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February 20, 2004

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COMMISSION
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BY HAND DELIVERY

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

Re: Docket No. 030851-TP

Dear Ms. Bayó:

Enclosed for filing are an original and 15 copies of AT&T Communications of the Southern States, LLC's Motion for Reconsideration of Order No. PSC-04-0173-PCO-TP in the above-referenced docket.

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

Thank you for your assistance with this filing.

- AUS _____
- CAF _____
- CMP _____
- COM 5
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- ECR _____
- GCL _____
- OPC _____
- MMS _____
- SEC _____
- OTH _____

Sincerely yours,

Tracy W. Hatch

TWH/las

Enclosure

cc: Parties of Record

RECEIVED & FILED

R-V.N.
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

02526 FEB 20 04

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**In Re: Implementation of Requirements)
Arising From Federal Communications) Docket No.: 030851-TP
Commission Triennial UNE Review:)
Local Circuit Switching for Mass) Filed: February 20, 2004
Market Customers)**

**AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC'S
MOTION FOR RECONSIDERATION**

AT&T Communications of the Southern States, LLC (hereinafter "AT&T") respectfully moves this Commission to reconsider a portion of the Order on BellSouth's Emergency Motion to Compel, issued February 19, 2004, by Commissioner and Prehearing Officer Charles M. Davidson. AT&T's Motion for Reconsideration is limited to a request that the Commission reconsider its decision contained in Part III.D. of the Order requiring AT&T to provide copies of the confidential and privileged documents for *in camera* review referenced in the privilege log in response to Requests for Production 34 and 35. In support of AT&T's request, AT&T respectfully shows the Commission the following:

I. Standard of Review

The standard for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission did not consider in rendering its 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 162 (Fla. 1st DCA 1981). In this instance, the Commission did not consider additional information pertaining to the specifics of the document identified in the privilege log that, if considered, would have led the Commission to the conclusion that the document identified in response to Requests for Production 34 and 35 falls clearly within the parameters of the work-product doctrine and the attorney privilege, without an *in camera* inspection.

II. Argument

In responding to Requests for Production 34 and 35, AT&T produced a privilege log identifying one document. Specifically, AT&T's response stated "[s]ubject to and without waiving that objection, AT&T has compiled a privilege log consisting of the following: UNE-P planning assumptions document prepared by attorney Thomas G. Dagger, Network, Access and Local Services Law Vice President, dated October 17, 2003."

This document contains the most sensitive of information and materials prepared by counsel for AT&T. Specifically, it contains information prepared by in-house counsel, attorney Thomas Dagger, at the request of high-ranking officials of AT&T and discusses sensitive litigation risk assessment related to the state cases required by the Triennial Review Order ("TRO"). This document is so highly sensitive that counsel from corporate headquarters did not disseminate the document to the regional counsel who were responsible for responding to

the subject discovery until after the subject Order was issued. Once issued, regional counsel reviewed the document and discovered that it is actually not responsive to Requests 34 and 35 because the subject document deals more with litigation strategy and interpretation of the Triennial Review Order than with the substance of Requests 34 and 35.

Regardless of the above, the information contained in the subject document is protected by Florida law. In Southern Bell Telephone and Telegraph Company v. Deason, the Supreme Court of Florida examined the attorney client privilege and the work product doctrine and enunciated specific criteria to consider when determining whether or not a particular document falls within the protections afforded by the privilege and doctrine. 632 So.2d 1377 (1994). In Southern Bell, the Supreme Court held that in determining whether or not a particular document is privileged, the Court should find the following:

- (1) the communication would not have been made but for the contemplation of legal services;
- (2) the employee making the communication did so at the direction of his or her corporate superior;
- (3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- (4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties; and
- (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

In the instant case, each of the above criteria are clearly established in the attached Affidavit. See, Affidavit of **Ava** Kleinman, attached hereto as Exhibit A.

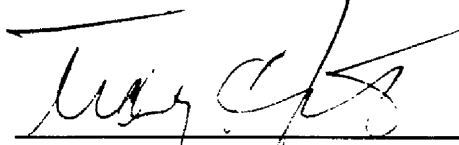
In addition to the above, it should be noted that Florida law prescribes even greater protections to documents that contain attorney opinion than to documents containing fact work product. As stated by the Supreme Court in Southern Bell, "[o]pinion work product consists primarily of the attorney's mental impressions, conclusions, opinions and theories . . . [o]pinion work product generally remains protected from disclosure." Id. at 1379. As explained in the attached affidavit, this document consists, in its entirety, of attorney opinions and theory.

