

ORIGINAL

ATTACHMENT B

**BellSouth Telecommunications, Inc.
FPSC Docket No. 001305-TP
Request for Confidential Classification
Page 1 of 1
8/2/02**

**REQUEST FOR CONFIDENTIAL CLASSIFICATION FOR PORTIONS OF
BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION TO STAY COMMISSION
ORDERS PSC-02-0413-FOF-TP AND PSC-02-0878-FOF-TP
FILED ON JULY 12, 2002 IN FLORIDA DOCKET NO. 001305-TP**

TWO REDACTED COPIES

DOCUMENT NUMBER-DATE

08111 AUG-28

FPSC-COMMISSION CLERK

1 **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**
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5 In re: Petition for Arbitration of the Interconnection)
6 Agreement Between BellSouth Telecommunications,) Docket No. 001305-TP
7 Inc. and Supra Telecommunications & Information)
8 System, Inc., Pursuant to Section 252(b) of the) Filed: July 12, 2002
9 Telecommunications Act of 1996.)
10 _____)

11
12
13 **BELLSOUTH'S OPPOSITION TO SUPRA'S MOTION TO STAY COMMISSION**
14 **ORDER NOS. PSC-02-0413-FOF-TP AND PSC-02-0878-FOF-TP**
15

16 Bellsouth Telecommunications, Inc. ("BellSouth") opposes Supra
17 Telecommunications & Information Systems, Inc.'s ("Supra") Motion to Stay
18 Commission Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP
19 ("Motion" or "Motion to Stay"). The Florida Public Service Commission
20 ("Commission") should deny Supra's Motion because it is nothing more than
21 Supra's latest attempt to game the regulatory process and to delay operating
22 under a new Interconnection Agreement with BellSouth.

23 **INTRODUCTION**

24 With nothing else to protest or challenge and on the eve of having to
25 execute, file, and operate under a new Interconnection Agreement, Supra is
26 seeking to indefinitely stay the Commission's denial of Supra's various post-
27 hearing motions, including two motions for reconsideration, in Order No. PSC-02-
28 0413-FOF-TP ("Order Denying Reconsideration"), issued on July 1, 2002, and
29 the Commission's Final Order ("Order No. PSC-02-0413-FOF-TP") issued on
30 March 25, 2002. This "last-ditch" effort by Supra to avoid operating under a new
31 Interconnection Agreement with BellSouth is identical in nature to (1) the Motion

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1 to Stay Supra filed on June 10, 2002, which the Commission denied on June 14,
2 2002; (2) the Motion to Stay Supra filed with the First District Court of Appeal,
3 which the court denied on June 11, 2002; and (3) various other motions Supra
4 has filed requesting reversal or at least delay of the Commission's Final Order
5 and include:

- 6 1. Supra's Motion to Defer Agenda Item 27 or In the Alternative
7 Request for Oral Argument, filed on February 13, 2002;
8
- 9 2. Supra's Motion for Rehearing, Motion for Appointment of
10 Special Master, Motion for Indefinite Deferral; and Motion for
11 Oral Arguments, filed on February 18, 2002;
12
- 13 3. Supra's Renewed Motion for Indefinite Stay of Docket 001305-
14 TP and in the Alternative Renewed Motion for Oral Arguments,
15 filed February 21, 2002;
16
- 17 4. Supra's Motion for Oral Arguments on Procedural Question
18 Raised by Commission Staff and Wrongful Denial of Due
19 Process, filed February 27, 2002;
20
- 21 5. Supra's Motion to Extend Due Date for Filing Motion for
22 Reconsideration, filed April 1, 2002;
23
- 24 6. Supra's Motion for Reconsideration of Order No. PSC-02-0464-
25 PCO-TP (Order denying extension to file motion for
26 reconsideration), filed April 10, 2002;
27
- 28 7. Supra's Motion for Reconsideration and Clarification of Order
29 No. PSC-02-0464-PCO-TP, filed April 8, 2002;
30
- 31 8. Supra's Motion for Reconsideration of the Denial of Its Motion
32 for Rehearing of Order PSC-02-0413-FOF-TP, filed April 10,
33 2002;
34
- 35 9. Supra's Motion to Disqualify and Recuse Commission Staff and
36 Commission Panel from All Further Consideration of this Docket
37 and to Refer Docket to DOAH for All Future Proceedings, filed
38 April 17, 2002;
39

