule 28-104.004(2)(a) and (b), Florida Administrative Code, requires BellSouth to provide specificity. BellSouth’s Petition for Waiver fails to identify with any specificity the billing period involved or the specific amount of alleged undisputed amounts which are past due and have gone unpaid. Thus, even if BellSouth was correct, which it is not, that Supra had not paid undisputed charges, Supra would have no way to cure as BellSouth has not identified the alleged undisputed amounts it claims are owed. As such, BellSouth’s Petition is deficient.

The waiver granted in Order No. PSC-02-1454-PCO-TL is based upon a mere allegation that: “BellSouth is within its rights under the Interconnection Agreement to immediately disconnect wholesale services to Supra . . .”¹ In the absence of this alleged “right,” BellSouth’s actions, to disconnect Supra’s end-use customers, would be an intentional and willful attempt to tortuously interfere with Supra and its customers and an act in breach of the parties’ Present Agreement. This Order is void of any findings. In fact, the truth is that BellSouth has misrepresented this fact in its Petition and Emergency Waiver because under the Present Agreement it is impossible for BellSouth to make this allegation. In fact, BellSouth has no

¹ See BellSouth’s Petition pgs.4-5.

contractual right to take the actions sought in the Petition and Emergency Waiver; and indeed BellSouth is simply violating the parties Present Agreement. Furthermore, BellSouth's Petition does not allege that any such determination has been made in any forum and for good reason, as none have been made. BellSouth is fully aware that Supra will be irreparably harmed by its actions. In fact, on September 18, 2002, during a hearing for a preliminary injunction counsel for BellSouth informed Judge Hinkle of the Northern District of Florida that it was intending on filing the very Petition it filed on October 21st and that if the FPSC Ordered BellSouth to implement the tariff, that BellSouth would provide customers notice through public media and through an automated dial announcement going down the customer's line, which drew the following response from Judge Hinkle:

That pretty well cinches the irreparable harm issue, doesn't it? I mean, I can't imagine what you could do to Supra that would be more irreparable than that, to take out a newspaper advertisement and pipe it on their phone, your carrier is not paying the bills, and you've got to go somewhere else. That pretty well would do Supra in, wouldn't it?

(9/18/02 TRO Hearing Transcript p. 161, ln. 22 to p. 162, ln. 11). Judge Hinkle went on to find that BellSouth had no contractual right to terminate services under the Present Agreement for monies alleged due under the parties' prior agreement.

At the time of BellSouth's Emergency Rule Waiver, Supra was and remains in complete compliance with all of its obligations under the parties' Present Agreement. Significantly, as the sole basis for its actions, BellSouth claims that Supra has failed to pay undisputed amounts under its August bill.² Services provided under the August bill were from July 20, 2002 to August 19, 2002. The earliest time at which the parties' Present Agreement could become effective is August 16, 2002, as noted by the FPSC in a

² See BellSouth's Petition and Emergency Rule Waiver at pgs. 1-2.

recent filing before the FCC.³ As such, only 4 days worth of service could possibly be due under the parties' Present Agreement. The remaining 27 days worth of service were provided under the parties' Prior Agreement, which calls for mandatory commercial arbitration regarding all disputes arising there under. All of the above information is omitted from BellSouth's petition as BellSouth has simply misrepresented key facts in its Petition and Emergency Waiver.

BellSouth also fails to address with any specificity how or why Supra is in violation of Attachment 6, Section 17.2.2 and Section 15. BellSouth makes a faint reference to Section 17.2.2 of Attachment 6 under the parties' Present Agreement as its authority for discontinuing service. This provision reads as follows:

If payment of undisputed amounts is not received by the bill day in the month after the original bill day, BellSouth may provide written notice to Supra Telecom, that additional applications for service will be refused and that any pending orders for service will not be completed if payment of undisputed amounts is not received by the fifteenth day following the date of the notice. In addition BellSouth may, at the same time, give thirty days notice to the person designated by Supra Telecom to receive notices of noncompliance, and discontinue the provision of existing services to Supra Telecom at any time thereafter. [See Relevant Provisions of Attachment 6 attached hereto as Exhibit A]

BellSouth also fails to identify Section 1.3 of the GT&C of the Present Agreement which provides that "BellSouth shall not discontinue Services and Elements provided hereunder without the prior written consent of Supra Telecom". (Emphasis added). Supra has not consented to the discontinuance of any Services or Elements. [See Exhibit B].