Based on the attached affidavit and existing caselaw, there is simply no set of circumstances that would render this document discoverable. This is a document containing legal opinion relating to specific litigation strategy and potential outcomes of the TRO cases in Florida and throughout the country. This document goes to the very core of the attorney client privilege and the work product doctrines and should be protected from disclosure to the Commission as well as the parties. Indeed, in the instant situation the Commission's Order would work irreparable harm against AT&T in forcing it to divulge its litigation strategy, especially in light of the fact that the *in camera* review would be done by the tribunal itself.

In addition to the above, AT&T is concerned that by disclosing this document to the Florida Public Service Commission *in camera*, the attorney client privilege will be waived. For example, in United States v. Massachusetts Institute of Technology, the United States Court of Appeals held that because M.I.T. had disclosed privileged documents to the Defense Contract Audit Agency during review of performance on defense contracts, M.I.T. forfeited any attorney client privilege with respect to those documents. 129 F.3d 681 (1997). In this situation, AT&T is concerned that the above decision and its progeny may cause a finding of waiver with respect to the subject document, thereby allowing the document to be discovered by AT&T's opponents in this litigation.

Based on the above, AT&T respectfully requests that the Commission reconsider the Order issued February 19, 2004 on BellSouth's Emergency Motion to Compel and not require AT&T to produce the document referenced in its response to Request 34 and 35 to the tribunal *in camera*, and that the Commission instead rely upon the attached affidavit in determining that the referenced document is privileged work product that is not subject to discovery under any circumstances.

Respectfully submitted, this the 20th day of February, 2004.



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(850) 425-6360

Attorney for AT&T Communications
of the Southern States, LLC

**CERTIFICATE OF SERVICE
DOCKET NO. 030851-TP**

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail and U.S. Mail or as indicated this 20th day of February 2004, to the following parties of record:

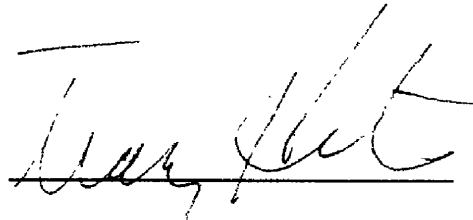
Jeremy Susac Office of the General Counsel Florida Public Service Commission 2540 Shumard Oak Boulevard Tallahassee, FL 32399-0850	BellSouth Telecommunications, Inc. * Nancy B. White c/o Ms. Nancy H. Sims 150 South Monroe Street, Suite 400 Tallahassee, FL 32301-1556 Phone: (850) 224-7798 Fax: 222-8640 Email: nancy.sims@bellsouth.com
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Sprint - Florida* Susan S. Masterton 1313 Blairstone Road MC: FLTLHO0107 Tallahassee, FL 32301 Phone: (850) 847-0244 Fax: 878-0777 Email: susan.masterton@mail.sprint.com	KMC Telecom III, LLC * Marva Brown Johnson, Esq. 1755 North Brown Road Lawrenceville, GA 30043-8119 Phone: (678) 985-6261 Fax: (678) 985-6213 Email: marva.johnson@kmctelecom.com
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McWhirter Reeves McGlothlin Davidson* Kaufman & Arnold, PA Vicki Gordon Kaufman 117 South Gadsden Street Tallahassee, FL 32301 Phone: (850) 222-2525 Email: vkaufman@mac-law.com	Verizon Florida Inc.* Mr. Richard Chapkis/Kim Caswell 201 N. Franklin Street, MCFLTC0007 Tampa, FL 33601 Phone: (813) 483-2606 Fax: (813) 204-8870 Email: richard.chapkis@verizon.com
Allegiance Telecom of Florida, Inc. Charles V. Gerkin, Jr. 9201 North Central Expressway Dallas, TX 75231 Phone: (469) 259-4051 Fax: 770-234-5965 Email: charles.gerkin@algx.com	Allegiance Telecom, Inc. Terry Larkin 700 East betterfield Road Lombard, IL 60148 Phone: 630-522-6453 Email: terry.larkin@algx.com

