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: May 2, 2001

PETITIONERS' MEMORANDUM IN OPPOSITION TO BELLSOUTH TELECOMMUNICATIONS, INC'S MOTION TO DISMISS

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DOCUMENT NUMBER DATE
05558 MAY-2 01
FPSC-RECORDS/REPORTING

TABLE OF CONTENTS

Page

INTRODUCTION 1

I. THIS COMMISSION HAS JURISDICTION TO CONSIDER AT&T'S PETITION AND TO ORDER THE REQUESTED RELIEF 6

A. Chapter 364 Authorizes this Commission to Hold Proceedings On the Structural Separation of BellSouth 6

1. Chapter 364 Authorizes This Commission to Hold Proceedings On Structural Separation in Furtherance and Protection of the Public Welfare Goal of Local Telephone Competition 6

2. The "Public Welfare" Jurisdiction of This Commission Has Been Construed Expansively 7

3. Other Provisions of Chapter 364 Authorize This Commission to Hold Proceedings Concerning Structural Separation 9

4. Section 120.80 of the Florida Statutes Provides This Commission With Express Authority to Implement the Act 11

5. The Courts of the State of Pennsylvania Recently Upheld the Pennsylvania Utility Commission's Jurisdiction to Consider Structural Separation 12

B. BellSouth's Arguments Challenging the Commission's Jurisdiction Under Chapter 364 Are Without Merit 13

II. CONDUCTING PROCEEDINGS ON A STRUCTURAL SEPARATION OF BELLSOUTH IS CONSISTENT WITH THE ACT AND THE COMMERCE CLAUSE 16

A. There is No Basis For a Finding of Federal Preemption 16

1. The Act Expressly Preserves This Commission's Authority Over Local Telephone Competition and Does Not Occupy the Entire Field of Regulation 17

2. The Proposed Remedy Is Consistent With the Act and Its Stated Goal Of Achieving Competition in Local Telephone Markets 20

B. Proceedings On Structural Separation Will Not Violate the Commerce Clause of the United States Constitution 24

III. THE PETITION SETS FORTH THE FACTS AND CLAIMS IN COMPLIANCE WITH PSC REGULATIONS, AND BELLSOUTH'S MOTION TO STRIKE SHOULD THEREFORE BE DENIED 29

CONCLUSION 31

Petitioners AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. ("AT&T"), by and through undersigned counsel, hereby respond to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion to Dismiss and respectfully state as follows:

INTRODUCTION

Having effectively resisted all prior efforts by Alternative Local Exchange Carriers ("ALECs") to convince, induce and/or require BellSouth to comply with the dictates of Chapter 364 of the Florida Statutes ("Chapter 364") and the Federal Telecommunications Act of 1996 (the "Act"), BellSouth now takes the extraordinary position that the Public Service Commission (the "Commission") is powerless to even consider the one remedy which may finally bring an end to BellSouth's chronic disregard of its legal obligations. Five years after passage of the Act, with BellSouth's monopoly over the local service markets in Florida still firmly in place, it is now clear that only a structural separation of BellSouth's wholesale and retail local exchange operations will ensure the emergence of true competition. It is equally clear that this Commission has the authority to consider implementation of such a remedy.

The transition to a competitive local exchange market was supposed to take place through BellSouth's compliance (voluntary or otherwise) with the non-discriminatory access requirements of both the Act (Section 251) and Chapter 364 (Section 364.161). Unfortunately, BellSouth has steadfastly refused to comply with its legal obligations. The Petition which initiated this proceeding is replete with examples of BellSouth's anticompetitive behavior, including its (1) failure to provide

OSS at parity with the services it provides to itself; (2) failure to provide unbundled network elements ("UNEs") in parity with the services it provides to itself ; and (3) failure to facilitate line splitting and other non-discriminatory ALEC access of xDSL. *See* Petition at pp. 12-13.

As a result of BellSouth's conduct, "competition in Florida's local market is virtually absent." Petition at pp. 15-16. Recognizing BellSouth's failure to facilitate ALEC competition, the Federal Communications Commission (the "FCC") has rejected all three of BellSouth's attempts under Section 271 of the Act to enter into the long-distance business. Clearly, something is still fundamentally wrong, and additional corrective action by this Commission is necessary to effectuate its legislative mandate to establish competition in the local exchange markets.

With competition in the local service market still virtually nonexistent, and with BellSouth reaping the attendant financial benefits, BellSouth is understandably reluctant to participate in a proceeding which will bring further scrutiny to the methods through which it has managed to protect its monopoly during the last five years. Accordingly, on April 10, 2001, BellSouth filed a Motion to Dismiss and/or Strike AT&T's Petition for Structural Separation (the "Motion to Dismiss"), a submission which amounts to a long and indiscriminate list of reasons why this Commission lacks the jurisdiction or authority ***to even consider*** the matters raised in the Petition.

BellSouth's arguments -- all of which attempt to support the untenable position that this Commission is powerless to act on a local competition issue that goes to the very core of its statutory mandate -- are easily disposed of. The broad grant of authority to the Commission set forth in Chapter 364 plainly permits consideration of the kind of structural remedies sought in the Petition

and the Commission's exercise of its jurisdiction in this regard has been recently affirmed by the Florida Supreme Court in *Teleco Communications Co. v. Clark*, 695 So. 2d 304 (1997).[1] BellSouth's argument that the 1995 amendments to Chapter 364 cannot have contemplated consideration by this Commission of structural remedies designed to effect the local competition goals of the Act (because the Act was not passed until 1996) is similarly without merit. The clear purpose of Section 364.01, which expressly anticipated passage of the Act, was to announce the intent of the Legislature that this Commission employ its broad "public welfare" jurisdiction to achieve the "transition from the monopoly provision of local exchange service to the competitive provision thereof . . . ."[2]

If this were not enough, Section 364 contains a host of additional provisions granting the Commission authority to conduct proceedings and regulate specific anticompetitive practices by incumbent Local Exchange Carriers ("LEC") like BellSouth.[3] Moreover, Section 120.80(13)(d) grants this Commission broad discretion to "employ procedures consistent with the Act," including the Act's mandate to open the local market to competition. The breadth of this discretion was expressly recognized by this Commission when, in a recent proceeding involving local competition,

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[1] *See infra* at 6-8.