Furthermore, Section 15 of Attachment 6 to the Present Agreement is entitled Billing Disputes [See Exhibit A]. Section 15.1 provides in part "[i]n the event of a billing dispute, the

³ See Comments filed by the FPSC before the Federal Communications Commission in WC Docket No. 02-238, where Richard Bellak (FPSC Assistant General Counsel) states: "Now that the follow-on agreement has become effective as of August 16, 2002, the prior agreement no longer has any force or effect." The language of the follow-on agreement however states that it will become effective upon approval by the FPSC (i.e. on August 22, 2002).

parties will endeavor to resolve the dispute within sixty (60) calendar days of the dispute notification date.” Section 15.2 provides in part “[i]f the issues are not resolved within the allocated time frame, each of the parties shall appoint a designated representative who has authority to settle the dispute”. Section 15.3 provides “[i]f the Parties are unable to resolve issues related to the disputed amounts within forty-five (45) days after the parties’ appointment of designated representatives, the dispute will be resolved in accordance with the dispute resolution procedure set forth in Section 16 of the General Terms and Conditions of this Agreement, incorporated herein by reference.” Under Section 15.2 the parties have not yet appointed designated representatives with authority to settle the dispute pursuant to Section 15.3. Accordingly, the dispute resolution procedures set forth in this Agreement have not been followed by BellSouth.

Given the foregoing, BellSouth is foreclosed from terminating service in the absence of a showing that Supra has failed to pay undisputed amounts, if any, arising after the effective date of the parties’ Present Agreement. The facts are that there are no undisputed amounts which have arisen after the effective date of the parties’ Present Agreement. BellSouth is attempting to ignore Supra’s good faith disputes and unilaterally decide that these disputes do not exist, thereby allowing BellSouth to bypass the billing dispute resolution procedures set forth in the agreement, and thereby alleging that Supra has not paid undisputed charges.

The Waiver Was Granted In Violation Of Law

Despite the Petition’s lack of specificity and the Orders failure to state the facts and reasons supporting the agency’s action, the waiver was granted. The Order states: “This Order authorizes implementation of the proper notice provision only, . . .” The serious problem with this decision is that in fact the Prehearing Officer has granted a de facto waiver without

complying with any of the applicable law. The allowance of notification to Supra's customers presupposes that the Commission – as opposed to a Prehearing Officer – has made some evidentiary determination that Supra is in fact in breach of the parties' Present Agreement and that BellSouth is entitled to a waiver.

The notification the Prehearing Officer authorized BellSouth to issue to all of Supra's end-use customers reads in part:

“Fourteen days from today, service provided by Supra will be interrupted **due to Supra's failure to pay for services provided to it by BellSouth** and you will not be able to make or receive normal calls.” (Bold added for emphasis).

Procedural due process dictates that approval of such a potentially libelous statement could only be granted at the conclusion of an evidentiary hearing in which the parties were issued adequate notice and provided a meaningful opportunity to be heard. “It is fundamental that the constitutional guarantee of [procedural] due process, . . . extends to every proceeding.” Rucker v. City of Ocala, 684 So.2d 836, 841 (1st DCA 1996). “To qualify under due process standards, the opportunity to be heard must be meaningful, full and fair, and not merely colorable or illusive”. Id.⁴ In Supra's case, there was no notice and no meaningful opportunity to be heard whatsoever.

BellSouth's own Certificate of Service demonstrates that Supra would not receive BellSouth's Petition and Emergency Waiver until Tuesday, October 22, 2002 via Federal Express. The Prehearing Officer nevertheless issued his order on Monday, October 21, 2002 – the same day the Petition was filed by BellSouth.

⁴ 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).

Despite the lack of procedural due process, the Prehearing Officer made no findings of fact that Supra has in deed failed to pay any undisputed charges for services provided to it by BellSouth under the parties' Present Agreement. Rule 28-104.005(2), F.A.C. requires the agency to state the specific "facts" that are based upon competent substantial evidence [See § 120.542(8), F.S.] that the agency relied upon for granting the waiver. The Agency is the Florida Public Service Commission and not the Prehearing Officer who only has limited authority under Fla.Adm.Code Sec. 28-106.211 to enter procedural orders; not substantive orders granting substantive relief sought in a petition. Accordingly, apart from the lack of authority to enter substantive orders, in the absence of any specific findings of fact, it was a mistake of fact as well as a mistake of law for the Prehearing Officer to have concluded that BellSouth had any contractual right to terminate any services under the parties' Present Agreement or otherwise to provide any notice to Supra's end-use customers of imminent disconnection of services.

