ORIGINAL

AT&T

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February 16, 2004

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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 Response to BellSouth's Motion to Compel 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.

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Sincerely yours,

Tracy W. Hatch

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of Requirements Arising From Federal Communications Commission Triennial UNE review: Local Circuit Switching For Mass Market Customers.	)	**Docket No. 030851-TP**
	)	**Filed: February 16, 2004**

AT&T'S RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S EMERGENCY MOTION TO COMPEL

In response to BellSouth Telecommunications, Inc.'s (hereinafter "BellSouth") Emergency Motion to Compel, AT&T respectfully shows the Commission the following:

BACKGROUND

BellSouth served its First Requests for Admission, Revised Sixth Set of Interrogatories, and Sixth Request for Production of Documents on AT&T on January 16, 2004. AT&T provided timely Objections to BellSouth's discovery on January 23, 2004.[1] On February 4, 2004, AT&T timely served its discovery responses.[2] On February 5, 2003, Bennett Ross, Georgia General Counsel for BellSouth, emailed a letter to AT&T attorney Michael J. Henry requesting supplementation of certain of the discovery responses and indicating that BellSouth would file a Motion to Compel if AT&T did not respond to his letter

[1] AT&T's Objections to BellSouth's First Requests for Admission, Sixth Set of Interrogatories, and Sixth Requests for Production of Documents are attached hereto as Exhibit A.
[2] AT&T's Responses to BellSouth's Sixth Set of Interrogatories are attached hereto as Exhibit B.

with written responses the following day, February 6, 2004.[3] Mr. Henry contacted Mr. Ross on Friday and had a general discussion about BellSouth's issues with the responses provided and indicated a willingness to provide supplemental responses but that it could not be done by close of business on that date. AT&T indicated that it was willing to negotiate a date for supplemental responses, but BellSouth indicated that they would file a Motion to Compel to "preserve their rights". BellSouth filed the subject Emergency Motion to Compel on the morning of February 9, 2004.

ARGUMENT

Although AT&T believes that its discovery responses, as originally written, were appropriate, responsive and within the parameters pursuant to the Order Establishing Procedure, Order No. PSC-03-1054-PCO-TP, issued September 22, 2003, and Second Order on Procedure, Order No. PSC-03-1265-PCO-TP, issued November 7, 2003 (hereinafter collectively "Procedural Orders"), by the Florida Public Service Commission (hereinafter "Commission"), Rule 28-106.206 of the Florida Administrative Code, and Rules 1.280, 1.340, 1.350 and 1.380 of the Florida Rules of Civil Procedure, AT&T will supplement its responses to Interrogatories 191, 192, 193, 199, 200, 208, 215, 216, 217, 218, 219, 228, 236, 237, 239, 241 and Request for Production 37. With regard to Requests for Production 34 and 35, AT&T will supplement those Requests to confirm that AT&T does not have any responsive information that is not

[3] Mr. Ross's letter is attached hereto as Exhibit C. Please note that the date on the letter is incorrect. The letter was sent on February 5, 2004 instead of January 5, 2004.

privileged or that is not protected by the work product doctrine. A privilege log will be produced in accordance with those requests. AT&T's supplemental responses are forthcoming and will be provided in the near future.

With regard to the remaining discovery at issue, Interrogatories 209 and 210, AT&T asserts that BellSouth's Motion to Compel is wholly without merit and should be denied. Each of these discovery requests is discussed in detail below:

> **Interrogatory 209: If the foregoing Request for Admission is denied, state all facts and identify all documents, including providing specific references to the hearing transcript from Docket 000731-TP that support such denial.**
>
> **Interrogatory 210: Is it your contention that in Docket 000731-TP before the Florida Public Service Commission AT&T was merely testifying that it "could" or "was capable" of providing local service to every BellSouth customer in Florida using its existing switches, but that there was no implication or suggestion that it would be economic for AT&T to do so? If the answer to this Interrogatory is in the affirmative, state all facts and identify all documents, including providing specific references to the hearing transcript from Docket 000731-TP, that support this contention.**