- 1 10. Motion to Strike and Reply to BellSouth's Opposition to Supra's
2 Motion for Reconsideration for a New Hearing in Docket No.
3 001305-TP, filed on April 24, 2002;
- 4
- 5 11. Motion for Extension of Time to File Interconnection Agreement,
6 filed on April 24, 2002;
- 7
- 8 12. Verified Supplemental Motion to Disqualify and Recuse FPSC
9 from all Further Consideration of this Docket and to Refer This
10 Docket to the Division of Administrative Hearings for All Further
11 Proceedings, filed April 26, 2002;
- 12
- 13 13. Motion to Strike and Reply to BellSouth's Opposition to Supra's
14 Motion to Disqualify and Recuse, filed May 1, 2002;
- 15
- 16 14. Motion to Strike BellSouth's Letter of April 25, 2002 to Blanco
17 Bayo with Attached Proposed Interconnection Agreement, filed
18 May 7, 2002;
- 19
- 20 15. Second Verified Motion to Disqualify and Recuse FPSC From
21 All Further Consideration of this Docket and to Refer this Docket
22 to the Division of Administrative Hearings for All Further
23 Proceedings, filed June 5, 2002;
- 24
- 25 16. Emergency Motion for Stay Pending Judicial Review of Order
26 Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-TP and
27 Notification of Exercise of Rights Under Rule 25-22.060, filed
28 June 10, 2002, and;
- 29
- 30 17. Motion to Strike BellSouth's Letter of October 30, 2001 to
31 Blanca Bayo; Strike BellSouth's Post-Hearing
32 Position/Summary with Respect to Issue B; and to Alter/Amend
33 Final Order Pursuant to Rule 1.540(B), filed June 17, 2002.
- 34

35 As with the motions referenced above, Supra filed the instant Motion to
36 Stay for one reason – to avoid entering into the new Interconnection Agreement
37 with BellSouth, because the new agreement will end Supra's current ability to
38 avoid its payment obligations to BellSouth. Simply put, once the new Agreement
39 is filed and approved, Supra will be required to pay BellSouth all undisputed
40 amounts, which now total over approximately [REDACTED], or face disconnection

1 of service. Faced with the eventual inability to continue to pocket money it
2 receives from its end users instead of paying BellSouth, Supra has and will do or
3 say anything, including filing multiple, baseless motions, like the instant Motion to
4 Stay, to put off the day it must pay BellSouth for services received. For the
5 reasons discussed in detail below, the Commission should summarily deny
6 Supra's most recent request for delay.

7 LAW AND ARGUMENT

8 9 **I. THE COMMISSION AND FIRST DCA HAVE ALREADY REJECTED** 10 **SUPRA'S ARGUMENTS AND REQUESTS FOR A STAY.**

11
12 On June 10, 2002, Supra filed an Emergency Motion for Stay Pending
13 Judicial Review of Order Nos. PSC-02-0772-PCO-TP and PSC-02-0773-PCO-
14 TP, wherein Commissioner Jaber and Commissioner Palecki denied Supra's
15 Motions to Recuse ("First Motion to Stay"). In a fashion identical to the
16 arguments Supra raises in the instant Motion, Supra claimed in the First Motion
17 to Stay that it will prevail on appeal because the Commission purportedly violated
18 its due process rights by not immediately addressing and granting its Motions to
19 Recuse.¹ The Commission denied this First Motion to Stay on June 14, 2002 in
20 Order No. PSC-02-0808-PCO-TP because it found that Supra did not meet the
21 standard for obtaining a stay.

22 In addition, on June 7, 2002, Supra filed a Motion to Stay with the First
23 District Court of Appeal ("Appellate Motion to Stay") upon the same grounds as
24 the First Motion to Stay – namely, that the Commission violated Supra's due

¹ Supra raised the same arguments in its Petition for Emergency Issuance of Writ of Mandamus, Writ of Prohibition and Other Relief, which it filed with the First District Court of Appeal. Supra premised its Motion for Stay with the appellate court on this filing.

1 process rights by not immediately addressing Supra's Motions to Recuse. The
2 First District Court of Appeal, however, denied Supra's request for a stay as well
3 as its Petition for Writ of Mandamus or Writ of Prohibition without opinion on June
4 11, 2002.

5 Identical to the First Motion to Stay, Supra sought the instant stay
6 pursuant to Rule 25-22.061, Florida Administrative Code. Furthermore, identical
7 to the First Motion to Stay and the Appellate Motion to Stay, Supra raises the
8 same, if not identical arguments, and cites to the same, inapplicable authority as
9 in its current request for a stay, while also adding a few arguments. Indeed, in all
10 three motions, Supra raises the same facts in support and makes the same due
11 process arguments. In this third request for a stay, Supra presents no new
12 legitimate reasons as to why it is entitled to a stay. Essentially, with this Motion,
13 Supra is attempting to relitigate an issue that both the Commission and an
14 appellate court have rejected. For this reason alone, the Commission should
15 deny Supra's Motion.