Decision on the merits

The decision is in fact a decision on the merits. BellSouth writes in paragraph 6 of its Petition, that "If the Commission determines that the Emergency Service Continuity Plan should be implemented, effective implementation by BellSouth requires a waiver of the following:" Rule 25-4.118, F.A.C. and Section 364.24(2), F.S.

Commissioner Palecki granted the waiver of these two provisions even though he concluded that: "This Order . . . shall in no way be construed as a determination that sufficient circumstances exist to justify full implementation of BellSouth's Emergency Service Continuity Plan." Pursuant to BellSouth's own words, they will now be permitted to "effectively implement" their plan.

BellSouth will likely begin its notification on Tuesday, October 22, 2002, if it did not begin so on October 21st immediately upon receipt of the Prehearing Officer's order.

The message reads in part:

"Fourteen days from today, service provided by Supra will be interrupted due to Supra's failure to pay for services provided to it by BellSouth and you will not be able to make or receive normal calls. **To avoid service interruption and keep your same telephone number, you must contact a new service provider in the next 2 to 3 days.** You have the option of choosing any new local services provider providing service in your area." (Bold added for emphasis).

The substantive effect of the above notification will be that Supra customers will begin en masse to attempt to switch to another provider within 2 to 3 days of receiving the above message. The next scheduled Agenda Conference for the Commission is Tuesday, November 5, 2002. The fact of the matter is that even if the Commission makes a determination that there is not a sufficient basis to justify allowing BellSouth to disconnect Supra's end-users, the damage will have already been done. The decision will have given BellSouth its stamp of approval to irreparably damage Supra's image by (a) telling Supra's customers that Supra has not paid undisputed bills, prior to any such determination, (b) threatening Supra customers that they will be losing service; and (c) forcing Supra customers to select a new carrier.

How can Supra be made whole after this regulatory fiasco? Had the Commission afforded Supra its basic procedural due process rights of notice and a meaningful opportunity to be heard, this matter could have been handled in an orderly and just fashion. Now, the Prehearing Officer's Order has placed Supra in an untenable position.

BellSouth intends to begin, and may have already begun, notifying Supra's customers of pending disconnections. As Supra has paid all undisputed amounts according to the parties' Present Agreement, it is BellSouth that is in breach of contract by seeking to interfere with Supra and its customers. Supra has been and will continue to be irreparably harmed by BellSouth's

actions in both informing the public and directly contacting Supra's customers of its intended actions, which constitute breaches of the parties' Present Agreement. The harm, loss and damage is simply incalculable.

The Order Is Inconsistent With Precedent

The present circumstances are substantively distinguishable from the circumstances BellSouth faced in Order No. PSC-02-0895-PAA-TP. In that case, BellSouth had purchased the right to serve the local business customer base of Adelphia Business Solutions ("Adelphia"). The purchase agreement between BellSouth and Adelphia provided that time is of the essence in the transfer of the customer base to accommodate Adelphia's business plans. BellSouth had a right to transfer those customers over to its network.

Likewise, BellSouth is also not faced with the situation Sprint faced in Order No. PSC-02-1223-PAA-TP. In that case, Adelphia had filed for bankruptcy. Adelphia had notified its own customers that Adelphia was discontinuing service and that the customers would need to select another local carrier by September 1, 2002. Sprint's records reflected, however, that as of August 30, 2001, approximately 2,500 Adelphia customers had still not requested a change to another carrier. Although Adelphia sent notices to its business customers, no mention was made of transitioning customers to Sprint if the customers did not choose another local carrier.

BellSouth is not faced with either of the above two situations. BellSouth has not purchased Supra's end-use customers as it did with Adelphia. Likewise, Supra has not been notifying its own customers that it will no longer be providing local telephone service because it has filed for bankruptcy, as was the case with Sprint and Adelphia. In each of these two above referenced cases, the Competitive Local Exchange Company ("CLEC") involved had decided,

itself, that it could no longer serve its end-use customers. In Supra's case, BellSouth has determined unilaterally that it no longer wishes to provide wholesale services to Supra.