[2] *See infra* at 6-8.

[3] *See infra* at 9-10.

it denied a BellSouth motion to dismiss premised on the argument that the Commission had "no legal authority to implement procedures other than those provided by the Act."[4]

BellSouth makes the bold and totally unsupported assertion that the "restructuring" of BellSouth proposed in the Petition is a remedy that has been rejected "by every state commission that has considered it." Motion to Dismiss at 1. But the ***only*** "restructuring" proceeding discussed in BellSouth's motion resulted in an Order which recognized the jurisdiction of the Pennsylvania Utility Commission ("PUC") to consider structural separation, affirmed by the reviewing Court, which in fact ***required*** the "restructuring" of the wholesale and retail operations of Bell Atlantic, the local exchange carrier in Pennsylvania. *See* PUC Opinion and Order, Docket Nos. P-0991648 and P-0991649 (September 30, 1999), *aff'd*, *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 736 A. 2d 440 (Pa. Commw. Ct. 2000). Inexplicably, BellSouth has also chosen to devote a substantial portion of its submission to arguments relating to jurisdiction and federal preemption which were thoroughly analyzed and squarely rejected by the decision of the Pennsylvania Court in *Bell Atlantic*. While this Commission is certainly free to reach a different conclusion with respect to its authority to consider structural separation than that of the reviewing Court in Pennsylvania, BellSouth could have been more clear in informing this Commission that it was presenting arguments that had been rejected in another structural separation proceeding. This is especially true with respect to those of the arguments rejected in Pennsylvania which BellSouth

[4] *In Re Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth Telecommunications, Inc.'s Service Territory*, Order No. PSC-99-0769-FOF-TP, Docket No. 981834-TP, April 21, 1999.

chose to repeat without even attempting to offer any distinguishing circumstance which would warrant this Commission reaching a different conclusion than the Pennsylvania Court.

This Commission has the exclusive jurisdiction to enforce Chapter 364 in furtherance and protection of the public welfare, and this Commission has been expressly empowered by the Act to facilitate the creation of competitive local exchange service. It is unquestionably within this Commission's statutory mandate to "provide for the development of fair and effective competition" to consider the imposition of more effective measures when BellSouth has managed -- despite a five-year effort by competitors and regulators to bring about the goal of competitive local exchange service -- to maintain its dominating monopoly position in the market for local telephone service in Florida. *See* Fla. Stat., §364.01(3) (2000).

For these reasons, this Commission should deny BellSouth's Motion to Dismiss and should schedule further proceedings in which all interested parties and the Commission will have an opportunity to develop a full record on the state of competition in the market for local telephone service in Florida and to address, on the merits, the question of whether the structural separation of BellSouth is a necessary step in the Commission's ongoing efforts to provide Florida consumers with the benefits of fair and effective local competition.

I. THIS COMMISSION HAS JURISDICTION TO CONSIDER AT&T'S PETITION AND TO ORDER THE REQUESTED RELIEF.

This Commission, like any administrative agency, "derives its powers, duties and authority solely from the Legislature." *Teleco Communications Co. v. Clark*, 695 So. 2d 304, 308 (1997). The power of the Commission, however, is not confined to the duties specifically set forth in the statutes; it has also implied authority. *Id.* at 308, 309. The Supreme Court of Florida has specifically determined that the Commission has "broad regulatory powers with regard to the telecommunications industry." *GTC, Inc. v. Garcia*, 778 So. 2d 923, 929 (Fla. 2001). Similarly, in *Florida Interexchange Carriers Ass'n v. Beard*, 624 So. 2d 248 (Fla. 1993), the Florida Supreme Court held that this Commission possesses, "broad authority to regulate telephone companies" derived from its "exclusive jurisdiction over telecommunications services." *Id.* at 251.

A. Chapter 364 Authorizes This Commission to Hold Proceedings On the Structural Separation of BellSouth.

1. Chapter 364 Authorizes This Commission to Hold Proceedings On Structural Separation in Furtherance and Protection of the Public Welfare Goal of Local Telephone Competition.

Chapter 364 vests broad, exclusive jurisdiction in this Commission to enhance competition and provide remedies for anticompetitive conduct. More specifically, this Commission has been instructed and empowered by the Legislature to facilitate the entry of ALECs into -- and through that means to create ***actual competition*** in -- the Florida local exchange market. Section 364.01 expresses this mandate in no uncertain terms:

> The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure. The 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 . . .

