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April 10, 2001

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
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 Motion to Dismiss, or in the Alternative, Motion to Strike AT&T 's Petition seeking the Structural Separation of BellSouth, 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,

E. Earl Edenfield Jr. (KA)

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

CERTIFICATE OF SERVICE
Docket No. 010345-TP

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

(*) Federal Express and U.S. Mail this 10th day of April, 2001 to the following:

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E. Earl Edenfield, Jr.
E. Earl Edenfield Jr. (LH)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of AT&T Communications of the Southern States,Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. for Structural Separation of BellSouth Telecommunications, Inc.	)	Docket No. 010345-TP
	)	Filed: April 10, 2001

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION TO STRIKE, AT&T'S PETITION SEEKING THE STRUCTURAL SEPARATION OF BELLSOUTH TELECOMMUNICATIONS, INC.

On March 21, 2001, AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. (collectively "AT&T") filed a "Petition" again dictating to the Florida Public Service Commission ("Commission") the terms under which AT&T will finally, after five years, enter the local telecommunications market.[1] AT&T contends that a restructuring of BellSouth – and only BellSouth – is required before the 444[2] alternative local exchange companies ("ALECS") certificated in Florida can effectively compete in the local market. This type of restructuring has been discredited by Congress in enacting the Telecommunications Act of 1996 ("1996 Act") and rejected by every state commission that has considered it. This Commission should likewise decline to impose such Draconian measures and, instead, dismiss AT&T's Petition because: (1) the Commission lacks subject matter jurisdiction over the relief requested; (2) AT&T fails to state a cause of action

[1] AT&T first set conditions on its entering the local market in FPSC Docket 981834-TP, wherein AT&T requested, among other things, a generic UNE docket and third-party testing of BellSouth's OSS. That docket was consolidated with FPSC Docket No. 990321-TP, wherein a number of carriers requested a generic collocation docket. Ultimately, the Commission ordered a generic UNE pricing and deaveraging docket, OSS workshops and independent third-party testing, and a generic collocation docket. (*See*, Order No. 99-1078-PCO-TP, dated May 26, 1999.) These dockets are either completed or in the final stages of completion.

[2] As of April 4, 2001, the Commission's website indicated that there were 444 certified ALECS in Florida.

upon which relief can be granted; and (3) the Commission is barred by the operation of the 1996 Act and other federal law from granting the requested relief.

Alternatively, the Commission should strike the Petition and require AT&T to re-file it in a format that clearly states a purported cause of action. In its current form, the Petition is basically a brief presenting legal and policy arguments rather than a pleading setting forth factual allegations that could form the basis for the relief requested by AT&T. Nowhere in the document does AT&T provide a single example or instance where BellSouth has allegedly prevented AT&T from effectively competing in Florida. Such information would be necessary for BellSouth to formulate a response to the Petition.

LAW AND ANALYSIS

I. THE COMMISSION SHOULD DISMISS AT&T'S PETITION FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE NO FLORIDA STATUTE AUTHORIZES THE COMMISSION TO BREAK UP A TELEPHONE COMPANY INTO SEPARATE PARTS THAT INDIVIDUALLY PROVIDE RETAIL TELEPHONE SERVICE AND WHOLESALE TELEPHONE SERVICE.

In order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. *See Keena v. Keena*, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). Subject matter jurisdiction arises by virtue of law only – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. Dist. Ct. App. 1998). This Commission, therefore, must dismiss a complaint or a petition to the extent that it seeks relief that the Commission is not authorized to grant. *See, e.g.,* Order Denying Complaint and Dismissing Petition (PSC-99-1054-FOF-EI) in Docket No. 981923-EI (May 24, 1999) (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint

involved "a claim for monetary damages, an assertion of tortious liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.").

AT&T seeks one and only one remedy in its Petition: "a proceeding to order the structural separation of BellSouth into distinct retail and wholesale units." *See* Petition at 28. Further, AT&T proposes that BellSouth's retail organization be "reconstituted as a publicly owned corporate affiliate separate from its wholesale organization." *See* Petition at 4. The remedy sought by AT&T, however, is one that the Legislature has not authorized the Commission to provide. As the Florida courts have recognized, the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. *See City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). Instead, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." *See Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977); *accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. Dist. Ct. App. 1995) (noting that an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and that "as a creature of statue," an agency "has no common law jurisdiction or inherent power . . . .").

As explained below, no statute grants the Commission the express or implied authority to require BellSouth to structurally separate its wholesale operations from its retail operations. Because it is not authorized to grant the only relief sought by AT&T in its Petition, the Commission should dismiss the Petition for lack of subject matter jurisdiction.

A. No statute expressly grants the Commission the authority to order a structural separation.

In its Petition, AT&T cites a decision in which the Pennsylvania Public Utility Commission initially ordered the structural separation of Verizon into wholesale and retail parts. *See Joint Petition of Nextlink Pennsylvania, Inc.*, Docket No. P-0991648 (Sept. 30, 1999), *aff'd, Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 736 A.2d 440, 464 (Pa. Commw. Ct. 2000). AT&T, however, fails to mention two important factors surrounding this decision.