Interestingly, both of the Emergency Rule waivers granted in Order Nos. PSC-02-0895-PAA-TP and PSC-02-02-1223-PAA-TP were issued as proposed agency actions which allow parties substantially affected by the Commission's decision to petition for an evidentiary hearing pursuant to Section 120.57, Florida Statutes.

Another interesting feature of these two waivers is that the full Commission made the decision in Order No. PSC-02-0895-PAA-TP and a panel of three Commissioners made the decision in Order No. PSC-02-02-1223-PAA-TP. Section 120.542, Florida Statutes as well as Rules 28-104.001-006, F.A.C., presupposes that the substantive decision regarding waiver will be decided by the agency. Section 350.01(5), F.S., places a duty on the Chairperson of the Commission to "distribute the workload . . . and to assign the various proceedings pending before the commission requiring hearings to two or more Commissioners." Pursuant to this provision this particular agency acts when either the full Commission or an assigned panel votes on an issue at a publicly noticed meeting.

In Supra's case, Commissioner Palecki, in violation of his authority under Fla. Adm. Code S. 28-106.211 as a Prehearing Officer, issued an Order granting the waiver. Commissioner Palecki failed to cite to any authority that would (1) allow a Prehearing Officer – as opposed to the full Commission or assigned panel - to decide a substantive issue, and (2) allow the Prehearing Officer to issue a final order on an ex parte basis without any notice or opportunity for Supra to be heard.

Accordingly, Order No. PSC-02-1454-PCO-TL is void because it was granted on an ex - parte basis by a Prehearing Officer – as opposed to the full Commission or assigned panel.

No Public Notice Or Comments Were Allowed

BellSouth's Petition and Emergency Waiver cites to Section 120.542, Florida Statutes, as well as Rule 28-104.004, Florida Administrative Code, as its authority for the relief sought. These provisions, however, do not permit BellSouth to obtain the relief sought.

Section 120.542(3), Florida Statutes, provides in part:

“The uniform rules shall include procedures for the granting, denying or revoking of emergency and temporary variances and waivers. (Emphasis added).

The uniform rules referenced above can be found in Rules 28-104.001-006, Florida Administrative Code. Accordingly, the statute mandates that Rules 28-104.001-006, F.A.C., shall include procedures for granting, denying or revoking of emergency variances and waivers. Subsection (3) of Section 120.542, F.S., provides further guidance on what limitations may be placed on the procedures for emergency waivers. Subsection (3) reads in part:

“Such provisions may provide for expedited timeframes, **waiver of or limited public notices**, and **limitations on comments** on the petition in the case of such temporary or emergency variances and waivers.”

The above referenced language presumes that Rules 28-104.001-006, F.A.C., may provide for waiver of or limited public notices. Stated differently, if Rules 28-104.001-006, F.A.C., do not contain a “waiver of or limited public notices,” then the Commission is bound by the public notice requirements in Section 120.542(6), Florida Statutes. No such waiver or limitation exist in the rules. Therefore, in accordance with Section 120.542(6), F.S., the Commission is required to provide notice of the petition for waiver to the Department of State within 15 days of it being filed.

Section 120.542(6), Florida Statutes, also requires that a means “shall” be provided for interested persons to provide comments on the petition. The above referenced language from subsection (3) presumes that Rules 28-104.001-006, F.A.C., may provide for a “limitation on

comments.” Stated differently, if Rules 28-104.001-006, F.A.C., do not contain a “limitation on comments,” then the Commission is bound by the provisions governing comments in Section 120.542(6), Florida Statutes, and Rule 28-104.003, F.A.C. The referenced language at most only permits a limitation on comments – as opposed to a complete waiver on comments. In short, comments can not be waived by the agency. A party may choose not to file comments, but the agency must allow parties to file such comments if so desired. *See* Rule 28-104.003(1), F.A.C., which reads in part: “The agency shall state in any order whether the comments were received by the agency.”

This mandate is in the rule for the simple reason that it is expected that the agency will allow comments. If a party chooses not to file comments, again, that is the choice of the party. *See* Rule 28-104.003(2), F.A.C., which states: “The agency **shall** maintain the comments as part of the record.” The plain reading of this language dictates that it is expected that the agency will permit a comment period before rendering a substantive decision.

