BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries.	DOCKET NO. 010345-TP ORDER NO. PSC-01-2178-FOF-TP ISSUED: November 6, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING BELLSOUTH'S MOTION TO DISMISS AT&T'S AND FCCA'S PETITIONS FOR STRUCTURAL SEPARATION

BY THE COMMISSION:

BACKGROUND

The Federal Telecommunications Act of 1996 (the Act), P.L. 104-104, 104th Congress 1996, provides for the development of competitive markets in the telecommunications industry. Part III of the Act establishes special provisions applicable to the Bell Operating Companies (BOCs). In particular, BOCs must apply to the FCC for authority to provide interLATA (long distance) service within their in-region service areas. A BOC shall receive such authority after a showing that the local market is sufficiently open. The FCC must consult with the Attorney General and the appropriate state commission before making a determination regarding a BOC's entry into the interLATA market. See Subsections 271(3)(2)(A) and (B). In complying with our obligations under the Act, we have opened several dockets and conducted numerous hearings

in an effort to address BellSouth Telecommunications, Inc.'s (BellSouth) application for long distance service and the status of the local telecommunications market.

On March 21, 2001, AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. (AT&T) filed a petition requesting that this Commission institute proceedings and enter an order requiring the structural separation of BellSouth "into two distinct wholesale and retail corporate subsidiaries." Subsequently, on April 10, 2001, BellSouth filed its Motion to Dismiss, or in the Alternative, Motion to Strike AT&T's Petition seeking the Structural Separation of BellSouth. (First Motion to Dismiss) On May 2, 2001, AT&T filed a response opposing BellSouth's Motion to Dismiss.

On April 10, 2001, Florida Competitive Carriers Association (FCCA) filed its Request for Commission Investigation Concerning the Use of Structural Incentives to Open Local Telecommunications markets in Support of AT&T's Petition to Initiate Proceeding. On April 17, 2001, BellSouth filed its Motion to Dismiss or in the Alternative Motion to Strike FCCA's Request. On May 2, 2001, FCCA filed its Response in Opposition to BellSouth's Motion to Dismiss FCCA's Request.

By Order No. PSC-01-1206-PCO-TP, issued May 30, 2001, we found that a Commission workshop would provide the best forum to determine subsequent courses of action, which would include ruling on the Motions filed in this docket. A Commission Workshop, attended by the full Commission (Workshop) was held on July 30 and 31, 2001, in Tallahassee.

The purpose of the workshop was to discuss AT&T's Petition, our legal authority, the problem to be remedied, the costs and benefits of the suggested remedies, legal impediments to remedies other than structural separation, and the effect structural separation would have on BellSouth's obligations under the Act and Chapter 364, Florida Statutes.

On June 20, 2001, AT&T filed its Motion to Clarify and Amend Petition for Structural Separation. On July 2, 2001, BellSouth filed its Opposition to Motion to Clarify and Amend AT&T's Petition for Structural Separation. By Order No. PSC-01-1615-PCO-TP, issued August 8, 2001, AT&T's Motion to Amend its Petition was granted.

On August 28, 2001, BellSouth filed its Motion to Dismiss (Second Motion to Dismiss), Motion for More Definite Statement, and Motion to Strike Clarified and Amended Petition.

On September 10, 2001, AT&T filed its Response to BellSouth's Second Motion to Dismiss.

We have jurisdiction over the Petitions pursuant to Section 364.01(4)(g), Florida Statutes.

FIRST MOTION TO DISMISS

The arguments raised by BellSouth in its Motion assert that "(1) the Commission lacks subject matter jurisdiction over the relief requested; (2) AT&T fails to state a cause of action upon which relief can be granted; and (3) the Commission is barred by the operation of the Telecommunications Act of 1996 (Act) and other federal law from granting the requested relief." These arguments addressed the sole issue of whether we could order full structural separation as requested by AT&T in its original petition.

By Order No. PSC-01-1615-PCO-TP, issued August 8, 2001, AT&T's Motion to Amend its Petition was granted. AT&T's amended petition clarified that it requests us to consider all relief necessary or appropriate under the circumstances.

Consequently, BellSouth's First Motion to Dismiss filed April 10, 2001, which was based solely upon our alleged inability to grant full structural separation, has been rendered moot. See Vanderberg v. Rios, 2001 Fla. App. LEXIS 15035.

SECOND MOTION TO DISMISS

BellSouth

According to the ILECs, structural separation is premised on the belief that local telecommunications remains essentially a natural monopoly. To the contrary, ILECs perceive local telecommunications as rapidly becoming a natural competitive market. In addition to the one-time and ongoing costs of structural separation, which will be passed on to end users in the form of higher rates, ILECs argue that such a plan would reduce BellSouth's incentive to invest. In addition, ILECs believe that

ALECs would also have less incentive to invest, since entrants could rely on the BellSouth wholesale entity and minimize the inherent risks associated with investing. Less investment would translate into less innovation.