16 **II. Supra's Motion Is Barred by Law of the Case Doctrine.**

17 Similar to res judicata, the doctrine of law of the case is a principle of
18 judicial estoppel that applies to proceedings within the same case. Florida Dep't
19 Transp. v. Juliano, 801 So. 2d 101, 107 (Fla. 2001). Under this doctrine, "[a]ll
20 points of law which have been adjudicated become the law of the case and are,
21 except in exceptional circumstances, no longer open for discussion or
22 consideration in subsequent proceedings in the case." Strazzulla v. Hendrick,
23 177 So. 2d 1, 3 (Fla. 1965). Pursuant to this doctrine, "a trial court is bound to

1 follow prior rulings of the appellate court as long as the facts on which such
2 decision are based continue to be the facts of the case.” McGregor v. Provident
3 Trust Co., 162 So. 2d 323, 327 (Fla. 1935). Additionally, the law of the case
4 doctrine may “foreclose subsequent consideration of issues implicitly addressed
5 or necessarily considered by the appellate court's decision.” Juliano, 801 So. 2d
6 at 106 (citing Dade County Classroom Teachers' Ass'n v. Rubin, 238 SO. 2d
7 284, 289 (Fla. 1970); Dicks v. Jenne, 740 So. 2d576, 578 (Fla. 4th DCA 1999).

8 Florida courts have used both law of the case and res judicata to deny
9 subsequent motions that are based upon same or similar grounds as a
10 previously denied motion. See Mercantile Invest. & Holding Co. v. Gilliland, 197
11 So. 538, 539 (Fla. 1940); see also, Johnson v. Singletary, 618 So. 2d 731, 731
12 (Fla. 1993); Isley v. State, 652 So. 2d 409, 410 (Fla. 5th DCA 1995).² For
13 instance, in Mercantile Invest. & Holding Co., a defendant filed a motion to stay a
14 writ of execution on a judgment based upon equitable grounds, which the trial
15 court denied. Several months later, the defendant filed a second motion to stay
16 based on additional grounds, which the trial court also denied. On appeal of the
17 second denial of the motion to stay, the Supreme Court held that, as a matter of
18 law, the second motion to stay was barred under the doctrine of res judicata
19 because it found that the first denial of the motion to stay resolved all of the
20 issues raised in the second motion to stay.

² As evidenced by the cited case law, Florida courts have often confused res judicata and law of the case doctrine. The Supreme Court distinguished the two doctrines in Juliano, 801 So. 2d at 106. Notwithstanding what doctrine is used, the concepts of judicial economy prohibit Supra from continually raising the same arguments over and over in an attempt to delay and frustrate the regulatory process.

1 While the latter motion presents additional grounds to
2 the motion filed December 16, 1939, the two motions
3 were presented under Section 4516, C.G.L. We think
4 the order entered by the lower court dated June 24,
5 1940, to which writ of error was taken, was fully
6 adjudicated in the order dated December 22, 1939,
7 and the same is res adjudicata, and the case at bar is
8 ruled by Dr. P. Phillips Co. v. Billo, 109 Fla. 316, 147
9 So. 579.

10
11 197 So. at 539.

12 Similarly, in Isley v. State, a defendant in a petition for habeas corpus
13 relief raised the same arguments that he previously raised in motion to vacate
14 sentence. 652 So. 2d at 410. Among other reasons, the court denied the
15 defendant's petition pursuant to the doctrine of "res judicata and the law of the
16 case." Specifically, the court found that the defendant's "repetitive arguments
17 concerning withdrawing his pleas and ineffective assistance of counsel" were
18 barred because "[t]hey have been heard, considered and rejected." Id. The
19 court concluded by stating that to "raise them again was an abuse of process"
20 and that "enough was enough." In addition, "in order to protect the limited judicial
21 resources to our judicial system and this court," the court prohibited the
22 defendant from filing any further pleadings concerning his conviction and
23 sentence. Id. at 410, 411.

24 In the instant case, law of the case bars Supra's third Motion to Stay
25 because it raises the same issues, facts, and causes of action that it raised in the
26 Appellate Motion to the Stay, which the First District Court of Appeal previously
27 denied. Like the Fifth District Court of Appeal found in Isley, the First District
28 Court of Appeal has "heard, considered and rejected" Supra's repetitive due

1 process arguments and request for a stay. “To raise them again is an abuse of
2 process . . . Enough is enough.” 652 So. 2d at 410-11.