First, a Pennsylvania statute expressly provides the Pennsylvania Commission with the authority to order a structural separation:

> For local exchange telecommunications companies serving over 1,000,000 access lines, the commission may require that a competitive service be provided through a subsidiary which is fully separated from the local exchange telecommunications company if the commission finds that there is a substantial possibility that the provision of the service on a nonseparated basis will result in unfair competition.

See 66 Pa.C.S. § 3005(h). This express statutory authority was confirmed in the *Bell Atlantic-Pennsylvania* decision. The Court noted that "Section 3005(h) expressly authorizes structural separation to the extent of confining the wholesale activity to a subsidiary, a separate corporate entity in common parlance, which is how the PUC's order must be understood." *See Bell Atlantic-Pennsylvania,* 736 A.2d at 464 (emphasis added). Second, and even more critical, is the fact that while the Pennsylvania Commission had express statutory authority to order the structural separation, it declined to exercise that authority after conducting extensive hearings on that very issue.

If the same or a similar statute existed in Florida, AT&T might have a legal basis on which to rest its Petition. However, in sharp contrast to the statutes governing the Pennsylvania

Commission, there is no Florida statute that expressly authorizes this Commission to order the breakup of a telephone company like BellSouth. In fact, nowhere in the twenty-eight pages of its Petition does AT&T cite any statute that purportedly grants the Commission the express authority to order structural separation. This is not an omission or oversight on the part of AT&T – instead, it is a tacit acknowledgement that there is no such statute in the State of Florida. Simply stated, the Florida Commission has no express authority to grant the relief sought by AT&T.

B. No statute impliedly grants the Commission the authority to order a structural separation.

As noted above, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." *See Deltona Corp. v. Mayo*, 342 So.2d 510, 512 n.4 (Fla. 1977). As the foregoing discussion makes clear, there is no express authority for the Commission to do what AT&T requests. Thus, the question devolves to whether the governing statutes grant by "necessary implication" the authority to do what is not expressly authorized.

Any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. *See Atlantic Coast Line R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909). In *Louisville & N. R. Co.*, for example, the Court struck down a Commission rule requiring railroad companies to report train wrecks to the Commission because it could find no power delegated to the Commission "which by any fair or reasonable implication or intendment could be reasonably held to include as an incident the power to adopt or prescribe" such a rule. 49 So. at 40. If there is any reasonable doubt as to whether the Commission does or does not have the statutory

authority to order the relief requested by AT&T, then it must be found that the Commission lacks the power. *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977).

As explained below, neither the general statutes granting the Commission certain authority over telecommunications companies nor the more specific statues cited by AT&T in its Petition impliedly authorize the Commission to split up a telephone company.

1. Statutes granting the Commission certain general authority over telecommunications companies do not impliedly authorize the Commission to split up a telephone company.

(a) Section 364.01 (2): Section 364.01(2) provides that "[i]t is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies . . . ." § 364.01(2), *F.S.A.* (1998) (emphasis added). In its Petition, AT&T suggests that this general language impliedly authorizes the Commission to order the drastic remedy of requiring BellSouth to set up a separate, publicly-owned company and transfer a significant portion of its assets to that new company. AT&T is wrong. This general statute simply clarifies that the Commission has the exclusive jurisdiction to exercise the authority that is granted to it by Chapter 364. It does not, as AT&T implies, expand the authority that has been granted to the Commission to include ordering any and every type of relief that may be requested with regard to the activities of a public utility.

If, for instance, AT&T's argument were correct and this statute impliedly authorized the Commission to split up BellSouth, one would think that the same statute also would impliedly authorize the Commission to order less drastic remedies, such as awarding monetary damages against BellSouth. That is exactly what the trial court found in *Southern Bell Tel. Co. v. Mobile America Corp.*, 291 So.2d 199, 202 (Fla. 1974) – that Section 364.01(2) did, in fact, grant the

Commission the exclusive jurisdiction to award money damages against a telephone company. The Florida Supreme Court, however, reversed that ruling, explaining:

> Although such a determination is understandable in view of the provisions of section 364.01(2), granting exclusive jurisdiction of all matters set forth in Parts 1 and 2 of Ch. 364 to the PSC, . . . the circuit court was not without jurisdiction in the matter. Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court . . . .

Id. at 202. If Section 364.01(2) cannot be read to grant the Commission the implied authority to award $100 in monetary damages against BellSouth when it injures some third party, it clearly is beyond the pale of reasonableness for AT&T to claim that the same statute impliedly authorizes the Commission to order the split-up of BellSouth because AT&T claims that otherwise it cannot compete with BellSouth.

Although the foregoing should be sufficient for the Commission to conclude that it does not have jurisdiction to order the structural separation of BellSouth, there are other rules of construction that are equally applicable to Section 364.01 (2) that lead to the same result -- that there is no implied authority that would authorize the Commission to break up BellSouth. For instance, one basic rule of statutory construction in Florida is that in order for a statute to give implied authority, the implied authority must have been within the contemplation of the legislature when it passed the statute. In *Radio Telephone Communications, Inc v. Southeastern Telephone Co.* 170 So.2d 577 (Fla. 1965), the court considered whether the Commission had the authority to regulate radio communications service. In determining that the Commission had no such authority, the court concluded that when the Legislature enacted a plan for the regulation of

telephone companies in 1913, the Legislature did not intend for the Commission to regulate radio services. *Id.* at 580-81. In this regard, the court stated:

> But, they say, the Legislature has re-adopted Chapter 364 at each biennial session from 1943 to 1963, so that the Legislature could have intended to include such communications services when the Act was re-adopted. To so interpret the statute and the legislative intent would, in our opinion, be judicial legislating of the kind frequently condemned – that is, interpreting an existing statute or constitutional provision to encompass a situation obviously not within the purview of the legislative branch of the government or the people at the time of its enactment or adoption – as well as directly opposed to the policy of this state in its regulation of public utilities.