Fla. Stat., §364.01(3) (2000). In amending Chapter 364 in 1995 in anticipation of the Act (Fla. Sess. Law 95-403), the Legislature announced an unequivocal public interest in opening local telephone markets to competition. Further amendments to Chapter 364 were unnecessary, as Chapter 364 already contained a grant to this Commission of broad jurisdiction to "protect the public health, safety and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices." Fla. Stat., §364.01(4)(a).[5]

2. The "Public Welfare" Jurisdiction of This Commission Has Been Construed Expansively.

The "public welfare" jurisdiction of this Commission under Section 364.01 has been construed expansively by the Florida Supreme Court. In *Teleco Communications Co. v. Clark*, 695 So. 2d 304 (Fla. 1997), a case which BellSouth failed to bring to the attention of the Commission,

[5] In addition, Section 364.01(4)(b) provides that the Commission shall exercise its exclusive jurisdiction in order to "encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services." Fla. Stat., §364.01(4)(b).

the Florida Supreme Court affirmed a ruling of this Commission that ordered an ALEC that illegally owned telecommunications facilities without Commission authorization to divest those assets. In so ruling, the Florida Supreme Court in *Teleco* "conclud[ed] that the PSC had the implied authority under Section 364.01(3)(a) to order the transfer of title."[6] Here, the Petition seeks structural separation as a remedy for the anticompetitive effects of BellSouth's continuing monopoly in the market for local telephone services, a remedy far less drastic than a forced divestiture of assets, which the Florida Supreme Court has determined the Commission may order. This Commission's broad powers under Chapter 364 to fashion appropriate relief in the interest of the public welfare, as construed by the Florida Supreme Court, provide ample authority for the initiation of proceedings to consider the structural separation of BellSouth.

BellSouth argues in its Motion to Dismiss (at pp. 7-9) that Chapter 364 cannot be used as authority for a remedy for a violation of the Act, because Chapter 364 was enacted prior to the passage of the Act in 1996. However, the Legislature did ***expressly*** consider the encouragement of local telephone competition by its amendment to Chapter 364 in 1995, in anticipation of the passage of the Act, and in furtherance of its explicitly stated intent to foster Local Exchange Carrier ("LEC") competition in Section 364.01(3). Thus, the 1995 amendments to Chapter 364 make clear that no

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[6] The parties agree that this Commission has power as granted to it by statute, and that it may exercise authority "derived from fair implication." Motion to Dismiss at p. 5. Additionally, of course, this Commission is responsible for interpreting the statutes that it is charged with enforcing, and its interpretations are afforded great deference. Absent a showing that this Commission's construction of the subject statute is *clearly erroneous*, the interpretation will be approved by the Florida Courts. *See e.g., Florida Interexchange Carriers Assoc. v. Clark*, 678 So. 2d 1267, 1270 (Fla. 1996).

post-1996 amendments to Chapter 364 were necessary to expand the already broad jurisdictional reach of this Commission. BellSouth cannot seriously claim that the Legislature did not intend Chapter 364 to further the mandate of local competition.[7]

3. Other Provisions of Chapter 364 Authorize This Commission to Hold Proceedings Concerning Structural Separation.

Beyond the broad powers conferred on this Commission by Section 364.01, Chapter 364 makes repeated reference to the Commission's power and duty to root out and eliminate specific forms of anticompetitive conduct. For instance, Section 364.051 provides that a LEC "shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers." Fla. Stat., §364.051(5)(a)(2). In addition, such companies may not engage in below cost or predatory pricing. *See* Fla. Stat., §364.051(5)(c). Section 364.058 grants this Commission the authority "to conduct a limited or expedited proceeding to consider and act upon any matter" within its jurisdiction under the statute. Fla. Stat., §364.058(1).

Section 364.01(4)(g) provides an additional jurisdictional basis for the initiation of proceedings on this Petition, through its mandate to this Commission to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint." Given that BellSouth has perpetuated its LEC monopoly by failing to provide access to its infrastructure on a non-discriminatory basis, as it is

[7] Further, the Act itself contemplates that state public service commissions will facilitate and enforce its local exchange competition policies and goal. *See* 47 U.S.C. §§ 251(d)(3), 252(b)(1), 253(b), and 271(d)(2)(B). Section 261 of the Act specifically authorizes states to utilize pre-Act regulations in implementing the policies of the Act. *See* 47 U.S.C. §261(b).

required to do under both Chapter 364 and the Act, this Commission may properly determine that conduct to be anticompetitive and fashion an appropriate remedy. *See Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *U.S. v. Terminal Railroad Assoc. of St. Louis*, 224 U.S. 383 (1912); *MCI Communications, Inc. v. American Telephone &Telegraph, Inc.*, 708 F.2d. 1081 (7th Cir.), *cert. den.*, 464 U.S. 891 (1983).

In the analogous federal context, where the general enabling authority conferred on the FCC by Congress to promote efficient and economical telephone service is no greater (or more specific) than the Florida Legislature's grant of authority to this Commission, it is noteworthy that the Courts have consistently upheld FCC's implied authority to order structural separation. *See, e.g., GTE Service Corp. v. Federal Communications Comm'n*, 474 F.2d. 724, 729-732 (D.C. Cir. 1973) (holding that order of structural separation was within the FCC's general enabling authority to promote efficient and economical telephone service.); *see also* Policy Rules Concerning Rates for Common Carrier Services and Facilities Authorization Therefore, FCC Docket No. 79-252, Fifth Report and Order, 98 FCC2d 1191 (1984) (noting other instances where the FCC has implemented structural separation without a challenge from affected entities). Of course, the implied authority to order structural separation is not exclusive to the FCC. This Commission may rely on its broad regulatory mandate under Chapter 364 to utilize this widely-accepted regulatory tool of structural separation in furtherance of the goal of local telephone competition.

4. Section 120.80 of the Florida Statutes Provides This Commission With Express Authority to Implement the Act.

In addition to the broad powers granted to this Commission by Chapter 364, the Legislature has specifically recognized the need for this Commission to have flexibility in employing procedures to implement the policies and goals of the Act. Fla. Stat. § 120.80(13)(d) states:

> 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.