Rule 28-104.003(1), F.A.C., reads as follows: “Any interested person or other agency may submit written comments on the petition for a variance or waiver within 14 days after the notice required by Section 120.542(6), F.S.” Nowhere in Chapter 28 of the Florida Administrative Code is there provision permitting a waiver of comments. In fact, pursuant to Section 120.542(3) and (6), F.S., at most Chapter 28 of the Code allows for a limit on time for filing comments. However, no such limitation can be found in Chapter 28 of the Code.⁵ It only follows that *Supra* was entitled, as a matter of law, to file comments in response to BellSouth’s

⁵ The plain language of Section 120.542(3), F.S., requires that if Rule 28-104.004, F.A.C., does not include either (1) an express waiver of or limited public notice requirements, or (2) an express limitation on comments, then both the public notice requirements and comment periods are mandatory. No such express waivers or limitations can be found in Chapter 28-104. Accordingly, public notice and comments are required.

petition for emergency waiver. Supra's right extended to 14 days after the proper notice was issued to the Department of State.

In Supra's case, the Prehearing Officer failed to issue a notice to the Department of State in accordance with Section 120.542(6), F.S. The Prehearing Officer also refused to allow Supra to file comments in opposition to BellSouth's Petition in contravention of Rule 28-104.003, F.A.C. The Prehearing Officer's Order is therefore void.

Interestingly, Rule 28-104.005, F.A.C., provides that an "agency shall grant or deny a petition for emergency variance or waiver within 30 days of its receipt by the agency." This rule demonstrates that even in alleged emergencies an agency may wait up to 30 days to act. Minimum due process requirements dictate that the Prehearing Officer had ample time to allow Supra time to comment.

Rule 28-104.004, F.A.C., requires that the petitioner for an emergency waiver shall specify: (1) the specific facts that make the situation an emergency, and (2) the specific facts that show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued expeditiously than the time frames provided in Section 120.542, F.S. First BellSouth fails to articulate why there is an emergency. In the absence of BellSouth unilateral decision to threaten to disconnect Supra's end use customers there would be no alleged emergency. Contrary to prior Commission decisions, Supra has not sold its customer base to an Incumbent Carrier, nor has Supra notified its own customers that it no longer intends to service them. *See* Order Nos. PSC-02-0895-PAA-TP and PSC-02-02-1223-PAA-TP. This alleged emergency is simply a fabrication.

Even if the Prehearing Officer believed that there existed an "immediate danger to the public health, safety and welfare" and that immediate action was required, the Prehearing Officer

was under a duty to provide Supra with advance notice. Section 120.525, Florida Statutes, outlines the notice requirements for public meetings or hearings. Subsection (1) of this statute provides in part that “each agency shall give notice of public meetings . . . by publication in the Florida Administrative Weekly not less than 7 days before the event.

Subsection (3) of Section 120.525, F.S., allows an agency to “hold an emergency public meeting and give notice of such meeting by any procedure that is fair under the circumstances and necessary to protect the public interest.” In the instant proceeding, Supra was given no notice or opportunity to be heard prior to the Prehearing Officer issuing his substantive order. No finding has been made under Fla.Stat. 120.525(3) that in fact the alleged emergency (of BellSouth’s own creation), constitutes any immediate danger to the public health, safety, or welfare which requires immediate action. Nor was any public meeting ever held prior to the entry of the order, which in fact, violates the Florida APA. As a consequence of the violations of Supra’s basic procedural due process right, this Order No. PSC-02-1454-PCO-TL is ultra vires, void under the Florida APA and thus should be reversed.

BellSouth Fails To Meet The Standard For A Waiver

BellSouth specifically seeks a waiver of Section 364.24(2), Florida Statutes, which prohibits BellSouth from reviewing the customer information of Supra.⁶ Nowhere in BellSouth’s Petition does it articulate how a waiver of this underlying statute – which requires this information remain confidential – will help serve the purposes of the underlying statute which prevents BellSouth from accessing this information without customer approval. BellSouth is required to demonstrate pursuant to Section 120.542(2), F.S., or Rule 28-104.003(2)(g), F.A.C., that a “substantial hardship or a violation of the principles of fairness would justify a

⁶ See BellSouth Petition and Emergency Rule Waiver pg. 6, paragraph 11.

waiver.” BellSouth has failed to articulate any substantial hardship. The only claim of alleged hardship expressed by BellSouth is the following: “to protect the financial health of BellSouth.” The facts, however, demonstrate that Supra has paid and continues to pay all undisputed amounts. Given that Supra continues to act in full compliance with the parties’ Present Agreement, any alleged “economic” hardship BellSouth may be experiencing cannot be the result of Supra and BellSouth’s new contract.