Id. at 581. The court concluded by stating that "if and when the Florida Legislature decides to enter the field reserved to it in the Federal Communications Act of 1934, . . . it will do so in no uncertain terms and in language appropriate to and by regulations suitable for this new type of communications service." *Id.* at 582.

Similarly, the statute that AT&T relies upon here predates the advent of competition in the local telephone market by at least 15 years.[3] At the time Section 364.01(2) was enacted, there was no competition in the local telecommunications market or, for that matter, in the long distance telecommunications market. When the statute was enacted, therefore, there was no reason for the Legislature to have contemplated the structural separation of the "wholesale" side of a local telephone company from the "retail" side of that same company because there were no competitors to whom the company could sell "wholesale" services. AT&T, therefore, cannot seriously argue that, in adopting the general language of Section 364.01(2) long before the introduction of competition in the local telecommunications market, the Legislature intended to

[3] *See* Ch. 80-36, *Laws of Florida.*

authorize the Commission to order the structural separation of a company in order to allegedly promote competition that was not even foreseen at the time.

AT&T's reliance on the general provisions of Section 364.01(2) as the source of implied authority for the Commission to dismantle BellSouth is even further misplaced in light of the fact that such an interpretation runs afoul of certain express limitations imposed on the Commission. Generally, corporations in Florida – including corporations that are regulated by the Public Service Commission – are authorized to organize themselves as they deem appropriate. The Supreme Court of Florida long ago acknowledged that:

> the Railroad Commission is clothed with power to regulate telegraph companies. It is also manifest that such regulation can under no circumstances be merged into control or operation . . . .
>
> * * *
>
> It is well settled that corporations performing a public or quasi public service may under the police power of the state be regulated in the interest of public convenience and necessity. Such regulation must, however, bear reference to the comfort, safety, and welfare of society; it must not conflict with the provisions of the corporate charter, or under the guise of regulation take from the corporation any of the essential rights and privileges which its charter confers. They must be police regulations in fact, and not amendments of the charter in curtailment of its corporate franchise.

State v. Western Union Telegraph Co., 118 So. 478, 479-80 (Fla. 1928). This conclusion is fully consistent with the fact that the state is not clothed with the general power to manage the companies that it regulates. *Southwestern Bell Tel. Co. v. Missouri Public Serv. Comm'n*, 262 U.S. 276, 289, 43 S.Ct. 544, 67 L.Ed. 981 (1923).

AT&T's argument that the general language of Section 364.01(2) impliedly authorizes the Commission to order the structural separation of BellSouth is wrong, therefore, because such an interpretation is directly at odds with the longstanding principle that Commission regulation

cannot conflict with a company's corporate charter. As admitted by AT&T in its Petition, BellSouth is organized and functions as a single business entity that offers both retail and wholesale services. Ordering BellSouth to restructure into separate retail and wholesale corporate subsidiaries would take from BellSouth certain fundamental rights that all companies enjoy through their corporate charter -- the right to (1) select a management and organizational structure; (2) be self-governing; and (3) make independent financial decisions for the benefit of its shareholders. Effectively, by ordering structural separation, this Commission would become BellSouth's board of directors, which the United States and Florida Supreme Court have found to be impermissible. *See Southwestern Bell Tel. Co*, 262 U.S. 289; *Western Union Telegraph Co.*, 118 So. at 479-80.

Clearly, for the foregoing reasons, Section 364.01(2) does neither expressly nor impliedly authorizes the Commission to grant the relief that AT&T seeks.

(b) Section 120.80(13)(d): The Commission has, in the past, relied upon Section 120.80(13)(d) to find jurisdiction where none was otherwise apparent.[4] Like Section 364.01(2), Section 120.80(13)(d) grants the Commission certain general powers with regard to telecommunications companies. This statute provides that

> Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with the Act.

§120.80(13)(d), F.S.A (emphasis added). Unlike Section 364.01(2), this section clearly does not grant the Commission any substantive authority. Instead, it allows the Commission to employ

[4] *See*, Order No. PSC-99-0769-FOF-TP in FPSC Docket No. 981834-TP, dated April 21, 1999, at p. 5.

procedures that are consistent with the substantive authority that was granted to the Commission by the Telecommunications Act of 1996.