This Commission has previously recognized that it "is given express authority under state law to implement the Act through appropriate procedures under Section 120.80(13)(d), Florida Statutes." *In Re Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth Telecommunications, Inc.'s Service Territory*, Order No. PSC-99-0769-FOP-TP, Docket No. 981834-TP, April 21, 1999 ("FCCA Proceeding").

In the FCCA Proceeding, the Florida Competitive Carriers Association and certain ALECs (including AT&T) requested pro-active and declaratory relief in order to promote LEC competition in BellSouth's service territories in Florida. BellSouth filed a motion to dismiss, arguing that this Commission had "no legal authority to implement procedures other than those provided by the Act." *Id.* at *2. This Commission rejected BellSouth's argument and denied its motion to dismiss, stating:

> Put simply, processes designed to further open the local market to competition are entirely consistent with the purposes and procedures of the Act. ***If the Commission finds that the requested relief (proceedings) is designed to achieve that goal and do not***

> ***undermine the procedures prescribed by the Act, then the relief is well within the legal authority of the Commission.***

Id. at *5 (emphasis supplied). BellSouth has failed to offer any explanation as to why this holding does not require denial of the Motion to Dismiss it has filed in this proceeding.

5. The Courts of the State of Pennsylvania Recently Upheld the Pennsylvania Utility Commission's Jurisdiction to Consider Structural Separation.

In proceedings involving the Pennsylvania Public Utility Commission ("PUC"), the reviewing Court addressed -- and squarely rejected -- virtually all of the arguments advanced in support of BellSouth's Motion to Dismiss.[8] *See Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Comm'n,* 763 A.d. 440 (Pa. Commw. Ct. 2000) (*"Bell Atlantic")*. BellSouth attempts to distinguish *Bell Atlantic* by arguing that the jurisdiction of the PUC is more expansive than that of this Commission. In fact, the statutorily mandated jurisdiction of this Commission is at least as broad as that of the PUC. Pennsylvania's public utility laws do not contain the "public welfare" and "anticompetitive behavior" mandates contained within Chapter 364. Thus, it is not surprising that the amendments to the Pennsylvania public utility laws enacted in 1996 to implement the Act

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[8] In its Motion, BellSouth argues that the PUC "declined to exercise its authority to order the structural separation". Motion to Dismiss at p. 4. In its recent April 11, 2001 Order, the PUC did not, as BellSouth suggests, decide that it lacked authority to jurisdiction to consider structural separation. Rather, the PUC required that Bell Atlantic-Pennsylvania, Inc. ("BAP") "agree" (which it did) to a complete "functional" separation of wholesale and retail operations based on the facts presented in that case. The PUC Order further stated that the PUC would order a structural separation if BAP did not agree to this functional separation. That Order was first adopted and publicly announced on March 22, 2001, and BellSouth undoubtedly knew of its provisions prior to the filing of its Motion.

included an express provision addressing the remedy of structural separation (66 Pa.S.C. § 3005(h)).[9] In light of the broad powers possessed by this Commission upon the enactment of the Act, no such amendment was necessary for Florida's implementation of the Act.

B. BellSouth's Arguments Challenging the Commission's Jurisdiction Under Chapter 364 are Without Merit.

BellSouth advances three arguments in support of its effort to challenge this Commission's jurisdiction pursuant to Chapter 364: (1) this Commission cannot award monetary damages to private litigants, and therefore, this Commission must not have the power to grant structural separation; (2) the Florida Legislature did not contemplate the existence of local competition (and therefore the possible necessity of a structural separation remedy) at the time Chapter 364 was enacted, and thus, the remedy must be unavailable; and (3) the remedy of structural separation would impermissibly infringe upon the privileges BellSouth enjoys pursuant to its corporate charter. Each of these arguments is fatally flawed and should be rejected.

BellSouth cites *Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc.*, 291 So. 2d 199 (Fla. 1974) for the proposition that, because this Commission is without authority to award monetary damages, this Commission must necessarily lack subject matter jurisdiction to order structural separation. *Mobile America Corp.* does not support such an overreaching proposition. In *Mobile America Corp.*, a mobile home financing company brought a tort claim

[9] The PUC does not have the power to award damages or decide private contract disputes. *See, e.g., Allport Water Authority v. Winburne Water Co.*, 393 A.d. 673 (Pa. Super. 1978). The Court in *Bell Atlantic* did not consider the absence of such authority as relevant in reaching its conclusion that the PUC was empowered to consider structural separation.

against Southern Bell for its failure to provide efficient telephone service. The trial court dismissed the action, ruling that the matter should be brought before the Commission. The Florida Supreme Court, however, disagreed, holding that "primary jurisdiction in a tort action does not rest with the PSC and that the PSC does not have authority to award damages for past failure to meet service standards." *See Mobile America Corp.*, 291 So. 2d at 234. Of course, the Commission's lack of jurisdiction over tort actions for money damages is not an issue in this case.

Similarly inapposite is *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So. 2d 577 (Fla. 1965), which BellSouth cites for the proposition 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." Motion to Dismiss at p. 7. In that case, the Florida Supreme Court addressed the issue of whether a radio company, whose operations fit within the literal description of "operating a telephone line" contained in Section 364.33, was properly regulated by this Commission. In determining whether the statute was to be given its plain meaning, the Court reasoned that radio communication services:

> ***cannot be regulated by the same rule, mode or prescription applicable to telephone and telegraph companies.*** . . . The problems to be resolved in granting or withholding permits or licenses are entirely different and require a considerable technical knowledge of the science of radio to resolve them. . . . Moreover, the limitations inherent in the use of radio channels as communications media . . . would seem to require a different policy . . . than that prescribed by our Legislature . . .