3 **III. SUPRA HAS NOT MET THE STANDARD FOR OBTAINING A STAY.**

4 Assuming arguendo that res judicata or law of the case does not bar
5 Supra’s current Motion to Stay (which is denied), the Commission should still
6 deny Supra’s motion because – like Supra’s earlier motions -- it fails to satisfy the
7 standard for receiving a stay pending judicial review. Rule 25-22.061(2), Florida
8 Administrative Code, governs a party’s request to stay a final order of the
9 Commission pending judicial review. In determining whether to grant a stay, the
10 Commission may consider the following: (a) whether the petitioner is likely to
11 prevail on appeal; (b) whether the petitioner has demonstrated that he is likely to
12 suffer irreparable harm if the stay is not granted; and (c) whether the delay will
13 cause substantial harm or be contrary to the public interest. See Rule 25-
14 22.061(2), Florida Administrative Code. In addition, the Commission may
15 condition a stay upon the posting of a corporate bond or corporate undertaking,
16 or both. Id. In the case at hand, and as previously recognized by the
17 Commission, Supra cannot satisfy any of the requirements necessary to obtain a
18 stay.

19 **A. Supra Will Not Prevail on Appeal.**

20 In a manner identical to its First Motion for Stay, Supra claims that it will
21 prevail on appeal because the Commission purportedly violated its due process

1 rights by not immediately addressing and granting its Motions to Recuse.³ In
2 support, Supra raises the same case law and arguments that it raised in the First
3 Motion for Stay, which the Commission considered and rejected in Order No.
4 PSC-02-0808-PCO-TP. Because the two motions are identical, the
5 Commission's rationale applies equally here.

6 First, the Commission correctly determined that Supra's Motions to
7 Recuse were untimely under the Administrative Procedure Act ("APA"). Section
8 120.665, Florida Statutes, provides in pertinent part:

9 . . .any individual acting alone or with others as an
10 agency head may be disqualified from serving in an
11 agency proceeding for bias, prejudice or interest
12 when any party to the agency proceeding shows just
13 cause by a suggestion filed **within a reasonable**
14 **period of time prior to the agency proceeding.**

15
16 (emph. added).

17 The phrase "agency proceeding" is not defined by the statute and has yet
18 to be expressly defined by Florida courts; however, previous decisions indicate
19 that the filing of a motion to disqualify prior to a formal hearing would not be
20 considered untimely. For instance, in Bay Bank & Trust Co. v. Lewis, 634 So. 2d
21 672, 678 (Fla. 4th DCA 1994), the court, in deciding the issue on other grounds,
22 refused to find that an "agency proceeding" meant the filing of a petition for a
23 hearing under Section 120.57, Florida Statutes. Similarly, the Commission in In
24 re: Southern States Util., Inc., Order No. 95-1438-FOF-WS refused to find that a

³ Supra raised the same arguments in its Petition for Emergency Issuance of Writ of Mandamus, Writ of Prohibition and Other Relief, which it filed with the First District Court of Appeal. Supra premised its Motion for Stay with the appellate court on this filing.

1 motion to disqualify a Commissioner was untimely because, among other
2 reasons, technical hearings and an agenda conference had yet to take place.⁴

3 As the Commission correctly found, the filing of a motion to disqualify
4 cannot be considered timely after a final hearing has taken place and after a final
5 order has been issued and in effect. Such a finding is consistent with the
6 standard for disqualifying a Commissioner under the APA, which is “whether the
7 facts alleged would prompt a reasonably prudent person to fear that he could not
8 get a fair and impartial trial.” In re: Southern States Util., Inc., Order No. PSC-95-
9 1438-FOF-WS.⁵

10 In addition, such a conclusion is consistent with the purpose of the statute
11 empowering parties to seek to disqualify a biased agency head to insure a fair
12 hearing. Once a hearing has concluded, an agenda conference has been held,
13 the Commission has voted, and a final order has been issued, the purpose of
14 that statute cannot be achieved. To find otherwise would lead to absurd and
15 unreasonable consequences as parties could use Section 120.665 to attempt to
16 reverse adverse final rulings after a Commission vote, which is exactly what
17 Supra is doing in the instant matter. See City of St. Petersburg v. Siebold, 48 So.
18 2d 291 (Fla. 1950) (absurd or unreasonable results should be constrained when
19 interpreting statutes).

⁴ In In re: Southern States Util., Inc., the Commission briefly discussed whether a motion to disqualify filed after an evidentiary hearing was timely but did not reach a conclusion as to this issue. Instead, in finding the motion timely, the Commission focused on the fact that technical hearings and an agenda conference were scheduled in one of the dockets in which the motion to disqualify was filed.