BellSouth argues that to the extent the Clarified and Amended Petition seeks structural separation as relief, BellSouth moves that we dismiss AT&T's Amended Petition. In support of this Motion, BellSouth incorporates by reference all arguments set forth in its First Motion to Dismiss.[1]

BellSouth argues that no statute expressly nor impliedly grants us the authority to order structural separation. BellSouth states that when AT&T cites to an order of the Pennsylvania Commission in support of structural separation, AT&T fails to point out that the Pennsylvania Commission had the express authority to order structural separation. The same or similar authority does not exist in Florida. Consequently, we do not have the express authority to order structural separation.

Next, BellSouth states that any implied authority 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). Moreover, if there is any reasonable doubt as to whether we do or do not have the authority to order structural separation, BellSouth argues that it must be found that the we lack the power. State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977).

Counsel for BellSouth has argued that a finding that we have the implied power to structurally separate BellSouth would require a finding that the legislature intended to allow us to deregulate the newly formed wholesale entity.[2] BellSouth contends that such an intent is unpalatable.

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[1]These arguments were also incorporated in BellSouth's Motion to Dismiss FCCA's Request. Consequently, we find the conclusion reached herein is equally applicable to that Motion.

[2]BellSouth also argued that the Florida Legislature and Congress clearly envisioned a single "local exchange telecommunications company" providing both wholesale and retail services.

In support of its argument, BellSouth cites to Section 364.02(12), Florida Statutes, which defines "telecommunications company" as "every corporation, partnership, and person . . . offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility." This definition expressly excludes "an entity which provides a telecommunications facility exclusively to a certified telecommunications company." § 364.02(12)(a), Florida Statutes. If BellSouth were structurally separated into two distinct retail and wholesale entities, the company contends that the wholesale entity would then cease to provide telecommunications service to the public and would be providing telecommunications facilities exclusively to certificated telecommunications carriers.

ALECs

The Alternative Local Exchange Companies (ALECs) take the position that attempting to develop local competition by continued reliance on regulatory enforcement is very time consuming, resource intensive, and ineffective. Structural separation is seen as a way of aligning incentives such that BellSouth's wholesale entity would be dealing with all retail entities on an equal footing. According to the ALECs, this would eliminate the inherent conflict of interest with BellSouth being the dominant retail provider and also the dominant supplier upon which its competitors rely.

DECISION

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

While we have broad authority to regulate the telecommunications industry, we only have those powers expressly granted by statute or necessarily implied. See Florida Interexchange Carriers Ass'n v. Beard, 624 So. 2d 248, 251 (Fla. 1993); Deltona Corp. v. FPSC, 220 So. 2d 905, 907 (Fla. 1969). Section 364.01, Florida Statutes, states 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 . . . ." Moreover, Section 364.01(4)(g), Florida Statutes, requires us to exercise our exclusive jurisdiction to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint."

We find it unfathomable that the Legislature intended to grant us authority so broad that it would ultimately negate our express authority over the ILEC under Section 364.02(12), Florida Statutes. See State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977)(holding that if there is any reasonable doubt as to whether the Commission does or does not have the authority to do a certain act, it must be found that the Commission lacks the power). Consequently, we find that the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation.

However, our analysis does not end there. To address the remainder of the Petitions' lesser included remedies, we note that in fulfilling the Legislative mandate to promote competition our decisions must not be made in a vacuum. We must not only carefully examine the decision before us, but we must also cautiously examine how each of our other actions affect the parties involved, their employees and investors; the effect on other industry stakeholders; and most importantly, the consumers of their services.

Almost three years ago a Petition was filed by FCCA and AT&T, among others, who argued that the quickest way to competition was through the following:

(a) Establishment of a generic BellSouth Unbundled Network Element (UNE) pricing docket to address issues affecting local competition;

(b) Establishment of a Competitive Forum to address BellSouth operations issues;

(c) Establishment of third-party testing of BellSouth's Operational Support Systems (OSS);

(d) Initiation of a rulemaking proceeding to establish expedited dispute resolution procedures applicable to all local exchange carriers (LECs); and

(e) Provision of such other relief that the Commission deems just and proper.

To date, we have initiated an investigation into UNE pricing; established third party testing of BellSouth's OSS; established permanent performance measures and self-executing remedies; created an expedited dispute resolution process; and established a collaborative process to resolve systemic problems arising from interconnection agreements. Some of these were opened at the insistence of the Petitioners now before us.