The fact that this statute does not alter or expand the Commission's substantive authority is evident from the fact that the statute does not appear in Chapter 364, which sets out the substantive powers of the Commission. Instead, this statute appears in the Administrative Procedure Act ("APA"), and the APA neither grants an agency any new substantive authority nor expands an agency's existing substantive authority. In *Witmer v. Department of Bus. & Prof. Reg.*, 662 So.2d 1299, 1301-02 (Fla. Dist. Ct. App. 1995), for instance, the court stated

> We do not regard Section 120.633 as authority for the Division to enact substantive rules governing the conduct of racing. That section is part of the Administrative Procedures Act. It provides an exemption to hearing and notice requirements [of certain sections of the APA]. However, it authorizes the Division to enact alternative rules of procedure for the holding of such hearing . . . Thus, it does not provide authority for substantive rules.

(emphasis in original) *See also, Bayonet Point Reg. Med. Center v. Department of Health & Rehab. Services*, 516 So.2d 995, 999 (Fla. Dist Ct. App. 1987) ("The APA is a procedural mechanism, providing a forum to exert rights, but was never intended to change substantive law.")(concurring and dissenting opinion).

Section 120.80(13)(d), therefore, addresses only the procedures the Commission may employ in order to exercise the substantive authority it has been provided by statute. This statute neither expands the scope of the Commission's substantive authority nor creates any new or additional substantive authority. This statute, therefore, does not provide implied authority for the Commission to split up BellSouth as requested by AT&T.

At their bottom, none of the statutes that purport to grant the Commission general powers to act can be stretched to cover the situation here. There is simply no authority, express or

implied, that can be found in the general statutes governing the Commission that would allow the Commission to do what AT&T asks in this case.

2. The other individual statues cited by AT&T, which authorize the Commission to take certain specific actions, do not impliedly authorize the Commission to split up a telephone company.

In addition to relying on the general language of Section 364.01(2), AT&T also claims that the more specific language of three other statutes impliedly authorizes the Commission to split up BellSouth. As demonstrated by the following discussion, AT&T is wrong on all counts.

a. Sections 364.01(4)(c),(i)

AT&T suggests that the following language impliedly authorizes the Commission to split up BellSouth:

> The Commission shall exercise its exclusive jurisdiction in order to:
>
> > (c) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation; and . . .
> >
> > (i) Continue its historical role as surrogate for competition for monopoly services provided by local exchange telecommunications companies.

§§ 364.01(4)(c),(i), F.S.A (emphasis added). AT&T's suggestion, however, is clearly wrong. Like the case with Section 364.01(2), this section was enacted in 1990,[5] which was five years prior to the removal of franchises in order to promote competition in the local telecommunications market. *See* Ch. 90-244, *Laws of Florida*. The Legislature, therefore, could

[5] In 1995, the Legislature made a minor amendment to Section 364.01(4)(c) by adding the word "price." The Legislature made no changes to Section 364.01(4)(i).

not have intended for the words in the quoted sections to empower the Commission to order the structural separation of a company to allegedly promote local competition. Accordingly, this section does not give the Commission any implied authority to order the structural separation of BellSouth.

Additionally, as noted above, the Commission's exercise of any police powers it has been granted "must not conflict with the provisions of the corporate charter, or under the guise of regulation take from the corporation any of the essential rights and privileges which its charter confers." *Western Union Telegraph Co.*, 118 So. at 479-80. Moreover, the Commission may not use any "police powers" granted by Section 364.01(4)(c) to create any powers that are not otherwise conferred upon it by statute. *See State v. Mayo*, 354 So.2d at 361 (ruling that the PSC's power to regulate the service and safety of operations of motor carriers did not authorize the Commission to set minimum rates in the interest of safety for carries of road building aggregates). Because the local market was composed of franchised incumbents when this section was adopted, there has to be, at a minimum, "reasonable doubt" as to whether the legislature intended to give the Commission the implied power to take such drastic action as that requested by AT&T. "And any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." *Mayo,* 354 So.2d at 361.

This is especially true of the "police power" provisions articulated in Section 364.01(4)(c), which are expressly limited to those powers necessary to ensure that specified telecommunications services "continue to be subject to effective price, rate, and service regulation." § 364.01(4)(c), F.S.A. For decades, the Commission has served as a "surrogate for competition" and has regulated the price, rate, and services offered by BellSouth and its predecessors without even suggesting that a structural separation was necessary to accomplish

those actions. By authorizing the Commission to "continue" subjecting specified services to "price, rate, and service regulation," and to "continue the historical role as a surrogate to competition," the Legislature can hardly be deemed to have granted, by implication, the authority to take the drastic step of structurally separating a company.

b. Section 364.01(3)

AT&T quotes the portion of Section 364.01(3) which provides that "[t]he Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition . . . ." *See* Petition at 22. AT&T, however, ended its quote too soon to accurately reflect the intent of this statute. The portion of the statute that AT&T omitted goes on to say, "but nothing in this chapter shall limit the availability to any party of any remedy under state or federal antitrust laws." § 364.01(3), F.S.A. When the portion of the statute AT&T quoted is read in conjunction with the portion of the statue AT&T omitted, it becomes clear what the Legislature intended.

Far from impliedly granting the Commission the authority to order what is an inherently antitrust remedy,[6] Section 365.01(3) makes it clear that none of the authority that the Commission does have with regard to BellSouth limits any parties' right to seek "any remedy under state or federal antitrust laws." Had the legislature intended to allow the Commission to order what is inherently antitrust relief, it would have plainly and clearly said so. By specifically including the reservation of antitrust rights language in Section 364.01(2), however, the

[6] The remedy sought by AT&T – the structural separation of a company that does business in multiple states – is not only a drastic remedy, but it is also an antitrust remedy. AT&T is well aware of this. After all, the breakup of AT&T in 1984 was not the result of action by a state Commission or the FCC. Instead, it was the result of protracted antitrust litigation that was prosecuted in federal court.