<p>Messer Law Firm * Floyd Self/Norman Horton P.O. Box 1876 Tallahassee, FL 32302-1876 Phone: 850-222-0720 Fax: 850-224-4359</p>	<p>MCI WorldCom Communications, Inc.(GA)* De O'Roark, Esq. Six Concourse Parkway, Suite 600 Atlanta, GA 30328 Email: de.oroark@wcom.com</p>
<p>Granite Telecommunications, LLC Rand Currier/Geoff Cookman 234 Copeland Street Quincy, MA 02169-4005 Phone: (617) 847-1500 Fax: (617) 847-0931 Email: rcurrier@granitenet.com</p>	<p>Miller Isar, Inc. Andrew O. Isar 7901 Skansie Avenue, St. 240 Gig Harbor, WA 98335 Phone: (253) 851-6700 Fax: (253) 851-6474 Email: aisar@millerisar.com</p>
<p>Moyle Law Firm (Tall) Jon Moyle, Jr. The Perkins House 118 North Gadsden Street Tallahassee, FL 32301 Phone: (850) 681-3828 Fax: 681-8788 Email: jmoylejr@moylelaw.com</p>	<p>NewSouth Communications Corp.* Jake E. Jennings/Keiki Hendrix Two North Main Center Greenville, SC 29601-2719 Phone: (864) 672-5877 Fax: (864) 672-5313 Email: jejennings@newsouth.com</p>
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<p>Supra Telecommunications and Info. Systems Jonathan Audu 1311 Executive Center Drive, Suite 220 Tallahassee, FL 32301-5027 Phone: (850) 402-0510 Fax: (850) 402-0522 Email: Jonathan.audu@stis.com</p>	<p>Sprint (KS) Kenneth A. Schiffman 6450 Sprint Parkway Mailstop: KSOPHN0212-2A303 Overland Park, KS 66251-6100 Phone: 913-315-9783</p>
<p>Sprint (NC) H. Edward Phillips, III 14111 Capital Blvd. Mailstop: NCWKFR0313-3161 Wake Forest, NC 27587-5900 Phone: 919-554-7870</p>	<p>Xspedius Communications Ms. Rabinai E. Carson 5555 Winghamen Blvd., Suite 300 O'Fallon, MO 63366-3868 Phone: (301) 361-4220 Fax: (301) 361-4277 Email: rabinai.carson@xspedius.com</p>
<p>Matthew Feil FDN Communications 390 North Orange Avenue Suite 2000 Orlando, FL 32801 (407) 835-0460 Email: mfeil@mail.fdn.com</p>	<p>Scott A. Kassman FDN Communications 390 North Orange Avenue Suite 2000 Orlando, FL 32801 (407) 447-6636 Email: skassman@mail.fdn.com</p>

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Tracy W. Hatch

**AT&T's Motion for Reconsideration
FPSC Order on BST's Motion to Compel
Docket 030851-TP**

AT&T's Motion for Reconsideration

Exhibit A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal) Docket No. 030851-TP
Communications Commission triennial UNE Review: Local)
Circuit Switching for Mass Market Customers) Filed: February 20, 2004

AFFIDAVIT OF AVA KLEINMAN ON BEHALF OF
AT&T COMMUNICATIONS

County of Somerset
State of New Jersey

I, Ava Kleinman, being of lawful age and duly sworn upon my oath, depose and state:

1. My name is Ava Kleinman and my business address is One AT&T Way, Bedminster, New Jersey 07921.
2. I am currently employed by AT&T Corp. as Chief Counsel, Network Facilities and Local Services. In this capacity, among other things, I am responsible for providing legal advice and counsel to executives of AT&T Business Services ("ABS"), responsible for providing local telephone service throughout the United States. I report to Thomas G. Dagger, the Vice-President of Network, Access and Local Services Law, the attorney in charge of legal services to, among other units, the local business services unit of ABS. Both my position and Mr. Dagger's are within AT&T's Law & Government Affairs ("L&GA") organization.
3. I am providing this affidavit in support of AT&T Communications of the Southern States, LLC's Motion for Reconsideration (AT&T's Motion), filed simultaneously herewith, of the Order Granting, In Part, and Denying, In Part,

