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December 3, 2001

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

**Re: Docket No. 010345-TP (Structural Separation of BellSouth)**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Memorandum in Opposition to AT&T's Motion for Reconsideration of Order No. PSC-01-2178-FOF-TP, which we ask that you file in the captioned docket.

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

Sincerely,

  
James Meza III  
(2)

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

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**CERTIFICATE OF SERVICE  
Docket No. 010345-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

U.S. Mail this 3rd day of December, 2001 to the following:

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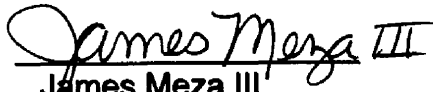
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Petition of AT&T Communications of ) Docket No.: 010345-TP  
the Southern States, Inc., TCG South )  
Florida, and MediaOne Florida )  
Telecommunications, Inc. for )  
Structural Separation of BellSouth )  
Telecommunications, Inc. ) Filed: December 3, 2001

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
MEMORANDUM IN OPPOSITION TO AT&T'S MOTION FOR  
RECONSIDERATION OF ORDER NO. PSC-01-2178-FOF-TP**

BellSouth Telecommunications, Inc. ("BellSouth") submits this Memorandum in Opposition to the Motion for Reconsideration of Order No. PSC-01-2178-FOF-TP ("Order") filed by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. (collectively "AT&T"). AT&T's Motion is nothing more than a "last-ditch" effort to salvage its claim for structural separation and should be denied because it raises no point of fact or law the Florida Public Service Commission ("Commission") overlooked or failed to consider.

**BACKGROUND**

On November 6, 2001, the Commission issued Order No. PSC-01-2178-FOF-TP, wherein it discussed several issues but made two, separate decisions: (1) the Commission granted BellSouth's Motion to Dismiss AT&T Petition for Structural Separation ("Petition") because it determined that it had no authority to grant the specific relief requested by AT&T, the full structural separation of BellSouth, see Order at 6; and (2) the Commission, sua sponte, denied without prejudice AT&T's claim for lesser, unspecified remedies, because it found that

proceeding to hearing on those claims would be cumulative or interfere with various pending dockets and would strain Commission resources, see Order at 6, 8, 10.

### ARGUMENT

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 Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3<sup>rd</sup> DCA 1959) (citing State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958)). Moreover, a motion for reconsideration is not intended to be “a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order.” Diamond Cab Co., 394 So. 2d at 891. Indeed, a motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based on specific factual matter set forth in the record and susceptible to review.” Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

In its Motion, AT&T requests that the Commission reconsider the Order because it “overlooks or misapprehends essential points of law . . . .” Motion at 1. Pursuant to the above-described legal standard, AT&T offers no legitimate basis for the Commission to review or modify its decision.

**I. The Commission Properly Concluded that it Does not Have the Authority to Order Structural Separation.**

As grounds for reconsideration of the Commission's decision to grant BellSouth's Motion to Dismiss, AT&T adopted and incorporated "all prior pleadings, memorandum of law, and arguments made in support of the original and amended petitions, and in opposition to the motions to dismiss." Motion at 3. In its Motion, AT&T does not set forth any point of law or fact that the Commission failed to consider in granting BellSouth's motion and finding that the Commission lacked the authority to order structural separation. Instead, as admitted by AT&T in its Motion for Reconsideration, it is simply reasserting arguments previously made in its opposition to BellSouth's Motion to Dismiss and considered by the Commission, which is insufficient to satisfy the standard for reconsideration. Accordingly, AT&T's Motion for Reconsideration should be denied as to this issue.

**II. The Order Does Not Violate AT&T's Due Process Rights or Established Rules.**

The thrust of AT&T's Motion is that the Commission decided the case on the merits, "but without benefit of due process or compliance with established rules." Motion at 1. In violation of the standard for reconsideration, AT&T fails to identify the "established rules" or law that the Commission violated, failed to consider, or overlooked. For this reason alone, AT&T has not met its burden for reconsideration.

In addition, the clear wording of the Order, wherein it discusses the standard for deciding a motion to dismiss (Order at 5), establishes that the



Commission was cognizant of and fully considered all applicable rules and legal requirements in dismissing AT&T's Petition. Thus, AT&T has failed to point to any fact of law that the Commission failed to consider or overlooked.

Notwithstanding this fact, the Commission did not violate AT&T's due process rights or any rules in granting BellSouth's Motion to Dismiss. In reaching its decision, the Commission made a legal determination based solely on AT&T's Petition and its specific request for relief, finding that the Petition failed "to state a cause of action upon which relief can be granted." Order at 6. The Commission did not consider (and AT&T has not cited any evidence to the contrary) any information outside of AT&T's Petition in finding that it lacked the authority to grant full structural separation. Accordingly, there can be no question that the Commission fully considered and complied with all applicable rules and due process requirements in granting BellSouth's Motion to Dismiss.