Legislature made it clear that the Commission cannot order the antitrust relief that AT&T seeks in its Petition.

c. Sections 364.051 and 364.163

AT&T notes that Section 364.051 establishes a price regulation plan addressing basic local service, and Section 354.163 establishes a price regulation plan addressing network access service. AT&T then makes the remarkable statement that this means, "the retail/wholesale distinction already exists in Florida's statutes," (*see* Petition at 22), and suggests that this "distinction" somehow supports its claim that the Commission is authorized to order a structural separation of BellSouth. Just the opposite is true.

Section 364.051 allows a "local exchange telecommunications company" to elect to operate under a price regulation plan. § 364.051(1), F.S.A. Section 364.163 requires "[e]ach local exchange telecommunications company" operating under such a price regulation plan to "maintain tariffs with the commission containing the terms, conditions, and rates of each of its network access services." § 364.051(1), F.S.A. This same section defines "network access services" as "any service provided by a local exchange telecommunications company to a telecommunications company . . . to access the local exchange telecommunications network . . . ." *Id.*

It is clear, therefore, that the Legislature envisioned a single "local exchange telecommunications company" providing both "retail" services under Section 364.051 and "wholesale" services under Section 364.163. It is also clear that the Legislature expressly stated the authority it intended for the Commission to retain with regard to each type of service. With regard to "retail services," for instance, the Legislature expressly stated that the Commission has "continuing regulatory oversight of nonbasic services for the purposes of ensuring resolution of

service complaints, preventing cross-subsidization of nonbasic services with revenues from basic services, and ensuring that all providers are treated fairly in the telecommunications market." § 364.051(5)(b), F.S.A. With regard to "wholesale" services, the Legislature expressly stated that the Commission has "continuing regulatory oversight of local exchange telecommunications company-provided network access services for the purposes of determining the correctness of any price increase resulting from the application of the inflation index and making any necessary adjustments, establishing reasonable service quality criteria, and assuring resolution of service complaints." § 364.163(5), F.S.A.

Far from suggesting that it is improper or even troublesome for a single company to provide both "retail" and "wholesale" services, the Legislature clearly contemplated and condoned exactly that scenario. Moreover, to the extent that it had concerns regarding a company's provision of either of these types of services, the Legislature addressed those concerns by imposing price caps and other statutory guidelines and by authorizing the Commission's "continuing regulatory oversight" of such services for specified purposes. The Legislature, however, did not impliedly authorize the Commission to order the breakup of a company that was providing both services. Rather, the Legislature clearly recognized that such disparate services would be provided by a single company. This language clearly belies any suggestion that the Legislature intended to allow the Commission to dismember BellSouth or any other local telephone company.

II. THE COMMISSION SHOULD DISMISS AT&T'S PETITION FOR FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE RELIEF SOUGHT BY AT&T IS IMPERMISSIBLY IN CONFLICT WITH FEDERAL LAW.

A motion to dismiss for failure to state a cause of action tests the legal sufficiency of the complaint to state a cause of action upon which the relief requested in the complaint can be granted. *McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss*, 704 So. 2d 214, 215 (Fla. Dist. Ct. App. 1998). As explained above, the Commission has no authority to grant the relief AT&T has requested. The Commission, therefore, should dismiss the Petition on that basis alone.

Even if Florida statutes authorized the Commission to order the split up of BellSouth, however, the Commission still could not order that remedy because doing so would violate the commerce clause of the Constitution of the United States. Such an action by the Commission would also be inconsistent with the provisions of the 1996 Act. *See* 47 U.S.C. § 261(c) ("Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.)(emphasis added); *see also,* §120.80(13)(d), F.S.A, ("in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with the Act.) (emphasis added). Even if the Commission were not inclined to grant BellSouth's motion to dismiss for lack of subject matter jurisdiction, the Commission should still dismiss the Petition because, as explained below, the relief AT&T has requested would be inconsistent with federal law.

A. Applying any of the statues cited by AT&T in the manner suggested by AT&T would violate the Constitution of the United States.

Article I, Section 8 of the United States Constitution empowers Congress to "regulate Commerce . . . among the several states . . . ." *See Armstrong v. City of Tampa*, 118 So.2d 195, 199 (Fla. 1960). The purpose of this provision is to insure the free and unimpeded flow of goods and services between the states. *Id.*, Over the years, this provision has been "construed to mean that the states are precluded from imposing any undue or unreasonable burden on interstate commerce." *Id.* Because this preclusion arises from the Constitution itself, it applies even if there is no federal statute or rule that preempts a particular state statute or regulation.[7] *See Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 710 (3rd Cir. 1995). The commerce clause, therefore, prohibits the Commission from applying any of the statutes cited in AT&T's Petition in a manner that would impermissibly burden interstate commerce.[8]

Yet that is exactly what AT&T is asking the Commission to do. If AT&T had its way, BellSouth would not be able to provide any retail service in Florida unless BellSouth's "retail organization" is "reconstituted as a publicly owned corporate affiliate separate from its wholesale

[7] The specific relief requested by AT&T in this instance, however, presents the issue of whether the Commission is precluded from considering structural separation as a result of express preemption under §§253(a), 253(b) and 261 or some other type of preemption, such as conflict preemption under §§251, 252, 254, 271, 272 and 706, agency preemption by the FCC, or field preemption by Congress.