In addition to the above named dockets, we have also initiated an investigation into alleged anticompetitive behavior by BellSouth.[3] That docket will examine the systemic deficiencies that the Petitioners have alleged herein. The goal of that docket is to discover what the problems are, if any, and to apply specific solutions to those problems.

In the instant docket, however, the Petitioners are requesting that we establish our authority to order a remedy, so that we may investigate whether the facts justify exercising that authority. This is a solution in search of problem. While we always encourage innovative ways to remedy current problems, we are wary of searching for problems for which to apply innovative solutions.

Moreover, while some of those dockets are pending, AT&T and FCCA have petitioned this Commission for additional relief. This most recent Petition requests relief so draconian that of the

[3]Similar dockets have been opened to investigate the alleged anticompetitive behavior of other ILECs.

states that have examined the issue, all have rejected it.[4] To find that structural separation is necessary to promote competition, as the Petitioners urge, implies at best, that we question our confidence that the other dockets will promote competition; and at worst, that our earlier efforts have been in vain. Similarly, this most recent Petition either is cumulative, or will interfere with, our earlier efforts, many of which are ongoing. In any event, pursuing this course of action will further deplete our limited resources to the detriment of other pending dockets, some of which, as mentioned earlier, were initiated at the request of the Petitioners before us.

This most recent Petition also suggests that the way to fix a problem is to apply numerous remedies in the hopes that one will work. We find that this is an inefficient way to encourage competition. Each additional regulation imposed on BellSouth creates costs and inefficiencies; may interfere with other regulations previously imposed; and brings uncertainty to an industry in which stability is necessary to foster competition. Not only is it premature to judge the efficacy of our earlier efforts, but it is also premature to determine that another solution is necessary.[5]

As stated above, our decisions are not made in a vacuum. In the instant docket, we have benefitted from a full two days of workshop testimony during which each stakeholder, including the Petitioners here, had full opportunity to discuss and relate to us the many ramifications of structural separation and other potential remedies, as well as the bearing of our other pending dockets on matters here alleged.

We cannot indulge hypertechnical interpretation of procedural protocol where the interests of Florida ratepayers are at stake. In this proceeding, like all others, we need to take a common sense approach, considering costs and benefits of suggestions which come before us. In the workshop, we were advised that a bifurcation of BellSouth would inevitably lead to greater costs - greater costs

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[4]Pennsylvania approved functional separation.

[5]At the Agenda Conference AT&T was afforded the opportunity to withdraw its Petition, with leave to pursue this matter once the other dockets had been resolved.

which would be ultimately borne by Florida's ratepayers. We learned of the necessity for certainty in this industry - certainty which would be upset by further investigation of such a draconian measure. We were advised that the fracture of BellSouth would discourage both innovation and investment - innovation and investment which would have otherwise inured to the benefit of the ALEC community, and to Florida's ratepayers. Indeed, investment and innovation are among the many reasons we are mandated to foster competition to begin with.

What's more, we cannot ignore the hundreds of agreements amicably reached by and between BellSouth and the ALEC community under BellSouth's current structure. Thankfully, relatively few disputes have arisen, fewer still have come to our attention because many of the disputes have been amicably settled. The agreements and their amicable refinement contradict any notion that structural separation is a prerequisite to the establishment of competition in this industry.

The competitive marketplace has been analogized to a machine. We find that analogy appropriate here. When someone desires to repair a machine, they begin their job by discovering the source of the problem. Then, they hypothesize what will remedy that problem and apply that remedy. Next, they wait to see if the machine performs better or worse than previously. This accomplishes two things. First, it minimizes the disruption to the machine and the costs involved in fixing the problem. Second, it helps outside observers, in this case other utility commissions, see what works and what does not work for a specific problem.

The Petitioners have suggested an alternative way to fix the alleged problem. The remedy requested herein, would scrap the existing machine, ignore previous efforts that are still ongoing, and hope that the resulting machine will yield the desired result. This uncertain outcome associated with structural separation will not only impose additional costs and inefficiencies, but discourage investment in and innovation by BellSouth.

With respect to an additional important issue: at the October 16, 2001, Agenda Conference, counsel for Verizon informed us of the impacts the events of September 11 had on its operations. Verizon's counsel stated that after the destruction of its facilities in Manhattan, Verizon was told to get Wall Street back

in business in less than a week; it did. Counsel for Verizon went on to state that "[t]his unprecedented achievement would not have been possible if Verizon's wholesale and retail operations were in two separate companies." This is a risk to our economy and consumers that we are not willing to take. It would be a violation of simple common sense for this Commission to erect a structural barrier to BellSouth's ability to react to national emergency in these troubled times.

