

**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: August 7, 2001

ALECS' MEMORANDUM CONCERNING APPLICATION OF SECTION 364.02(12)

Petitioners AT&T Communications of the Southern States, Inc., TCG South Florida, MediaOne Florida Telecommunications, Inc., WorldCom, Inc., the Competitive Telecommunications Association, Inc., and the Florida Competitive Carriers Association, (collectively the "ALECs"), by and through undersigned counsel, hereby file this Memorandum on Jurisdictional Status of a Separated Entity, and respectfully state as follows:

INTRODUCTION

In its oral presentation at the workshop held on July 30 and 31, 2001, BellSouth Telecommunications, Inc. ("BellSouth") raised for the first time the argument that structural separation could not have been intended by the Florida Legislature because a structural separation could lead to the Commission's loss of jurisdiction over the resulting wholesale entity. BellSouth suggested that the wholesale company structure it hypothesized would no longer constitute a "telecommunications company" under Section 364.02(12).

BellSouth is wrong for a number of reasons. First, the argument advanced by BellSouth does not even apply to the form of structural separation most focused upon at the workshop.

Under that structure, the BellSouth wholesale company would continue to serve existing retail customers (the new BellSouth ALEC would deal with new retail customers) and the BellSouth wholesale company would therefore continue to be a "telecommunications company" for so long as it continued to serve a single retail customer. Moreover, as this example makes clear, BellSouth's argument is premature. Its comments are directed solely to one particular remedy that might be imposed by the Commission, rather than the fundamental question whether this Commission has jurisdiction to continue this proceeding. The workshop made clear that there are a wide variety of structural remedies that the Commission may consider in this proceeding. Even accepting BellSouth's assertion that one possible permutation of one such remedy might ultimately lead to deregulation of BellSouth's wholesale services -- which the ALECs dispute -- BellSouth's argument provides no basis for finding that the Commission lacks jurisdiction to conduct proceedings on the petition.

Finally, even under the particular structural separation remedy that BellSouth claims would limit this Commission's Chapter 364 jurisdiction over the BellSouth wholesale entity, this Commission would still retain broad jurisdiction over the wholesale entity pursuant to Section 251 and 252 of the Telecommunications Act of 1996 (the "Federal Act.")

I. BellSouth's Argument is Premature and Has no Bearing on the Commission's Jurisdiction to Consider Structural Remedies.

The ALECs do not agree that the separated wholesale company would "fall between the cracks" and cease to be regulated by this Commission as a "telecommunications company." Yet that is what BellSouth is asking this Commission to decide at the preliminary stages of this case: that the

Commission lacks jurisdiction because **any** form of structural relief would *per se* result in an entity that is not a "telecommunications company," under Section 364.02(12).

Indeed, the only specific form of structural separation discussed in any detail at the workshop would involve a wholesale entity that continues to provide service to BellSouth's retail customers existing at the date of the Commission's final order. New retail customers, on the other hand, would purchase their local telecommunication services from either the newly formed BellSouth retail entity or any other ALEC. Under this structure, **both** the existing wholesale entity and the newly formed retail entity would continue to fit within the definition of a "telecommunications company" under Fla. Stat. § 364.02 (and therefore would continue to be subject to Commission jurisdiction under Fla. Stat. 364 *et seq.*) until such time as every legacy BellSouth retail customer has migrated to an ALEC. Therefore, there can be no finding that the Commission lacks jurisdiction to entertain a proceeding at this time. *See PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 284 (Fla. 1988) (recognizing petitioner's sale of electricity to a single customer rendered petitioner subject to the Commission's jurisdiction, even though the customer could later divest the Commission of jurisdiction over petitioner by exercising an option to purchase petitioner's electrical facility and electing to furnish its own power).