⁵ This conclusion is also supported by the fact that, under Section 120.569(2)(a), a party may request the disqualification of an ALJ “by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.”

1 Second, the Commission correctly determined that Supra's Motions to
2 Recuse were based on facts that were legally insufficient to support recusal.
3 Because agency heads have "significantly different functions and duties than do
4 judges," the standard for disqualifying an agency head is different from the
5 standard for disqualifying a judge. Bay Bank & Trust Co. v. Lewis, 634 So. 2d
6 672, 678 (Fla. 1st DCA 1994). As stated by the Commission in In re: Southern
7 States Util., Inc., Order No. PSC-95-1438-FOF-WS, "a petitioner seeking the
8 recusal of a commissioner is faced with satisfying a more stringent standard than
9 is one seeking the recusal of a trial judge." The test for disqualification is
10 whether the facts alleged would prompt a reasonably prudent person to fear that
11 he could not get a fair and impartial trial. Id.

12 While the Commission is not to resolve disputed issues of fact in a motion
13 to recuse and must assume the truth of the facts alleged, the Commission does
14 not have to consider allegations that are "too tenuous and speculative to require
15 disqualification of an agency head" and which are "unsupported by any
16 allegations of underlying facts that demonstrate such bias" Bay Bank, 634
17 So. 2d 676, 679. The Commission correctly determined that the allegations
18 Supra raised to support recusal were wholly conclusory and devoid of any factual
19 support and thus were insufficient under Bay Bank to support recusal.

20 Third, the propriety of the Commission's decision to deny Supra's Motion
21 to Recuse was confirmed by the First District Court of Appeal, which denied,
22 without opinion, Supra's Petition for Emergency Issuance of Writ of Mandamus,
23 Writ of Prohibition and Other Relief. This Petition was based on the same

1 arguments upon which Supra premised its First Motion to Stay and the current
2 Motion to Stay. Thus, an appellate court has already rejected the very
3 arguments that Supra now says will allow it prevail on appeal.

4 Fourth, Supra claims that the Commission erred in not immediately
5 resolving Supra's three Motions to Recuse, which were filed on April 17, 2002,
6 April 26, 2002, and June 5, 2002. According to Supra, the Commission "was
7 required to address and resolve Supra's motions for disqualification prior to ruling
8 on any other substantive matters." See Motion at 10. Thus, Supra claims that
9 the Commission was "without authority to rule on any other pending matters once
10 the motions for disqualification were filed on April 17, 2002." Id. at 11.

11 What Supra fails to articulate in this argument is that, despite filing its first
12 Motion to Recuse on April 17, 2002, Supra filed several requests for relief with
13 the Commission after that date, all of which required Commission action. For
14 instance, on April 24, 2002, Supra filed a Motion for Extension of Time to File
15 Interconnection Agreement.⁶ Supra filed the Motion in lieu of filing an executed
16 Interconnection Agreement on April 25, 2002 in compliance with the Final Order.
17 The Commission granted Supra's request on May 8, 2002 in Order No. PSC-02-
18 0637-PCO-TP, giving Supra 14 days from the issuance of the order resolving

⁶ In addition to this Motion, Supra also filed the following motions with the Commission after April 17, 2002: (1) a Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion for Reconsideration for a New Hearing in Docket No. 001305-TP; (2) a Verified Supplemental Motion to Disqualify and Recuse FPSC; (3) Objection to BellSouth's Request for Confidential Classification; (4) Motion to Strike and Reply to BellSouth's Opposition to Supra's Motion to Disqualify and Recuse; (5) Motion to Strike BellSouth's Letter of April 25, 2002 to Blanco Bayo with Attached Proposed Interconnection Agreement; (6) Motion for leave to File Reply to BellSouth's Oppositions to Supra's Motion to Strike, or in the Alternative, to Strike New Issues Raised in BellSouth's Opposition; (7) Motion for Reconsideration of Order No. PSC-02-0700-TP; (8) Second Verified Motion to Disqualify and Recuse FPSC; (3) Motion for Clarification and Partial Reconsideration of Order No. PSC-02-663-CFO-TP.

1 Supra's motions for reconsideration to execute and file the new Interconnection
2 Agreement. If Supra had not received this extension, Supra would have violated
3 the Final Order and been subject to a \$25,000 a day fine for every day that the
4 Supra refused to execute the Agreement. See Section 364.285, Florida Statutes.