[8] BellSouth is not asking the Commission to invalidate any of the statutes upon which AT&T relies in its Petition. Rather, BellSouth is asking the Commission to recognize that applying these statutes in the manner suggested by AT&T would be unconstitutional. It is well settled that "the notion that the constitution stops at the boundary of an administrative agency's jurisdiction does not bear scrutiny," and an agency "cannot shut its eyes to constitutional issues that arise in the course of administrative proceedings it conducts." *Communications Workers of America v. City of Gainesville*, 697 So.2d 167, 169-70 (Fla. Dist. Ct. App. 1997). The Commission, therefore, is authorized to consider the constitutionality of the manner in which a party asks it to apply a given statute. *See In re Duke Energy New Smyrna Beach Power Co.*, Order No. PSC-99-0535-FOF-EM in Docket No. 981042-EM at 28-30 (March 22, 1999).

organization."[9] *See* Petition at 4. Under AT&T's logic, each of the other eight state Commissions in BellSouth's region presumably could order BellSouth to implement a unique type of structural separation in order to provide retail services in that state: one Commission, for instance, could require a publicly owned corporate affiliate, another could require a single corporate entity with separate divisions, and others could require other forms of separation.[10]

The specter of a company having to implement nine separate forms of corporate organization in order to do business in its operating region clearly constitutes an impermissible burden on interstate commerce. In *Southern Pacific Co. v Arizona*, 325 U.S. 761 (1945), the Supreme Court struck down an Arizona statute prohibiting the operation within the state of trains of more than fourteen passenger or seventy freight cars. Even though there were no conflicting federal statues or regulations, the Court ruled that the statue violated the commerce clause:

> The Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass,

[9] While AT&T and other ALECS have chosen to serve only the most lucrative accounts, BellSouth offers retail telephone service to every customer in its serving area. Granting the relief requested by AT&T, therefore, would hamper BellSouth's ability to serve Florida citizens that neither AT&T nor other ALECs are willing to serve.

[10] The prospect of nine different rulings on structural separations is fundamentally different than the prospect of nine different rulings on rates for services. Charging one rate for a basic business line in Florida and a different rate for a basic business line in Georgia, for example, may involve various programming and systems changes. Unlike the relief requested by AT&T, however, it does not require the establishment of independent sets of systems owned by separate companies and operated and maintained by separate sets of employees.

> whose laws thus control the carrier's operations both within and without the regulating state.

Id., at 773. If requiring a carrier to "break down and reconstitute" its trains in order to operate them in a state is an impermissible burden on interstate commerce (*See, Id.*), then certainly requiring a carrier to break up and "reconstitute" its entire corporate structure in order to provide service in a state is an even more impermissible burden on interstate commerce. *See* Petition at 4.

Corporate reorganization involves much more than simply filing a form or two with the appropriate state agencies. In addition to the tax implications, there are transactional burdens associated with transferring the various real estate and personal property involved in the reorganization from one entity to the other. There are administrative burdens associated with managing the associated payroll, benefits, and pension changes. There are also costs and burdens involved in duplicating the various assets that currently are shared by BellSouth's "wholesale" and "retail" organizations (such as office buildings, payroll systems, and billing systems).

These burdens on interstate commerce are further exacerbated by AT&T's request that BellSouth's "retail organization" be "reconstituted as a publicly owned corporate affiliate." *Id.* Granting such relief necessarily would involve an order requiring the issuance of stock in the "publicly owned corporate affiliate." The commerce clause, however, prevents the Commission form entering such an order.

By way of example, the Supreme Court of North Carolina considered a regulation requiring state Commission approval of the issuance of stock. The Court ruled that applying the regulation to BellSouth's predecessor, Southern Bell, would violate the commerce clause, explaining that:

> If the North Carolina Commission disapproves a proposed securities issue and the Georgia Commission approves it, Southern Bell is stymied, for it is put in an

> impossible position. In our view, the mere possibility of such a conflict, as applied to Southern Bell under the facts of this case, makes Rule R1—16, and the statutes which authorize the rule, a direct regulation and an impermissible burden on interstate commerce.

State v. Southern Bell Tel. & Tel. Co., 217 S.E.2d 543, 551 (N.C. 1975). Several other state courts have employed similar reasoning in ruling that statutes or rules requiring a state Commission to approve the issuance of securities violate the commerce clause to the extent that they are applied to a company doing business in multiple states. *See, e.g., Panhandle Eastern Pipe Line Co. v. Public Utilities Comm'n*, 383 N.E.2d 1163 (Ohio 1978); United *Air Lines v. Illinois Commerce Comm'n*, 207 N.E.2d 433 (Ill. 1965); *United Air Lines, Inc. v. Nebraska State Ry. Comm'n*, 112 N.W.2d 414 (Neb. 1961). If the commerce clause prohibits a state Commission from approving or disapproving a multi-state company's decision to issue new shares of stock, how can AT&T seriously contend that the same commerce clause would allow the same state Commission to require the same company to issue the same stock?