AT&T responded to Interrogatory 209 by stating that it was not applicable and to Interrogatory 210 by stating that:

> ***The issue involved in Docket 000731-TP was whether AT&T was or is entitled to receive reciprocal compensation at the tandem rate level based on whether AT&T's local network serves or is capable of serving a geographic area comparable to the geographic area served by BellSouth's tandem network. The issue involved in that proceeding did not involve whether it is profitable or economic to serve all of the customers who reside within that area and certainly not whether it is profitable or economic to serve mass market customers (as opposed to enterprise customers) with its own network and switch, which is the issue in this Docket***

030851-TP. The transcript of the hearings in Docket 000731-TP will reflect what the AT&T witnesses testified to.

With regard to Interrogatory 209, BellSouth seeks to have AT&T dig through hearing transcripts and provide references supporting its denial. Interrogatory 210 seeks similar information by requesting references to the hearing transcript from Docket 00731-TP. This request is improper for two reasons. First, the request seeks to compel AT&T to provide a digest of information that BellSouth has equal access to and to undertake a burdensome exercise through volumes and volumes of testimony which would be unduly burdensome. Second, the request seeks information that is privileged work product of AT&T's attorneys without the requisite showing of substantial need pursuant to Fla. R. Civ. P. 1.280(b)(3).

Interrogatories 209 and 210 seek to compel AT&T to provide a digest of information relating to testimony given in another proceeding involving a different subject matter than the issue currently before the Commission. Based on BellSouth's quoting of testimony given at the proceeding,[4] it is likely that BellSouth is currently in possession of the hearing testimony from Docket 000731-TP. Even if BellSouth does not currently have possession of the testimony it is readily accessible on the Florida Public Service Commission website.

[4] For example, Interrogatory 208, which is technically a Request for Admission, quotes language that purports to be testimony from the proceeding in Docket 000731-TP.

Florida case law is consistent in holding that where parties to a case have equal access to documents or items, one party cannot compel another party to prepare materials on their behalf. In Liberty Mutual Fire Insurance Company v. Hanson, the Fifth District of the District Court of Appeal of Florida held that where "the [requesting party] has alternative means to obtain this information . . . the trial court departed from the essential requirements of the law in ordering [one party] to do [another party's] leg work." 824 So. 2d 1013, 1015 (2002); *See also,* Southern Bell Telephone and Telegraph Company v. Deason, 632 So.2d 1377, 1384 (1994)("one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures"). In Liberty Mutual, an insured and her daughter filed suit against Liberty Mutual seeking uninsured motorist benefits under the insurance contract. Id. The insured filed a request seeking, among other things, "[c]opies of any lawsuit where the insurer was sued or sought declaratory relief involving the terms 'resident,' 'residence,' or 'residing.'" The insurer objected to the discovery asserting that the requests were overly broad, unduly burdensome and that the documents were protected work product and attorney-client communications. Id. The insured filed a motion to compel and the trial court granted the motion. Id. Liberty Mutual successfully appealed, with the appellate court ruling that the insured had equal access to

information regarding the prior court proceedings and that it was error for the trial court to order Liberty Mutual to do the insured's leg work. Id.

In this case, BellSouth is seeking to compel AT&T to provide information to which it has equal access. In addition to requesting information that it already has, BellSouth seeks to compel AT&T to provide references to prior, *unrelated*, testimony which plainly seeks information that, if compiled,[5] would constitute work product pursuant to Fla. R. Civ. P. 1.280. Under these circumstances, BellSouth has failed to make the required showing pursuant to Fla. R. Civ. P. 1.280(b)(3) that it "has need of the materials in preparation of its case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