5 Under Supra's own warped logic, the Commission did not have authority
6 to grant Supra's request for an extension of time to file the new Interconnection
7 Agreement, because the Commission granted the extension after April 17, 2002,
8 notwithstanding the fact that Supra asked for the extension after that date.
9 Accordingly, Supra's own argument results in Supra being subject to at least a
10 **\$1,950,000** fine, which grows by \$25,000 a day. Supra cannot have it both ways
11 – Supra cannot argue that the Commission should not have made any rulings
12 after April 17, 2002 but also take advantage of one of those rulings to avoid the
13 filing of the new Interconnection Agreement on April 25, 2002 as ordered by the
14 Commission in its Final Order.

15 **B. Supra Will Not Suffer Irreparable Harm.**

16 Supra claims that it will suffer irreparable harm if a stay is not provided.
17 Again, the Commission previously rejected this argument in denying Supra's First
18 Motion to Stay in Order No. PSC-02-0808-PCO-TP. The Commission should
19 reach the same conclusion here for the following reasons.

20 First, the Commission has already determined in Order No. PSC-02-0808-
21 PCO-TP that Supra will not suffer irreparable harm if the Commission proceeding
22 is not stayed pending judicial review. Second, Supra will suffer no irreparable
23 harm because Supra's rights to challenge and appeal the Final Order are

1 expressly preserved and are not waived by executing and filing the new
2 Interconnection Agreement. Specifically, Section 25.1 of the new Agreement
3 addresses the effect of the execution of the new Interconnection Agreement
4 while Supra appeals or otherwise challenges the Order:

5 **25. Reservation of Rights**

6
7 25.1 Execution of the Interconnection Agreement by either Party
8 does not confirm or infer that the executing Party agrees with
9 any decision(s) issued pursuant to the Telecommunications Act
10 of 1996 and the consequences of those decisions on specific
11 language in this Agreement. Neither Party waives its rights to
12 appeal or otherwise challenge any such decision(s) and each
13 Party reserves all of its rights to pursue any and all legal and/or
14 equitable remedies, including appeals of any such decision(s).
15 If such appeals or challenges result in changes in the
16 decision(s), the Parties agree that appropriate modifications to
17 this Agreement will be made promptly to make its terms
18 consistent with those changed decision(s).⁷

19
20 Therefore, under the express terms of the new Interconnection
21 Agreement, Supra will not waive any of its rights to challenge or appeal the
22 Commission's decision in the Order by executing the new Agreement. Further, if
23 any of Supra's challenges are subsequently upheld, either by the Commission on
24 reconsideration or by an appellate court, the Agreement will be promptly
25 amended to reflect those changes in the Commission's decision. Thus, Supra's
26 rights are protected in the event it prevails on any issue on appeal and therefore
27 would suffer no "irreparable harm" if a stay is not granted.

28 Third, Supra's claim that it will suffer irreparable harm though the loss of
29 customers and good will must be rejected. Assuming arguendo that Supra may

⁷ This section is substantively identical to General Terms and Conditions § 42 of the parties' expired agreement.

1 suffer harm as a result of operating under the new Agreement (which is denied),
2 any potential harm can be compensated in money damages. It is well settled
3 that “irreparable harm does not exist where the potential loss is compensable by
4 money damages.” Barclays Am. Mtg. Corp. v. Holmes, 595 So.2d 104, 105 (Fla.
5 5th DCA 1992). Any customer loss that Supra may suffer by operating under an
6 arbitrated agreement can be compensated with damages. See e.g., Merrill
7 Lynch, Pierce, Fenner & Smith, Inc. v. deLinieri, 572 F. Supp. 246, 249 (N.D.
8 Ga. 1983) (loss of business could be addressed with money damages); Lafayette
9 Beverage Distribs., Inc. v. Anheuser-Busch, Inc., 545 F. Supp. 1131, 1151 (N.D.
10 Ind. 1982) (loss of good will could be addressed with money damages). Further,
11 as noted by the Commission in its denial of Supra’s First Motion to Stay, the
12 authority Supra cites in support of its claim that it will suffer irreparable injury is
13 distinguishable in that the cited authority involved injunctions, not stays pending
14 appeal. See Order No. PSC-02-0808-PCO-TP.

15 Fourth, Supra’s claims of “irreparable harm” are false. For instance,
16 Supra claims that it will suffer “irreparable harm” if required to operate under the
17 new Interconnection Agreement because the new Agreement, unlike the expired
18 Agreement, does not provide for direct access to BellSouth’s OSS. Contrary to
19 Supra’s assertions, the expired Agreement does **not** entitle Supra to direct
20 access to BellSouth’s OSS, and BellSouth is under no present obligation to
21 provide Supra with direct access. Likewise, Supra claims that the new
22 Agreement, unlike the expired agreement, does not provide for meet point billing.
23 Thus, Supra argues that it will suffer “irreparable harm” if forced to operate under

1 the new Agreement. However, both the new Agreement and the expired
2 Agreement permit meet point billing where appropriate. Further, Supra never
3 raised meet point billing as an issue for arbitration and thus cannot rely on the
4 alleged absence of such a provision in the new Agreement to request a stay.