Radio Telephone Communications, Inc., 170 So. 2d at 581 (emphasis supplied). Therefore, the Court's holding was grounded upon a finding that Chapter 364 did not apply to the entire radio service communication industry, which was then considered a "new type of communications service[]." *Id.,* 170 So. 2d at 582. The Court did not ground its ruling, as BellSouth suggests, on the basis that the Legislature did not contemplate granting this Commission implied authority to regulate radio service. Moreover, unlike the situation presented in *Radio Telephone Communications, Inc.*, here the Legislature did ***expressly*** consider the encouragement of competition in the local telephone markets by its amendment to Chapter 364 in 1995, including its explicit intent to foster LEC competition in Section 364.01(3). Consequently, there is no question that the Legislature contemplated both the regulation of BellSouth by the Commission, and the need for the Commission to exercise its power to promote the entry of ALECs and competition in the local exchange markets.

Finally, BellSouth contends that this Commission is without power to order structural separation because such a remedy would impede certain rights allegedly enjoyed by BellSouth pursuant to its "charter," *citing State v. Western Union Telegraph Co.*, 118 So. 478 (Fla. 1928). In that case, the Florida Supreme Court held that requiring Western Union Telegraph to place a telegraph station in a specific location was not justified by the evidence. *See Western Union* 118 So. at 478. From this limited holding, BellSouth has attempted to manufacture the boundless proposition that this Commission may do nothing that adversely affects the alleged rights that a company enjoys under its corporate charter. Suffice it to say that, "[b]eing creatures of statute, corporations are amenable to ***all reasonable regulations imposed by statute, both as to their***

internal operation and as to the rights of those who own them, their stockholders." *Florida Telephone Corp. v. State*, 111 So. 2d 677, 679 (Fla. 1st DCA 1959) (emphasis supplied).

In sum, there is no merit to BellSouth's argument that this Commission is without jurisdiction to conduct proceedings on the question of whether the structural separation of BellSouth is necessary to achieve the Commission's mandated goal of creating competition in local telephone markets.

II. CONDUCTING PROCEEDINGS ON A STRUCTURAL SEPARATION OF BELLSOUTH IS CONSISTENT WITH THE ACT AND THE COMMERCE CLAUSE.

This Commission's traditional authority over local, intrastate telephone competition was preserved, and not preempted, by the Act. This Commission's consideration of the Petition is consistent with the Act, and does not violate the Commerce Clause, as the proposed remedy may be established in the course of these proceedings to be necessary to (and not inconsistent with) achievement of the Act's mandate, and the state and national interest in developing local exchange competition.

A. There is No Basis For a Finding of Federal Preemption.

Federal law can preempt state law in three ways: (1) when, in enacting federal law, Congress explicitly defines the extent to which it intends to preempt state law; (2) when, in the absence of express preemptive language, Congress indicates an intent to occupy an entire field of regulation and has left no room for States to supplement the federal law; and (3) when compliance with both state and federal law stands as an obstacle to the accomplishment of the full purposes and objectives of

Congress. *See Michigan Canners and Freezers Ass'n., Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469 (1984). Here, Commission proceedings on a structural separation of BellSouth do not implicate preemption in any of these ways because (1) the Act explicitly preserves this Commission's authority over local telephone market competition, (2) the Act does not "occupy the entire field of regulation," but instead expressly provides for the State commissions to continue to act in furtherance of the goal of opening local telephone markets to competition, and (3) there is no basis on this record to conclude that the remedy of a structural separation would stand as an obstacle to the Act's goal of achieving local competition.

1. The Act Expressly Preserves This Commission's Authority Over Local Telephone Competition and Does Not Occupy the Entire Field of Regulation.

The regulation of utilities is one of the most important functions traditionally associated with the police power of the States. *See, e.g., Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). In the Communications Act of 1934, Congress created a dual federal and state regulatory structure which granted the federal government jurisdiction over interstate communications, 47 U.S.C. § 152(a), while reserving to the states existing jurisdiction over intrastate communications. 47 U.S.C. § 152(b). In February, 1996, Congress utilized that structure to further the cause of opening all local telephone markets to competition. *See* 47 U.S.C. § 151, *et. seq.* (1996). Significantly, the Act does not preempt the states' traditional authority over local (intrastate) telephone regulation, and does not repeal the dual system of federal and state regulation over telephone markets codified in Section 152(b) of Title 47.

On the contrary, the Act includes express provisions designed to preserve the role of the States in ensuring that local markets are competitive. For instance, in Section 251 of the Act, Congress provided that:

> In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] ***shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers***; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. §251(d)(3)(emphasis supplied).[10]

Similarly, Section 253, which requires the removal of barriers to entry into interstate and intrastate telephone markets, also preserves the broad role of state commissions in acting to foster competition:

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

[10] Section 252(e), which sets forth procedures for negotiation, arbitration (by state commissions) and approval of interconnection agreements between incumbent carriers and their competitors, specifically reserves to state commissions the responsibility to approve interconnection agreements in furtherance of the goal of achieving local competition. This section also contains a limited preemption provision, providing for federal preemption in the area of interconnection agreements only "if a State commission fails to carry out its responsibility under [Section 252])." 47 U.S.C. §252(e)(5). This limited preemption provision is not implicated here.

47 U.S.C. § 253(b). Section 253(d) further states that this broad grant of authority to the States may be preempted by the FCC only if the FCC, after notice and an opportunity for public comment, determines that a State commission's action violates Section 253. *See* 47 U.S.C. 253(d). By creating a process through which the preemption issue is to be addressed by the FCC ***after*** a notice and comment period, and ***after*** the Commission has acted in a manner challenged as being inconsistent with the Act, it is clear that Congress did not intend, as BellSouth suggests, to preempt the ability of state commissions to act in the first place.