AT&T seeks relief that is not authorized by state statute. Even if any state statute did authorize the Commission to order structural separation, applying that statue in the manner suggested by AT&T would violate the commerce clause. Given that the Commission is precluded from granting the only relief AT&T seeks in its Petition, the Commission should dismiss the Petition.

B. Requiring BellSouth to split into two separate entities prior to providing retail service would be inconsistent with Section 253 of the Act because it would create an impermissible barrier to entry and it would not be competitively neutral.

Section 253(a) of the Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a)

(emphasis added). The Act is groundbreaking legislation that expressly addresses the relationship between incumbents and new entrants – including the manner in which an incumbent providing retail services to its end users must also provide wholesale services to its competitors. AT&T, therefore, cannot seriously contend that when it used the term "any entity" in Section 253(a), Congress really intended to say "any entity except an incumbent" or "any entity except an incumbent as it is currently organized." Section 253(a), therefore, prohibits a State from imposing requirements that prohibit any entity – including BellSouth as it is currently organized – from providing any retail telecommunications services in the State of Florida.

If the Commission were to order BellSouth to split into a "wholesale" entity and a "retail" entity, however, the "wholesale" entity would be prohibited from providing any telecommunications services to any end users. It is difficult to imagine a more direct violation of the federal statute that unequivocally states that a State may not prohibit "the ability of any entity to provide any interstate or intrastate telecommunications service." The remedy requested by AT&T, therefore, clearly is inconsistent with Section 253(a) of the Act.

AT&T's requested remedy also is inconsistent with Section 253(b) of the Act, which provides:

> Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[11]

[11] By its own terms, this statute does not create any new rights for the states, and it does not expand any existing rights of the states. This statute, therefore, does not alter the fact that the Commission has no authority under existing Florida law to order the structural separation of BellSouth.

47 U.S.C. § 253(b) (emphasis added) The relief requested by AT&T clearly is not competitively neutral because the other ILECS and the ALECS in Florida would not be required to undergo a structural separation and would not be required to incur the costs associated with such a separation. If AT&T had its way, these other ILECS and the ALECs would enjoy a distinct competitive advantage over BellSouth, which violates the plain language of Section 253(b) of the 1996 Act.

C. Requiring BellSouth to split into two separate entities prior to providing retail service would be inconsistent with Section 272 of the Act and with the resale and unbundling obligations imposed by the Act.

Congress is no stranger to structural separation requirements, and when it intended to impose such requirements in the 1996 Act, it did so in clear and unequivocal language.[12] In Section 272(a)(1), for instance, Congress expressly stated that certain local exchange carriers may provide certain service only "through one or more affiliates that are separate from any operating company entity that is subject to the requirements of Section 251(c)." 47 U.S.C. § 272(a)(1). The services that are subject to this separate affiliate requirement are manufacturing activities, origination of certain interLATA telecommunications services, and certain interLATA information services. *See* 47 U.S.C. §272(a)(2). Additionally, Section 274 of the 1996 Act imposes a structural separation requirement on the provision of certain electronic publishing services. Significantly, none of these express structural separation requirements applies to the provision of any intraLATA telecommunications service.

[12] See, *Powell Says He's No Fan Of Company-Specific Merger Conditions*, Communications Daily (April 6, 2001) ("Powell also indicated opposition to structural separation for Bell companies because Congress specifically opted not to take that route. He said he was adherent of separation as means of promoting local competition when Congress was writing Telecom Act. However, Congress chose interconnection regime instead and that's what should be followed now, he said. ...) (emphasis in original)

To the contrary, Congress clearly envisioned an incumbent providing both wholesale and retail intraLATA services through the same corporate entity. In Section 251(c)(2)(D), for example, Congress required incumbents "to provide, for the facilities and equipment of any requesting telecommunications carriers, interconnection with the [incumbent's] network" on rates, terms, and conditions that comply with the requirements of Section 252. In Section 251(c)(4)(A), Congress required these same incumbents "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. 251(c)(4)(A) (emphasis added). Congress, therefore, clearly envisioned the same corporate entity would be providing both retail services to end users at retail prices as well as wholesale services to other telecommunications carriers at either resale rates or UNE rates. AT&T's requested remedy is inconsistent with this clear Congressional intent.

To further demonstrate the extent to which the relief requested by AT&T is inconsistent with the Act, consider just a few of the results of granting such relief. Because the "wholesale" entity would provide no services to end users, there would be no "retail" rate for the services provided by the "wholesale" entity. Presumably, the wholesale entity would simply provide services to both the "retail" entity as well as to other telecommunications service providers at the TELRIC-based rates established pursuant to Section 252 of the Act. After purchasing these services from the "wholesale" entity, the "retail" entity presumably would resell those services to end users at rates that would cover its marketing, billing, collection, and similar costs.