Regarding the Commission's sua sponte decision to deny AT&T's request for "lesser remedies," although not clear, AT&T appears to argue that reconsideration is proper because the Commission looked beyond the four corners of the Petition in reaching its decision, which is prohibited in deciding a motion to dismiss. The fundamental flaw in AT&T's argument is that the Commission did not base its decision to deny AT&T's request for "lesser remedies" pursuant to a motion to dismiss or because it found that AT&T's request for "lesser remedies" failed to state a cause of action. Rather, the Commission ultimately decided not to proceed to hearing at this time on the "lesser remedies" and denied AT&T's request because it found that AT&T's

claims and requests for relief would be cumulative and may interfere with several pending dockets.<sup>1</sup> Order at 7-8.

Thus, as a matter of judicial economy, the Commission denied AT&T's claim for these unspecified, "lesser remedies" without prejudice, allowing AT&T to refile its Petition with the condition that it (1) explain the specific relief requested; (2) explain what the requested remedy will accomplish; and (3) explain precisely why this relief cannot be accomplished in already pending dockets. Order at 10. Clearly, the Commission did not violate any rule (and AT&T has not cited anything to the contrary) by issuing an order that promotes judicial economy and avoids the unnecessary duplication of efforts and strain on Commission resources. Indeed, the Commission previously recognized this right in denying a request for a declaratory statement, stating that it "would be inconsistent with judicial economy to have the same issue[s] brought before us twice in parallel proceedings." Order No. PSC-94-1280-DS-TC at 2.

The Commission's decision is akin to ordering the consolidation of AT&T's request for unspecified remedies with the pending dockets. Under Rule 28-106.108, Florida Administrative Code, separate matters involving similar issues of law or fact, or identical parties may be consolidated, if "it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." Consistent with this rule, the Commission denied AT&T's request for unspecified relief because it implicitly found that AT&T could raise the same arguments and

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<sup>1</sup> The Commission did discuss several other reasons why it felt that proceeding with the Petition would be inappropriate. However, all of these reasons constitute dicta, as they are not essential -

request the same relief in pending dockets. Importantly, to insure that AT&T's rights would not be prejudiced, the Commission, dismissed these claims without prejudice, instructing AT&T to refile its Petition if the relief requested could not be accomplished in other dockets.

Moreover, contrary to AT&T's assertions, the Commission's Order preserves AT&T's due process rights because it dismisses the claim for "lesser remedies" without prejudice. Thus, AT&T can raise the same claims and request the same relief in a pending docket or in a subsequent petition.

In sum, AT&T has not identified any point of fact or law that the Commission failed to consider or overlooked in reaching its decision. Indeed, the transcript of the agenda hearing (pgs. 49, 55-56, 88-92) and the Order establishes conclusively that the Commission was well aware and fully considered the applicable rules and laws regarding its decision to deny AT&T's claim for unspecified, "lesser remedies."

### **III. AT&T Has Other Points of Entry to Protect Its Interest.**

Next, AT&T argues that AT&T has a "statutory and constitutional right to initiate their own proceeding" and that the Commission's decision deprived it of "a clear point of entry to protect their substantial interests." Motion at 2. AT&T premises this erroneous argument on the misbelief that no pending docket provides it with an adequate point of entry. Motion at 2. Reconsideration is not warranted on this issue for the following reasons.<sup>2</sup>

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to the Commission's ultimate holding, which is set forth on page 10 of the Order.

<sup>2</sup> Although not made clear, BellSouth presumes that this argument is limited to the sua sponte decision to deny, without prejudice, AT&T's claims for "lesser remedies" because such an argument as to the decision to grant BellSouth's Motion to Dismiss would be illogical and clearly

First, fatal to its own argument, AT&T cites to discussions at the agenda conference for support of reconsideration. Consequently, as admitted by AT&T and as proven by a cursory reading of the agenda transcript (pgs. 55-58, 65-66, 74-79, 85-87) the Commission considered AT&T's argument and rejected it, finding that other pending dockets afforded AT&T an effective point of entry. AT&T cites to no point of law that the Commission failed to consider or overlooked in making this decision.<sup>3</sup> To the contrary, AT&T simply reargues matters that were properly considered and rejected by the Commission because it is dissatisfied with the result, which is insufficient to meet the standard for reconsideration.