In addition, Section 261(c) provides that:

> 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 [FCC's] regulations to implement this part.

47 U.S.C. § 261(c).[11] Moreover, in Section 601(c) of the Act, Congress included a "No implied effect" clause, which states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." Act, Section 601(c)(1), codified at 47 U.S.C. §152 note.

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[11] The Florida Legislature also has recognized that the 1996 Act did not preempt the States' traditional authority over local telephone markets, and that this Commission plays an important role in implementing the Act. *See* Fla. Stat., §120.80(13)(d) (2000) ("in implementing the Telecommunications Act of 1996, Pub. L. No. 104-404, the Public Service Commission is authorized to employ procedures consistent with the Act."). In addition, the Florida Supreme Court has recognized that there is no federal preemption where a federal statute contemplates a role for the Public Service Commission over a particular matter. *See, e.g., Panda-Kathleen L.P. v. Clark*, 701 So. 2d 322 (Fla. 1997).

Tellingly, BellSouth does not point to any provision of the Act which expressly prohibits this Commission's consideration of a structural separation of a LEC's wholesale and retail operations. Absent such a prohibition, the Act itself makes clear that it is not intended to affect the ability of the States to "impos[e] requirements on [BellSouth] for intrastate services that are necessary to further competition. . . ." 47 U.S.C. 261(c).

In sum, this Commission retains its traditional authority over matters relating to local telephone markets and the Commission is in no way precluded by the Act from conducting proceedings on the matters asserted in the Petition.

2. The Proposed Remedy Is Consistent With the Act and Its Stated Goal Of Achieving Competition in Local Telephone Markets.

BellSouth does not dispute that Section 261(c) -- which expressly reserves to the states the authority to "impos[e] requirements . . . necessary to further competition" -- applies here. BellSouth's disagreement with Petitioners is limited to the question of whether structural separation is necessary to achieve the Act's goal of furthering local competition. However, arguments over whether the relief sought is consistent with the Act (or is necessary under the facts and circumstances of this case) have no place in a motion to dismiss challenging jurisdiction. Not surprisingly, given the early stage of the proceeding, there is simply no basis in the factual record to support a determination that the structural separation of BellSouth is inconsistent with the Act's goal of local competition.

Nevertheless, BellSouth has advanced several arguments in an effort to convince this Commission that it should rule -- even before BellSouth has admitted or denied the allegations of the Petition -- that structural separation is inconsistent with various provisions of the Act. These identical arguments were recently addressed by the Court in the *Bell Atlantic* case, which soundly rejected each and every argument and held that structural separation was consistent with the Act and its goal of achieving local telephone competition. *See, e.g., Bell Atlantic*, 763 A.2d. at 463-65. Each of these specious arguments are now addressed in turn.

BellSouth first argues that structural separation would be inconsistent with Section 253 of the Act because it would allegedly create an "impermissible barrier to entry" and would not be "competitively neutral," because structural separation would prohibit BellSouth's retail entity from providing wholesale services, and vice-versa. *See* Motion to Dismiss at p. 21-22. This very same argument was considered and rejected by the Court in *Bell Atlantic*, which held that where "the state agency mandate is that Bell provide retail services through a structurally separate *affiliate*, albeit operating independently, it cannot be said that Bell ***as a business organization*** is being precluded on the whole from providing retail services." *Id.*, 763 A.2d at 463 (emphasis supplied). BellSouth also argues that a structural separation would not be competitively neutral because the proposed structural separation only involves BellSouth, and not other LECs which may currently enjoy unfair advantages over ALECs. As the *Bell Atlantic* Court stated in rejecting this same argument:

> [E]xamination of the [competitively neutral] requirement shows that the wholesale-retail separation is just that -- competitively neutral in the practical sense that its intent is to insure neutrality in competition

> and thereby protect consumers' rights to choice of suppliers without encountering the higher costs which ensue from lack of competition.

Id., 763 A.2d at 463.

Next, BellSouth contends that the Act contemplates structural separation being required only as to equipment manufacturing and certain long-distance and information services, and electronic publishing services, 47 U.S.C. §§ 272(a)(2) and 274, and that by omission, the Act negates structural separation in any other context or circumstances. The *Bell Atlantic* Court rejected this argument, stating:

> However, the straightforward terms of those sections only describe those services for which the federal law mandates separate affiliates; in no way do those sections constrain a state regulatory body from requiring separated affiliates for other functions.

Bell Atlantic, 763 A.2d at 463. Indeed, this argument is explicitly rejected by the very terms of the Act, which contains a "No Implied" clause mandating that nothing in the 1996 Act shall be "construed to modify, impair, or supersede Federal, State or local laws" unless ***expressly*** provided in the Act. *See* Section 601(c), 47 U.S.C. 152(b), note (emphasis supplied).

Similarly, BellSouth cannot prevail on the argument that because Section 251 of the Act contemplates the unbundling of "certain network elements," Section 251 must by negative implication prohibit structural separation, which BellSouth compares to the unbundling of "an entire network." This argument is yet another variation of BellSouth's argument that any state action not explicitly described in the Act is inconsistent with the Act, an argument which is completely undermined by Section 601(c), which shows the intent of Congress to be exactly the opposite. *Id.*

Moreover, a structural separation requiring BellSouth to modify its corporate structure is not in any sense the equivalent of the unbundling of BellSouth's network elements. Accordingly, BellSouth's reliance on *AT&T v. Iowa Utilities Board,* 525 U.S. 366 (1999) is misplaced, as the remedy of structural separation simply has nothing to do with the unbundling requirements contained in Section 251 of Title 47.