The question then becomes, which entity has the resale obligation? If it is the "wholesale" entity, does that mean the wholesale entity must resell services for something less that the TELRIC-based rates for which it is already offering the service? Nothing in the Act

suggests that anything lower than a TELRIC-based rate is permissible, and in fact, anything less than such a rate would be confiscatory. If it is the "retail" entity that has the resale obligation, will that entity resell its services after stripping its marketing, billing, collection, and other avoided costs as provided in Section 252(d)(3)? If so, how is that different than the TELRIC price the wholesale company is already charging for the elements that make up the services? Further, that would impose a resale obligation on the BellSouth "retail" company that would not be required of the ALEC companies against whom the BellSouth "retail" company is to compete. Such discriminatory treatment runs contrary to both state and federal law.

Likewise, AT&T's requested relief is inconsistent with the general premises surrounding the unbundling requirements of §251(c)(3) of the 1996 Act. When enacting §§251 and 252 of the 1996 Act, Congress recognized that the ILECs were providing retail telecommunications services over existing networks. Recognizing that providing new entrants with access to the elements of these existing networks would accelerate the development of local exchange competition, Congress imposed various obligations on the ILECs, including a duty to make available at wholesale prices elements of the ILECs' networks. Congress, however, did not require the ILECs to separate their network from their retail offerings.

The powers granted to the FCC and the state commissions through the 1996 Act were not so unlimited as to permit the extraordinarily extreme level of intrusion on the management decisions of the ILECs as AT&T is proposing here. Under the Act, the FCC and a state commission can compel an ILEC to unbundle a particular network element from its tariffed retail services if, *inter alia*, the FCC finds: (1) that access to such network elements is necessary: and (2) that he failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. In other

words, Congress contemplated a program under which an ILEC would be allowed to continue to offer an integrated network of retail services but would have to unbundle access to elements of that network to give the ILECs' competitors an opportunity to compete.

As the Supreme Court found in *AT&T Corp.* v. I*owa Utilities Board*, 119 S.Ct. 721, 525 U.S. 366, 142 L.Ed.2d 835, however, there are limitations on the ILECs obligations to unbundle network elements. The Court noted that, "the FCC did not adequately consider the "necessary and impair" standards when it gave blanket access to these network elements and others in Rule 319." *Id.*, 142 L.Ed.2d at, 854. In other words the FCC required too much unbundling of the network and was ordered to take another look at the question of what elements must be unbundled. If the "necessary and impair" standard is not met, the FCC and this Commission cannot order an ILEC to unbundle network elements.

Now AT&T comes before this Commission and asks for a far more draconian intrusion on BellSouth's rights. In addition to asking this Commission to order BellSouth to unbundle *elements* of the network BellSouth uses to provide retail services, AT&T asks the Commission to order BellSouth to unbundle *its entire network* from its retail offerings. AT&T's requested relief not only exceeds what the Supreme Court found acceptable in *AT&T Corp.*, the requested relief is inconsistent with the rights of the ILECs--preserved in the Telecommunications Act--to choose how to operate their businesses.

Clearly, the remedy AT&T seeks in its Petition creates a Pandora's box of legal and policy issues that would take years to sort out. More importantly, the remedy AT&T seeks is inconsistent with the Act. The Commission, therefore, should dismiss AT&T's Petition because it seeks a remedy that this Commission is prohibited from granting.

III. IN THE ALTERNATIVE, THE COMMISSION SHOULD STRIKE AT&T'S PETITION AND REQUIRE AT&T TO RE-FILE ITS PETITION IN THE APPROPRIATE FORM.

AT&T's Petition is not a true Petition or Complaint. It is really a memorandum of law or a post-hearing brief, devoid of any facts in support of its claims, which is unacceptable as an initial pleading. Rule 1.110(f) of the Florida Rules of Civil Procedure mandates that "all averments of claim or defense shall be made in consecutively numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances." Rule 1.110(f). The complaint must set out the elements and the facts that support them so that the court and the defendant can clearly determine what is being alleged. *Barrett v. City of Margate,* 743 So. 2d 1160, 1162-63 (Fl. Dist. Ct. App. 1999). Further, the assertions in a complaint or petition are to be stated simply and succinctly. Id.

Additionally, a pleading is insufficient if it pleads opinions, theories, legal conclusions or arguments. *Barrett,* 743 So. 2d at 1163. A complaint must set forth factual assertions that can be supported by evidence which gives rise to legal liability. *Id.* The vast majority of AT&T's allegations in the Petition are not facts but are AT&T's opinions, theories, legal conclusions, or arguments. After a detailed review of the twenty-nine page Petition, one is hard pressed to find any facts in the Petition. Indeed, the Petition fails to include such fundamental facts as the state of incorporation of either BellSouth or AT&T. Stripped of the improper allegations, opinions, and legal conclusions, AT&T's Petition does not satisfy basic pleading requirements, including the requirement that a pleading set forth the facts to support a cause of action, assuming one exists.

If the Commission denies BellSouth's motion to dismiss, therefore, it should strike AT&T's Petition and order AT&T to re-file a Petition that conforms to the rules set forth above.

CONCLUSION

For the foregoing reasons, this Commission should dismiss AT&T's Petition requesting the break up of BellSouth into separate wholesale and retail corporate subsidiaries. Alternatively, the Commission should strike AT&T's pleading because it contains redundant, irrelevant, and impertinent allegations.

Respectfully submitted this 10th day of April 2001.

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