Moreover, the burden that Supra is an alleged “non-paying CLEC” in contravention of the parties’ Present Agreement is on BellSouth. Mere “allegations,” as characterized by Commissioner Palecki, are not sufficient as a matter of law to justify the Prehearing Officer’s Order granting such a waiver. Accordingly, BellSouth cannot meet the substantial hardship test.


Principles of fairness are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons subject to the rule. *See* Section 120.542(2), F.S. In the instant case, the principles of fairness cannot be violated by the literal application of the rule. There has been no finding that Supra is in breach of the parties’ Present Agreement thereby conferring on BellSouth some absolute and unilateral right to discontinue service to Supra’s end-use customers. In the absence of any findings regarding an actual breach, and as such some alleged “right” by BellSouth to disconnect, it must be presumed that BellSouth’s actions, to disconnect Supra’s end-use customers, are an intentional and willful attempt to tortuously interfere with Supra and its customers. The literal application of the statute prohibiting BellSouth from gaining access to Supra’s customer record information, will not affect BellSouth any differently than any other CLEC or ILEC subject to the rule.

On the contrary, if BellSouth is granted access to Supra's customer record information, it is Supra that will suffer a substantial hardship. BellSouth will utilize this information to immediately and irreparably harm Supra's image by (a) telling Supra's customers that Supra has not paid undisputed bills, prior to any such determination, (b) threatening Supra customers that they will be losing service; and (c) forcing Supra customers to select a new carrier. Likewise, allowing BellSouth access to this information in the absence of an evidentiary hearing with findings of facts and conclusions of law will violate the principles of fairness as well as due process.

For all of these reasons, BellSouth's specific request for waiver of Section 364.24(2), must be denied and Order No. PSC-02-1454-PCO-TL must be reversed.

Respectfully submitted,

SUPRA TELECOMMUNICATIONS &
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2620 S.W. 27th Avenue
Miami, FL 33133
Telephone: 305.476.4248
Facsimile: 305.443.9516


Brian Chaiken
General Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail and/or Federal Express this 22nd day of October, 2002 to the following:

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

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By: Brian Chaiken/ABS
Brian Chaiken

Telecom will provide BellSouth with one address to which such payments shall be rendered and BellSouth will provide to Supra Telecom with only one address to which such payments shall be rendered. In the event Supra Telecom receives multiple bills from BellSouth which are payable on the same date, Supra Telecom may remit one payment for the sum of all bills payable to BellSouth's bank account specified in this subsection if Supra Telecom provides payment advice to BellSouth. Each Party shall provide the other Party with a contact person for the handling of billing payment questions or problems.

15. BILLING DISPUTES

- 15.1 On a connectivity by connectivity basis and until such time as a pre-certification process is in place, each party agrees to notify the other party in writing upon the discovery of a billing dispute. The disputing party agrees to provide the billing party sufficient documentation to investigate the dispute and may withhold any disputed amounts supported by such documentation. Until documentation is provided all outstanding billed amounts will be considered past due. In the event of a billing dispute, the parties will endeavor to resolve the dispute within sixty (60) calendar days of the dispute notification date. Resolution of the dispute is expected to occur at the first level of management resulting in a recommendation for settlement of the dispute.
- 15.2 If the issues are not resolved within the allotted time frame, each of the parties shall appoint a designated representative who has authority to settle the dispute and who is at a higher level of management than the persons with direct responsibility for administration of this Agreement. The designated representatives shall meet as often as they reasonably deem necessary in order to discuss the dispute and negotiate in good faith in an effort to resolve such dispute. The specific format for such discussions will be left to the discretion of the designated representatives; however all reasonable requests for relevant information made by one Party to the other Party shall be honored.
- 15.3 If the Parties are unable to resolve issues related to the disputed amounts within forty-five (45) days after the parties' appointment of designated representatives, the dispute will be resolved in accordance with the dispute resolution procedure set forth in Section 16 of the General Terms and Conditions of this Agreement, incorporated herein by this reference.
- 15.4 If a party disputes a charge and does not pay such charge by the payment due date, such charges shall be subject to late payment charges as set forth in Section 16 of this Attachment 6. If a party disputes charges and the dispute is resolved in favor of such party, the

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other party shall credit the bill of the disputing party for the amount of the disputed charges along with any late payment charges assessed no later than the second Bill Date after the resolution of the dispute. Accordingly, if a party disputes charges and the dispute is resolved in favor of the other party, the disputing party shall pay the other party the amount of the disputed charges and any associated late payment charges assessed no later than the second bill payment due date after the resolution of the dispute.