BellSouth next argues that the Act's requirement that LECs must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail" constitutes a recognition that a single carrier might provide both wholesale and retail services and that the Act therefore prohibits by implication the structural separation of an LEC's wholesale and resale operations. However, as noted in *Bell Atlantic*, nothing in the federal law requires the States "to share a Congressional expectation (which may be overly optimistic) that an integrated wholesale/retail business will sell to competing suppliers at a reasonable wholesale discount, particularly in the telecommunications field where access is often limited by technological factors." *See id.,* 763 A.2d at 464. On the contrary, the Act expressly reserves to the States the authority to impose ***additional requirements*** designed to further local competition. *See* 47 U.S.C. § 261(c); 47 U.S.C. § 601(c).[12] That role has been expressly reserved for this Commission pursuant to Section 261(c) and the other provisions cited above and, in the face of Congress' clear intent to protect the

[12] The purpose of this proceeding is to explore whether, after a five year period during which BellSouth's monopoly over local telephone service has remained fully intact, "additional requirements" designed to further local competition are necessary.

role of the States in this area, there can be no serious argument that federal law preempts the entire field.

B. Proceedings on Structural Separation Will Not Violate the Commerce Clause of the United States Constitution.

The Commerce Clause grants to Congress the power "[t]o regulate Commerce ... among the several states." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause also contains a negative or dormant aspect, which "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon*, 511 U.S. 93, 98 (1994). This, however, limits the States' authority only in areas where Congress has not affirmatively acted to either authorize or forbid the challenged state regulation. *See Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 710 (3d Cir. 1995). Accordingly, BellSouth's Commerce Clause analysis has no application to this proceeding, where the proposed action involves regulation over local *intrastate* telephone competition, and where Congress has enacted a dual federal and state statutory scheme which expressly preserves the States' historic authority over such matters . *See* 47 U.S.C. § 251 , 47 U.S.C. § 252 , 47 U.S.C. § 253 , 47 U.S.C. § 261(c). Moreover, because Congress has determined that competition in local *intrastate* telephone markets is in the national interest, this Commission's actions in furtherance of achieving that goal promotes the national interest and could not possibly violate the Commerce Clause.

The United States Supreme Court has adopted a "two-tiered" approach to analyzing state regulation under the Commerce Clause. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). When a state requirement *directly* regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the state requirement is invalid under the Commerce Clause. *See Id.*, 476 U.S. at 579 (citations omitted). This analysis is not implicated by the Petition because a structural separation of BellSouth's wholesale and retail operations in Florida will not directly regulate interstate commerce, but rather regulates *intrastate* local telephone competition, consistent with the dual federal and state statutory scheme codified in 47 U.S.C. § 152.

Where a state requirement (like structural separation in this case) does not directly regulate interstate commerce, has only indirect or incidental effects on interstate commerce, and regulates evenhandedly, the state requirement is upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This principle is reflected in *Southern Pacific Co. v. State of Arizona,* 325 U.S. 761 (1945), the case upon which BellSouth principally relies, where the Court noted that "when the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation. . . such regulation has been held to be within state authority." *Id.* at 767.[13]

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[13] More recently, the Supreme Court has interpreted "undue burden" or discrimination against interstate commerce as the "differential treatment of in-state and out- of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc,* 511 U.S. at 99.

In *Southern Pacific*, the Supreme Court determined that Arizona's stated "safety" interest in limiting the length of interstate passenger and freight trains which passed through the state was outweighed by the strong competing national policy of promoting efficient railway service. *Southern Pacific,* 325 U.S. at 773.[14] Accordingly, the state's requirement that *Southern Pacific* reconstitute its trains in the interest of local public "safety" when passing through the State imposed an undue burden on interstate commerce and the national interest of achieving efficient rail service, particularly where the state did not adequately present facts showing a correlation between train length and safety. *See id.*

Unlike *Southern Pacific,* where the putative state interest unduly burdened and obstructed the achievement of a competing national interest, ***here the state and the national interest is one and the same: local telephone competition***. Further, unlike the situation in *Southern Pacific*, where no federal law authorized the state to impose regulations concerning the length of trains, here the Act expressly preserves the States' historic role in regulating local telephone competition. Accordingly, a structural separation order designed to further Florida's interest in achieving local telephone competition cannot possibly impose an "undue burden" or in any way obstruct interstate commerce, where the Congressionally declared national interest also seeks to promote the very same goal.

[14] As BellSouth itself pointed out in its motion to dismiss, the Court in *Southern Pacific* struck down the Arizona Train Limit Law because it "interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service." 325 U.S. at 773.

Moreover, BellSouth's Commerce Clause challenge fails because BellSouth cannot possibly establish at this early stage of the proceedings that a structural separation is "clearly excessive" in relation to the countervailing benefits of local telephone competition. *See, e.g., Pike*, 397 U.S. at 142. Specifically, BellSouth has failed to provide any basis for its contention that a structural separation order would so unduly burden the flow of interstate commerce or discriminate against out-of-state interests such that consumers should not enjoy the considerable benefits of increased local competition. Although BellSouth asserts that a structural separation would place a transactional and administrative burden on BellSouth (a matter best left for an evidentiary hearing), BellSouth has failed to show how any such burdens constitute burdens on *interstate commerce* or obstruct any national interest, or any interest other than BellSouth's interest in maintaining its monopoly position in local telephone markets.

The "spectre" of BellSouth potentially facing varying requirements in different states is a curious argument for any public utility subject to the jurisdiction of each state's public utility commission to make. In exchange for the privilege of being able to provide telephone service, BellSouth, and indeed all carriers, are subject to the varying regulatory requirements imposed by the States in accordance with each State's determination of what is required in the public interest. If the potential for varying state requirements was a credible "undue burden," then under BellSouth's logic *every* state-specific requirement imposed by every public utility commission would potentially violate the Commerce Clause, as requirements vary from state to state.