Second, AT&T is incorrect in its allegation that it has no point of entry to protect its interest. As found by the Commission, there are several pending dockets, of which AT&T is a party, where AT&T could assert its claims and requests for relief, including but not limited to the recently opened and consolidated anti-competitive docket (Docket No. 011977-TL).<sup>4</sup> Order at 6-8. Specifically, as recognized by the Commission, the anti-competitive "docket will examine the systemic deficiencies that the Petitioners have alleged herein. The goal of that docket is to discover what the problems are, if any, and to apply

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unsupported by the law. Nevertheless, to the extent AT&T is raising this challenge to the Commission's decision that it did not have the authority to order structural separation, the following argument applies to this claim as well.

<sup>3</sup> The two cases cited by AT&T, Friends of the Everglades, Inc. v. State, Dep't of Community Affairs, 495 So. 2d 1193, 1194 (Fla. 3<sup>rd</sup> DCA 1986); NME Hosp., Inc. v. State, Dep't of Health and Rehabilitative Services, 492 So. 2d 379, 385 (Fla. 1<sup>st</sup> DCA 1986), stand solely for the proposition that parties must be given a point of entry into the administrative process to be heard and protect their substantial interest. As discussed in detail below, AT&T has numerous points of entry to assert the same claims and request for relief as it did in the Petition.

<sup>4</sup> Examples of other pending dockets include Docket Nos. 990649A-TP, 990649B-TP, and 000121-TP.

specific solutions to those problems.” Order at 7. Further, because this docket is in its infancy and the specific issues to be resolved have yet to be established, there is no reason why AT&T would be prohibited from asserting all of its claims and requests for relief in this docket.

Third, AT&T’s “statutory and constitutional” right to initiate its own proceeding has not been violated. The Commission did not find that AT&T could not file a Petition asserting certain claims and requesting relief. Rather, the Commission held (1) that it did not have the authority to grant the specific relief requested, full structural separation; and (2) AT&T’s request for lesser remedies would be cumulative and/or conflict with pending dockets and thus should be denied without prejudice. As a result, this argument is nothing but a “red herring” and should be summarily rejected.

Simply put, there can be no question that AT&T has an effective point of entry to protect its interest through several pending dockets. This conclusion is evidenced by the fact that the Florida Competitive Carriers Association (“FCCA”), whose Petition for an investigation into structural separation was also dismissed, did not file a motion for reconsideration. Clearly, if the FCCA did not believe that there was an effective point of entry to protect its interest and the interests of its members, it could have asked the Commission to reconsider its decision.

In any event, in the unlikely case that AT&T cannot assert its claims and request for “lesser remedies” in these dockets, AT&T suffered no harm because the Commission denied AT&T’s request without prejudice, instructing AT&T to refile its Petition if the pending dockets were inadequate.

#### **IV. The Points Made in Commission Palecki's Dissent Do Not Warrant Reconsideration by the Entire Commission.**

Finally, as grounds for reconsideration, AT&T adopted and incorporated the dissent of Commissioner Palecki. For the most part, AT&T's arguments for reconsideration are substantially similar to the arguments Commissioner Palecki made in his dissent.<sup>5</sup> While BellSouth respectfully disagrees with Commissioner Palecki's dissent, the arguments therein, nonetheless, do not warrant reconsideration. Commissioner Palecki does not identify any point of fact or law that the Commission overlooked or failed to consider. Instead, the dissent simply sets forth the basis for his disagreement with the majority's decision. Further, because the arguments made in the dissent mirror those raised by AT&T, reconsideration is not warranted for the additional, specific reasons discussed in detail above.

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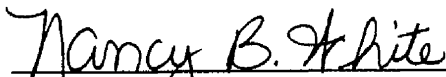
<sup>5</sup> Commissioner Palecki essentially makes four arguments in his dissent: (1) the Petition does state a cause of action for structural separation; (2) the majority violated the standard for deciding a motion to dismiss by deciding the case on the merits; (3) AT&T has no effective point of entry to explore these claims in other dockets; and (4) a hearing on this matter would have provided a vehicle to explore "options or modifications to our current command and control approach." Order at 13-17. AT&T raises all of these arguments except for the fourth one, which is insufficient to warrant reconsideration because it does not set forth any point of fact or law that the Commission failed to consider. Instead, it appears to be Commissioner Palecki's thoughts as to what issues could have been raised in the proceeding if it had gone to hearing.

**CONCLUSION**

For the foregoing reasons, BellSouth requests that the Commission deny AT&T's Motion for Reconsideration.

Respectfully submitted this 3rd day of December, 2001.

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NANCY B. WHITE (24)

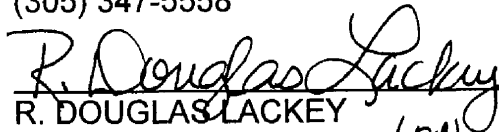
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