- 15.5 BellSouth and Supra Telecom may withhold payment of charges disputed in good faith during the pendency of the dispute. BellSouth and Supra may not withhold payment of undisputed charges. BellSouth shall be permitted to disconnect Supra for nonpayment of undisputed charges.

16. LATE PAYMENT CHARGES

- 16.1 If either Party fails to remit payment for any charges described in this Attachment 6 by the payment due date, or if a payment or any portion of a payment is received by either Party after the payment due date, or if a payment or any portion of a payment is received in funds which are not immediately available to the other Party, then a late payment penalty shall be assessed. For bills rendered by BellSouth for payment by Supra Telecom, the late payment charge shall be calculated based on the portion of the payment not received by the payment due date times the late factor as set forth in the following BellSouth tariffs, based upon the service for which payment was not received: for general subscriber services, Section A2 of the General Subscriber Services Tariff; for private line service, Section B2 of the Private Line Service Tariff; and for access service, Section E2 of the Access Service Tariff. For bills rendered by Supra Telecom for payment by BellSouth the late payment charge shall be calculated based on the portion of the payment not received by the payment date times the lesser of (i) .one and one-half percent (1 ½%) per month or (ii) the highest interest rate (in decimal value) which may be charged by law for commercial transactions, compounded daily for the number of days from the payment date to and including the date that payment is actual made. In no event, however, shall interest be assessed by Supra Telecom on any previously assessed late payment charges. BellSouth shall only assess interest on previously assessed late payment charges in a state where it has the authority pursuant to its tariffs.

17. DISCONTINUANCE OF SERVICE

- 17.1 The procedures for discontinuing service to an end user are as follows:

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- 17.1.1 Where possible, BellSouth will deny service to Supra Telecom's end user on behalf of, and at the request of, Supra Telecom. Upon restoration of the end user's service, restoral charges will apply and will be the responsibility of Supra Telecom.
- 17.1.2 At the request of Supra Telecom, BellSouth will disconnect a Supra Telecom end user.
- 17.1.3 All requests by Supra Telecom for denial or disconnection of an end user for nonpayment must be in writing.
- 17.1.4 Supra Telecom will be made solely responsible for notifying the end user of the proposed disconnection of the service.
- 17.1.5 BellSouth may disconnect and reuse facilities when the facility is in a denied state and BellSouth has received an order to establish new service or transfer of service from an end user or an end user's CLEC at the same address served by the denied facility.
- 17.2 The procedures for discontinuing service to Supra Telecom are as follows:
 - 17.2.1 BellSouth reserves the right to suspend or terminate service for nonpayment of undisputed amounts or in the event of prohibited, unlawful or improper use of the facilities or service, abuse of the facilities by Supra Telecom.
 - 17.2.2 If payment of undisputed amounts is not received by the bill day in the month after the original bill day, BellSouth may provide written notice to Supra Telecom, that additional applications for service will be refused and that any pending orders for service will not be completed if payment of undisputed amounts is not received by the fifteenth day following the date of the notice. In addition BellSouth may, at the same time, give thirty days notice to the person designated by Supra Telecom to receive notices of noncompliance, and discontinue the provision of existing services to Supra Telecom at any time thereafter.
 - 17.2.3 In the case of such discontinuance, all billed undisputed charges, as well as applicable termination charges, shall become due.
- 17.3 If BellSouth does not discontinue the provision of the services involved on the date specified in the thirty (30) days' notice and Supra Telecom's noncompliance continues, nothing contained herein shall preclude BellSouth's right to discontinue the provision of the services to Supra Telecom without further notice.
 - 17.3.1 If payment of undisputed charges is not received or arrangements made for payment by the date given in the written notification, Supra

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Telecom's services will be discontinued. Upon discontinuance of service on a Supra Telecom's account, service to Supra Telecom's end users will be denied. BellSouth will also reestablish service at the request of the end user or Supra Telecom upon payment of the appropriate connection fee and subject to BellSouth's normal application procedures. Supra Telecom is solely responsible for notifying the end user of the proposed disconnection of the service.