BellSouth's only remaining argument is that a structural separation would require the issuance of stock and that this relief violates the Commerce Clause to the extent applied "to a company doing business in multiple states." Motion to Dismiss at p. 21. However, even if the issuance of stock was required in this proceeding, such relief would not violate the Commerce Clause, as suggested by BellSouth. Indeed, the cases BellSouth offers in support do not apply to the circumstances of this case, and do not support the position that the Commission's action in this instance over a matter primarily involving intrastate local competition would violate the Commerce Clause.

For instance, in *United Air Lines, Inc. v. Illinois Commerce Commission,* 207 N.E.2d 433 (1965), the Illinois Supreme Court held that the requirement of prior approval by a state commission for every issuance of stock by an interstate carrier ***providing minimal intrastate service*** placed an undue burden on interstate commerce. *See id.* at 438. Similarly, in *United Air Lines, Inc. v. Nebraska State Railway Commission,* 112 N.W.2d 414 (1961), the Nebraska Supreme Court held that the issuance of stock by a corporation doing ***less than one percent of its business and holding less than one percent of its real property in Nebraska*** did not deal with the local aspects of the carrier's business and thus were beyond the commission's control. *See id.* at 417-18, 421. Surely, BellSouth will not suggest to this Commission that its presence in Florida is so minimal that the Commission action requested here, relating to local telephone competition, would violate the Commerce Clause.

Further, in *State v. Southern Bell Telephone & Telegraph Co.*, 217 S.E.2d 543 (N.C. 1975), the North Carolina Supreme Court determined that the requirement of prior approval for *every* issuance of securities by Southern Bell, whether or not such issuance involved a local North Carolina telephone matter, was held to violate the Commerce Clause. *See id.* at 551. Unlike the circumstances presented in that case, any structural separation order imposed in the instant proceeding (even if it did require the issuance of securities) would not involve the type of continuous supervision over the issuance of securities which was held in *State v. Southern Bell* to violate the Commerce Clause. Indeed, none of the cases offered by BellSouth even come close to suggesting that a state agency is prohibited in any and all circumstances from regulation within its jurisdiction which incidentally may require the issuance of stock, nor do any of these cases suggest that the structural separation requested in this case presents an undue burden on interstate commerce such that it obstructs any federal interest in violation of the Commerce Clause.

III. THE PETITION SETS FORTH THE FACTS AND CLAIMS IN COMPLIANCE WITH PSC REGULATIONS, AND BELLSOUTH'S MOTION TO STRIKE SHOULD THEREFORE BE DENIED.

Finally, in a procedural maneuver apparently designed to further postpone meaningful steps toward local telephone competition, BellSouth asks this Commission to strike the Petition and "order AT&T to re-file a Petition that conforms to the rules set forth above." However, the Florida Rules of Civil Procedure, including Rule 1.110(f) relied upon by BellSouth, simply do not apply to this proceeding. Instead, this Petition is governed by Florida Public Service Commission Rule 25-22.036(3)(b), which requires only that the petition contain the rule, order, or statute that has been

violated; the actions that constitute the violation; the name and address of the person against whom the complaint is lodged; and the specific relief requested, including any penalty sought.[15]

Here, AT&T has charged that BellSouth has violated Chapter 364 and the Act by failing to provide unbundled network services in a non-discriminatory manner. (Petition at p. 1). Specifically, BellSouth has violated the Act by engaging in the following practices:

- ALECs using BellSouth's OSS must wait much longer than BellSouth's retail arm to obtain access to BellSouth's network. (Petition at p. 11)
- BellSouth has not devoted sufficient technical and related resources necessary to develop OSS which provide parity to ALECs. (Petition at p. 12)
- BellSouth is unwilling to provide UNEs in the manner requested by ALECs and on the same terms and conditions as BellSouth provisions its own retail services. (Petition at p. 13)
- BellSouth has established retail prices that inure to the detriment of ALECs in Florida. (Petition at p. 14)
- Florida lags behind the national average, in that ALECs have only a 6.1 percent market share in the state. (Petition at p. 15)

As a remedy for these violations and the likelihood of continued future violations of Chapter 364, AT&T has requested a remedy of structural separation.

AT&T's petition complies with Commission Rule 25-22.036(3)(b), and BellSouth's request that AT&T be required to re-file the Petition in another format should be denied.

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[15] P.S.C. Rule 25-22.0375(1), which required that pleadings before the Commission conform to the Florida Rules of Civil Procedure, was repealed on May 3, 1999 and replaced that same day with amended Rule 25-22.036.

CONCLUSION

The actions of BellSouth must be halted in order to protect the welfare of the citizens of Florida. This Commission has the exclusive jurisdiction to protect the public in this regard, and is the best equipped to make the determinations as to whether structural separation is the necessary and appropriate remedy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the *Petitioners' Memorandum in Opposition to BellSouth Telecommunications, Inc's Motion to Dismiss* were sent via U.S. mail this 2nd day of May, 2001 to:

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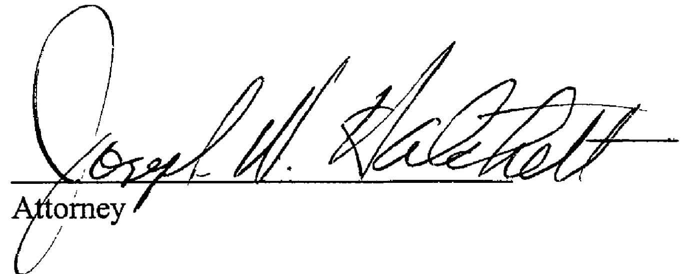

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