In seeking references that support a specific contention of AT&T, BellSouth seeks to discover attorney work product from AT&T's in-house and outside counsel. Furthermore, Interrogatories 209 and 210 seek portions of transcript testimony that AT&T contends are irrelevant to this proceeding and that AT&T *does not intend to present at the hearing.* Assimilations of information prepared by counsel that are not intended to be produced at trial have been consistently protected in Florida courts. In fact, the Supreme Court of Florida recently announced this position in Acken v. Northup. No. SC02-2435, 2004 WL 178589 (Jan. 29, 2004). In Acken, a plaintiff in a medical malpractice case sought to discover compilations of testimony gathered by

[5] AT&T notes that the digest of information BellSouth seeks has not yet been compiled. Therefore, BellSouth's motion would require AT&T to assimilate such information.

defense counsel that were previously given by plaintiff's expert witness. Id. at *1. In reversing the opinion from the lower appellate court, the Court held (1) that assimilations of materials prepared by counsel are work product; and (2) that the work product privilege protects assimilations of material from discovery where the party to which the discovery is directed "never expected or intended to use them for impeachment at trial." Id. at *4. In discussing the rationale for its decision, the Supreme Court of Florida also addresses the opinion in Gardner v. Manor Care of Boca Raton, Inc. 831 So. 2d 676 (2002). In Gardner, the Fourth Circuit, District Court of Appeal, held that a nursing home should be compelled to respond to interrogatories which requested the identification of specific surveys and personnel reports which counsel considered relevant. Id. In Aiken, the Florida Supreme Court declined to extend its holding and specifically rejected the Gardner decision. 2004 WL 178589 at *4. In rejecting Gardner, the Supreme Court declared the following axiom of law:

> [W]e do not approve the broad sweep of the Fourth District Court of Appeal's decision in Gardner v. Manor Care of Boca Raton, Inc. The district court's approval in Gardner of an order requiring 'counsel to cull through various surveys and personnel files to determine which ones are relevant,' [citation omitted] an action which the court admitted 'may indicate counsel's strategy,' [citation omitted] goes entirely too far. The overriding touchstone in this area of civil discovery is that an attorney may not be compelled to disclose the mental impressions resulting from his or her investigations, labor, or legal analysis unless the product of such investigation itself is reasonably expected or intended to be presented to the court or before a jury at trial. Only at such time as the attorney should reasonably ascertain in good faith that the

material may be used or disclosed at trial is he or she expected to reveal it to the opposing party.

Id. at *5.

The principles set forth in the Aiken decision are on point and those principles plainly dictate that BellSouth's Emergency Motion to Compel be denied. In the instant case, BellSouth requests that the Commission order that AT&T provide *specific references* to portions of a previous hearing which AT&T finds relevant to the issues contained in Interrogatories 208, 209 and 210, despite the fact that AT&T has *no intention whatsoever* of referring to this prior, unrelated hearing or the testimony presented at the hearing in the immediate case.[6] This request necessarily requires AT&T to provide information that is protected by the work product doctrine and to which BellSouth has equal access. Accordingly, BellSouth's motion to compel should be denied with respect to Interrogatories 209 and 210.

With respect to Request for Production 36, BellSouth seeks information that is simply not likely to lead to the discovery of admissible evidence pursuant to Fla. R. Civ. P. 1.280. Furthermore, the information requested is highly confidential and is comprised of extremely sensitive information that would be damaging to AT&T and Comcast if released. Under the circumstances, AT&T respectfully requests that BellSouth's Emergency Motion to Compel with respect to Request 36 be denied.

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[6] The only circumstances where an AT&T witness would address this prior unrelated hearing would be if BellSouth is permitted to cross examine AT&T witnesses about the prior hearings.

Respectfully submitted, this the 16th day of February, 2004.

Tracy Hatch
AT&T Communications of the
Southern States, LLC
101 North Monroe Street,
Suite 700
Tallahassee, FL 32301
(850) 425-6360

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 16th day of February 2004, to the following parties of record:

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