5 Similarly, Supra claims that it will suffer “irreparable harm” because the
6 new Agreement, unlike the expired Agreement, allows BellSouth to terminate
7 Supra’s service for the failure to pay disputed amounts. Contrary to these
8 statements, however, the new Agreement does not allow BellSouth to terminate
9 Supra’s service for the failure to pay any disputed amounts. Rather, BellSouth
10 will have the right to disconnect Supra for the failure to pay any undisputed
11 amounts or any amounts disputed in bad faith. Further, as ordered by the
12 Commission, Supra will not be allowed to use self-help or to offset its payment
13 obligations. These provisions will put Supra on equal footing with all of the other
14 ALECs in Florida who must honor their payment obligations to BellSouth or face
15 disconnection of service.

16 In addition, Supra could avoid any disconnection of service by operating
17 as a responsible carrier and paying all undisputed amounts and not submitting
18 bad faith disputes to avoid its payment obligations. Indeed, Supra expects the
19 same of its end users as Supra disconnects its own end-users consumers for the
20 failure to pay Supra and does not allow its customers to apply self-help. See
21 Final Order, Order No. PSC-02-0413-PCO-TP at 55 (“Supra does not allow its
22 retail customers to offset charges, nor does it require dispute resolution before
23 disconnection of retail customers for nonpayment.”).

1 **C. A STAY OF THE ORDER WILL CAUSE SUBSTANTIAL**
2 **HARM AND WILL BE AGAINST THE PUBLIC INTEREST.**

3
4 Granting Supra's request for a stay will cause substantial harm to both
5 BellSouth and to Florida consumers and is against the public interest. Any stay
6 of the Commission's Final Order or Orders on Reconsideration will result in
7 BellSouth being extremely prejudiced. This is so because as long as Supra
8 continues to operate under the expired agreement, Supra has not and will not
9 pay BellSouth for legitimate services received unless ordered to by the
10 appropriate authority. In fact, since [REDACTED]

11 [REDACTED].
12 Supra has no incentive to operate under the new Interconnection
13 Agreement with BellSouth because the expired agreement does not contain an
14 express provision authorizing the disconnection of service for nonpayment of
15 undisputed amounts. As evidenced by Supra's payment history, including the
16 statement of Supra's CEO at the hearing that Supra had not paid BellSouth for
17 two years (see Final Order at 54), Supra has chosen to avoid its payment
18 obligations and to force BellSouth to attempt to recover both disputed and
19 undisputed amounts through the long, arduous [REDACTED]
20 required under the expired agreement, while at the same time incurring new,
21 additional charges month after month. The new agreement, however, pursuant
22 to the Commission's Order, allows BellSouth to disconnect Supra's service for
23 the failure to pay undisputed amounts. Consequently, under the new agreement,
24 Supra will either have to pay undisputed amounts or face disconnection of
25 service.

1 Granting Supra's request for an indefinite stay would extend Supra's
2 practice of ignoring its payment obligations to BellSouth. Each day that Supra
3 fails to pay BellSouth for legitimate undisputed charges, BellSouth is prejudiced.
4 Accordingly, staying the Final Order, which gives BellSouth the right to
5 disconnect service, for any period of time greatly prejudices BellSouth.

6 The Commission recognized the importance and necessity of BellSouth
7 having the right to disconnect Supra for the failure to pay undisputed amounts in
8 its Final Order:

9 We believe an ILEC's ability to receive timely
10 payment for undisputed charges is important. We
11 recognized as much when addressing the
12 BellSouth/WorldCom arbitration in Docket No.
13 000649, where we stated:

14
15 BellSouth must be able to deny service in order to
16 obtain payment for services rendered and/or prevent
17 additional past due charges from accruing. It would
18 not be a reasonable business practice for BellSouth to
19 operate "on faith" that an ALEC will pay its bills.
20 Indeed, a business could not remain viable if it were
21 obligated to continue providing services to customers
22 who refuse to pay lawful charges.

23
24 Final Order at 54. Supra's continual refusal to honor its monthly payment
25 obligation that now totals approximately [REDACTED] a month for over 300,000
26 customers strains BellSouth's ability to provide wholesale services to other
27 ALECs and to Florida consumers. As recognized by the Commission, no
28 company can continue to operate if it is not being compensated for services
29 provided.