- 17.3.2 If within fifteen days after an end user's service has been denied, Supra Telecom has not contacted BellSouth in reference to restoring service, the end user's service will be disconnected.

18. ADJUSTMENTS

- 18.1 Subject to the terms of this Attachment 6, BellSouth will adjust incorrect billing charges to Supra Telecom. Such adjustments shall be set forth in the appropriate section of the bill pursuant to CBOS or CLUB/EDI standards.

19. REVENUE PROTECTION

- 19.1 Where BellSouth services are being resold and where Supra Telecom is using a BellSouth port, Supra Telecom will have the use of all present and future fraud prevention or revenue protection features, including prevention, detection, or control functionality embedded within any of the network elements available to BellSouth. These features include, but are not limited to, screening codes, call blocking of international, 800, 900, and 976 numbers.
- 19.2 The Party causing a provisioning, maintenance or signal network routing error that results in uncollectible or unbillable revenues to the other Party shall be liable for the amount of the revenues lost by the Party unable to bill or collect the revenues less costs that would have been incurred from gaining such revenues.
- 19.3 Uncollectible or unbillable revenues resulting from the accidental or malicious alteration of software underlying Network Elements or their subtending operational support systems by unauthorized third parties shall be the responsibility of the Party having administrative control of access to said Network Element or operational support system software to the extent such unbillable or uncollectible revenue results from the gross negligence or willful act or omission of the Party having such administrative control.
- 19.4 BellSouth shall be responsible for any uncollectible or unbillable revenues resulting from the unauthorized physical attachment to loop facilities from the Main Distribution Frame up to and including the Network Interface Device, including clip-on fraud to the extent such

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- 1. Provision of Local Service and Unbundled Network Elements**
- 1.1** This Agreement sets forth the terms, conditions and prices under which BellSouth agrees to provide: (a) telecommunications services that BellSouth currently provides, or may offer hereafter for resale; (b) interconnection of BellSouth's network to Supra Telecom's network including but not limited to reciprocal compensation, if applicable; (c) certain unbundled Network Elements ("Network Elements") and certain combinations of such unbundled Network Elements ("Combinations"); (d) access to poles, rights of way and conduits; and (e) collocation (resale, interconnection, Network Elements and Combinations, access to rights of way, poles and conduits, and collocation shall collectively be referred to as "Services and Elements"). BellSouth may fulfill the requirements imposed upon it by this Agreement by itself or, in the case of directory listings for white pages may cause BellSouth Advertising and Publishing Company ("BAPCO") to take such actions to fulfill BellSouth's responsibilities. This Agreement includes Attachments 1 – 13 and all accompanying Appendices and Exhibits. Unless otherwise provided in this Agreement, BellSouth will perform all of its obligations hereunder throughout its entire service area.
- 1.2** Subject to the requirements of this Agreement, Supra Telecom may, at any time add, relocate or modify any Services and Elements purchased hereunder. Requests for additions or other changes shall be handled pursuant to the process provided in Attachment 10. Terminations of any Services or Elements shall be handled pursuant to Section 3 of the General Terms and Conditions of this Agreement.
- 1.3** BellSouth shall not discontinue Services and Elements provided hereunder without the prior written consent of Supra Telecom. Such consent shall not be unreasonably withheld; provided, however, BellSouth may discontinue any telecommunications service available for resale as long as BellSouth provides Supra Telecom prior written notice of intent to discontinue any such service. BellSouth further agrees to make any such service available to Supra Telecom for resale to Supra Telecom's end users who are subscribers of such services from Supra Telecom until the date BellSouth discontinues any such service for BellSouth's customers. BellSouth also agrees to adopt a reasonable, nondiscriminatory transition schedule for BellSouth or Supra Telecom end users who may be purchasing any such service.
- 1.4** This Agreement may be amended from time to time as mutually agreed in writing between the Parties. The Parties agree that neither Party will take any action to proceed, nor shall either have any obligation to proceed on a requested change unless and until a