Moreover, even accepting BellSouth's flawed reading of Chapter 364, other forms of structural separation would **never** divest the wholesale entity of its status as a "telecommunications company." For example, the Commission might require that the wholesale entity continue to provide retail services to certain large end-users, such as businesses with more than 5,000 employees, colleges or universities, or to small customers in rural areas. Under this form of structural separation, the wholesale entity would continue to provide telecommunication services to

"the public for hire," and therefore, would continue to fit within the definition of a "telecommunications company." See *In re Petition for declaratory statement by LighTrade, Inc.*, Docket No. 001672-TP, Order No. PSC-01-0369-DS-TP, dated February 12, 2001 (finding that a company that provides telecommunication services to universities is a "telecommunications company" as defined by Fla. Stat. § 364.02(12)).¹

At this early stage, because no discovery has been taken and because no evidence has been received by the Commission, it is impossible to forecast the form of structural relief that the Commission might chose to implement, or how BellSouth may conduct its business operations following imposition of a structural remedy. Simply because BellSouth can hypothesize one form of structural separation that could conceivably result in the wholesale entity dropping from the definition of a telecommunications company under § 364.02 -- which the ALECs dispute -- does not mean that this Commission lacks jurisdiction to consider the ALECs' petition. If anything, it is probable that this Commission will adopt a structural remedy that preserves in the Commission continued jurisdiction over the wholesale entity, if it believes continued jurisdiction is in the public interest.

Finally, it would be unwise policy to make such a ruling now. A decision to not open proceedings for fear that one of an infinite number of possible remedies may lead to the deregulation of the wholesale company is directly at odds with the legislative directive to "encourage competition through flexible regulatory treatment." Fla. Stat. § 364.01(4)(b).

¹Indeed, it is impossible to categorize at this early stage what other services the wholesale entity might provide -- such as DSL service to retail customers -- that would render the wholesale entity a "telecommunications company" under §364.02(12).

II. Even If the Commission Adopted the Form of Structural Separation Hypothesized by BellSouth, the Commission Would Continue to Have Jurisdiction Under the Federal Act.

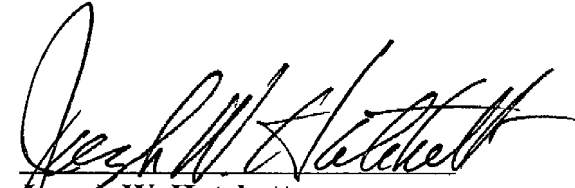
Even if the Commission imposed the form of structural separation theorized by BellSouth, the wholesale entity would continue to be subject to the Commission's jurisdiction. Under Section 251 and 252 of the Federal Act, a wholesale entity that provides no retail service whatsoever would still be an ILEC and still be subject to the Commission's jurisdiction.

The Commission's continued jurisdiction over a wholesale entity is guaranteed by virtue of the Federal Act. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721 (1999). As either a continuation of the existing BellSouth corporate entity or a successor entity to BellSouth, the wholesale entity would qualify as an ILEC under Section 251(h) of the 1996. *See, e.g.* 47 U.S.C. § 251 (h)(1)(A) (an incumbent is a "local exchange carrier that...on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area..."); 47 U.S.C. § 251(h)(B)(2)(ii) (an incumbent "is a person or entity that, on or after such date of enactment, became a successor or assign of a member . . ." that provided telephone exchange service prior to 1996). As an ILEC, a number of obligations would be imposed on the wholesale entity, including obligations regarding number portability, interconnection, and unbundled access to network elements. *See* 47 U.S.C. § 251 (b). Section 252, in turn, places significant responsibility on state commissions to oversee the Federal Act's requirements and to ensure that the Federal Act's directives are carried out. Therefore, irrespective of the status of the wholesale entity under state law, the Commission's continuing regulatory oversight of that entity is provided for under the Federal Act.

CONCLUSION

For the foregoing reasons, BellSouth's new argument should be rejected and this Commission should open a docket to investigate the anti-competitive conduct of BellSouth and the advisability of employing a structural remedy to foster local competition.

Respectfully submitted this 7th day of August, 2001.



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CERTIFICATE OF SERVICE

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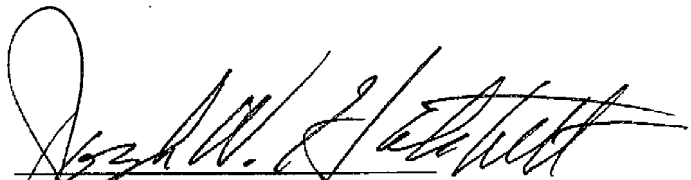
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