BellSouth's Emergency Motion to Compel ("Order"), issued in this Docket on February 19, 2004. One issue addressed in that Order is whether a document identified by AT&T as "UNE-P planning assumptions document prepared by attorney Thomas G. Dagger, Network, Access and Local Services Law Vice-President, dated October 17, 2003" ("the Dagger document") is subject to the attorney-client privilege. The Order notes that the Hearing Officer is "unable to determine whether the documents claimed by AT&T to be work product are, in fact, work product that is not subject to discovery." Order at p. 5. As a result, the Order directs AT&T to "produce a more specific privilege log identifying the documents responsive to BellSouth's Requests 34 and 35, as well as confidential copies of the documents at issue, to this office by close of business on Friday, February 20, 2004, so that I can review and determine whether the documents at issue are subject to discovery." *Id.* The purpose of this affidavit is to provide the additional information requested by the Order in order to demonstrate that the Dagger document is protected by the attorney-client privilege.

4. I am providing this affidavit in lieu of Mr. Dagger, who is out of the office and unavailable today, in order to meet the deadline set forth in the Order. I have first hand knowledge of the facts and circumstances described herein.
5. The Dagger document consists of two parts: (1) an electronic mail ("email") communication dated October 17, 2003, subject line "PRIVILEGED AND CONFIDENTIAL - L&GA View on ABS UNE-P Assumptions", sent to a limited distribution of executives within AT&T, including the then President, Betsy Bernard; and (2) the document attached to the email, entitled "ABS State

Impairment Business Case Planning Scenarios", also dated October 17, 2003.

Both are identified as being protected by the attorney-client privilege. The beginning of the email notes "PRIVILEGED AND CONFIDENTIAL ADVICE OF COUNSEL" and at the end, "This message and any attachments to it contain PRIVILEGED AND CONFIDENTIAL ATTORNEY CLIENT INFORMATION AND/OR ATTORNEY WORK PRODUCT exclusively for intended recipients."

The top of each page of the attachment states, "Privileged and Confidential Incorporates Advice of Counsel", while at the bottom of each page is stated, "AT&T PROPRIETARY (RESTRICTED) Privileged and Confidential – Prepared in connection with advice of counsel and incorporates advice of counsel."

6. The Dagger document was requested by executives senior to Mr. Dagger, including the President of AT&T, Betsy Bernard, soon after the FCC's Triennial Review Order ("TRO") was issued on August 21, 2003. In light of the TRO, legal analysis and advice was sought as to possible outcomes of the impending state proceedings so that ABS could prepare the appropriate business plans.
7. The Dagger document would not have been prepared but for the contemplation of the legal advice and services required by the business unit, ABS, in order to conduct its business.
8. The content of the Dagger document relates to the legal services being rendered, and its subject matter is within the scope of Mr. Dagger's duties. The content of the Dagger document is a legal analysis of the TRO, litigation strategy, and the potential rulings in the state proceedings. As the chief attorney for the local business unit of ABS, Mr. Dagger is responsible for analyzing key court and

regulatory decisions and accordingly thereafter advising the business unit on the appropriate business course. Providing advice to ABS on the TRO, a regulatory decision highly important to the business, falls squarely within the scope of his duties. In preparing this document, Mr. Dagger received and incorporated legal analysis from the regional Chief Regulatory Counsel from L&GA for each geographic region of the country.

- 9. The Dagger document is the most sensitive of documents, and to the best of my knowledge and belief, has not been disseminated beyond those persons who, because of the AT&T corporate structure, needed to know its contents. This extremely confidential document has been maintained only within a limited number of L&GA and ABS employees who had a business need for its high level advice. Because of its insights into the work product and analysis of AT&T's attorneys with regard to the TRO; litigation strategy in the state proceedings; and legal advice to the most senior management of the company, the Dagger document has been maintained as an attorney-client privileged communication handled with confidential treatment.**

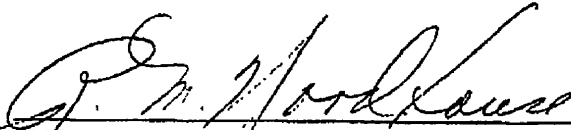
COUNTY OF SOMERSET

STATE OF NEW JERSEY



Ava Kleinman

SWORN TO and subscribed before me, this the 20th day of February, 2004.


NOTARY PUBLIC

My Commission Expires:

2/7/05

ROSITA M. WOODHOUSE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Feb. 7, 2006