30 In addition, it is against the public interest for Supra to avoid its payment
31 obligations to BellSouth while at the same time expecting its end users to timely

1 make payment to Supra. Every month, Supra receives wholesale services from
2 BellSouth to provide service to over 300,000 customers. At the same time,
3 Supra (1) receives payment for those services from its customers, and, instead of
4 paying BellSouth, pockets the money, or (2) if payment is not received,
5 disconnects its end users. By not paying BellSouth but expecting payment from
6 its own end users, Supra is obtaining an unearned financial windfall at the
7 expense of Florida consumers.

8 Further, Supra's failure to honor its payment obligations has an effect on
9 competition in this state. By refusing to timely pay undisputed bills or disputing
10 bills in bad faith, Supra obtains a preference over the other ALECs who timely
11 pay their bills. As a result, Supra can devote additional resources to advertising
12 and other means to increase its customer base. See In re: Complaint of
13 WorldCom Technologies, Inc. Against BellSouth, Docket No. 980499-TP, Order
14 No. PSC-00-0758-FOF-TP (denying BellSouth's request for a stay of the
15 Commission's order on the payment of reciprocal compensation for ISP-bound
16 traffic because it found that the stay would harm the public interest as it would
17 delay the development of competition.) In sum, the public interest demands that
18 Supra's "free ride" end.

19 **D. Supra Must Put Up a Bond.**

20 While BellSouth vehemently denies any suggestion that Supra is entitled
21 to a stay, if the Commission is inclined to grant Supra's request, notwithstanding
22 the fact that it has previously rejected such a request as well as the arguments
23 raised by Supra, the Commission should at least require Supra to (1) post a bond

1 that represents all unpaid amounts that Supra has accrued since January 1,
2 2002; and (2) place all future monthly amounts billed in escrow while the stay
3 continues. As previously stated, the accrued amount is over [REDACTED] and is
4 growing by [REDACTED] a month.

5 A bond is required because staying the Commission's Final Order will
6 have the direct effect of allowing Supra to continue its practice under the expired
7 Agreement of ignoring its payment obligations to BellSouth. Indeed, by the time
8 any appeals are resolved, Supra could realistically owe BellSouth [REDACTED]
9 [REDACTED]. Also, there should be no question that Supra has the
10 revenue to post such a bond, because Supra is keeping the revenue that it
11 receives from over 300,000 customers every month and not timely paying
12 BellSouth.

13 Furthermore, a corporate undertaking will not be sufficient because Supra
14 has filed financial information with the West Virginia Public Service Commission
15 ("WVPSC") and the North Carolina Utilities Commissions ("NCUC") indicating
16 that it sustained a loss for 2001. For instance, based on information filed with
17 the WVPSC in an April 25, 2002 filing, Supra sustained approximately a **\$23**
18 **million** loss for 2001. See Supra's 2001 Annual Report filed with the WVPSC,
19 attached hereto as Exhibit A. In addition, while inconsistent with what Supra
20 reported to the WVPSC, Supra informed the NCUC in a June 21, 2002 filing that
21 it suffered an approximate **\$11 million** loss for 2001. See Supra's Letter to
22 NCUC containing 2001 Statement of Income, attached hereto as Exhibit B. Even
23 though both public filings contain inconsistent financial information, they both

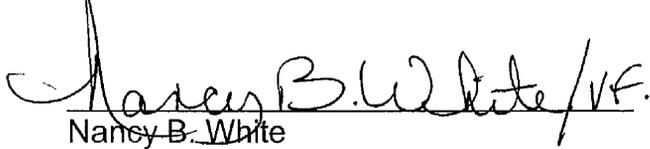
1 establish that Supra apparently sustained a loss for 2001. Accordingly, a
2 corporate undertaking will not be sufficient.

3 **CONCLUSION**

4 For the foregoing reasons, BellSouth respectfully requests that the
5 Commission refuse to consider and deny Supra's Motion to Stay Commission
6 Order Nos. PSC-02-0413-FOF-TP and PSC-02-0878-FOF-TP.

7 Respectfully submitted this 12th day of July 2002.
8
9

10 BELLSOUTH TELECOMMUNICATIONS, INC.

11 
12

13 Nancy B. White

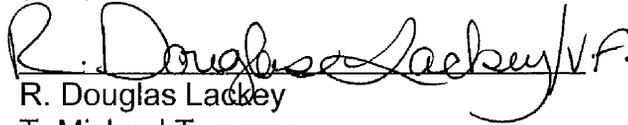
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