In consideration of the foregoing, BellSouth's Motion to Dismiss filed August 28, 2001, and BellSouth's Motion to Dismiss FCCA's Request filed April 10, 2001, are hereby granted. The remainder of AT&T's and FCCA's Petitions are denied without prejudice to refile and explain what exactly they are requesting; what they believe the requested remedy will accomplish; and precisely why this cannot be accomplished in already pending dockets. As the request for structural separation has been addressed herein, parties are cautioned against including this again in any future pleading.

MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

In light of our ruling on BellSouth's Second Motion to Dismiss, we find that BellSouth's Motion for More Definite Statement and Motion to Strike Clarified and Amended Petition, filed August 28,2001, have been rendered moot.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth's Second Motion to Dismiss, filed August 28, 2001, is hereby granted. It is further

ORDERED that BellSouth's Motion to Dismiss or in the Alternative Motion to Strike Florida Competitive Carriers Association's Request for Commission Investigation Concerning the Use of Structural incentives to Open Local Telecommunications markets in Support of AT&T's Petition to Initiate Proceeding, filed April 17, 2001, is hereby granted. It is further

ORDERED that the Motion to Dismiss, or in the Alternative, Motion to Strike AT&T's Petition seeking the Structural Separation

of BellSouth, filed April 10, 2001, has been rendered moot. It is further

ORDERED that BellSouth's Motion for More Definite Statement, and Motion to Strike AT&T's Clarified and Amended Petition, filed August 28, 2001, have been rendered moot. It is further

ORDERED that the parties may refile their Petitions as set forth in this body of this Order. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of November, 2001.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

JKF

Concurring Opinion

Chairman Jacobs concurred in part with the Commission's decision with the following opinion.

I concur in the majority opinion while offering the following clarification of the logic which led me to grant BellSouth's Motion to Dismiss.

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

In this case I conclude that the Commission has subject matter jurisdiction. Section 364.01(4)(g), Florida Statutes, requires us to exercise our exclusive jurisdiction to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint."

However, I believe that AT&T has failed to state a cause of action upon which relief may be granted in this forum. In my view, the act of structurally separating BellSouth constitutes the imposition of an equitable remedy, the principle purpose of which is the removal of impediments to the establishment of a competitive telecommunications market. International Salt Co. v. United States, 332 U.S. 392, 401 (1947). While the implied authority of the Commission is broad enough to inquire into competitive conduct, it does not clearly authorize us to impose equitable relief. Traditionally, equitable relief of this sort has been reserved to agencies with specific statutory or antitrust authority.

Therefore, to the extent that the Petition requests the remedy of structural separation, it fails to state a cause of action for which this Commission is authorized to grant relief. To the extent that the Petition requests all other appropriate remedies, currently there is a proceeding before us wherein any findings of anticompetitive practices could afford the petitioners an opportunity to proffer appropriate remedies. Thus, petitioners suffer no real harm in dismissing these Petitions.

Dissenting Opinion

Commissioner Palecki dissented from the Commission's decision with the following opinion.

I dissent from the majority decision to grant BellSouth's August 28, 2001 Motion to Dismiss and to dismiss the petitions of AT&T and FCCA. In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition fails to state a cause of action for which relief can be granted. BellSouth has not met that burden.

While the majority found that it lacked jurisdiction to order structural separation, structural separation is but one remedy among many available to the Commission, and the proof, if any, will determine the need and nature of the remedy. Indeed, the petitioners asked the Commission to consider a wide range of remedies and for an opportunity to provide the proof which may justify one or more of those remedies. The majority chose not to give the petitioners that opportunity here. It has been suggested that the petitioners might find their point of entry in other dockets. I disagree. First, it appears that these other dockets do not provide petitioners a point of entry to pursue remedies well within our jurisdiction, including even a modest proposal to require BellSouth to redesign its systems. Second, it seems that the petitioners are entitled to present their case to the Commission by means of a vehicle of their own selection.

The Commission ought not eschew jurisdiction unless there is good reason to do so. I see no need to decide the jurisdictional question in haste, and I am concerned that the majority's decision may tie the Commission's hands in the future. The Legislature may never have contemplated structural separation. However, if evidence were provided to demonstrate the need for such a remedy, I am convinced that the Commission has the jurisdiction under its broad statutory authority[6].

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[6]The term structural separation does not have a single, universally accepted definition. Even within the industry, the term can have different meanings. Remedies far short of the complete break-up of a utility may still

Even if the Commission lacked jurisdiction to order full structural separation, the matter of the broad range of remedies sought by both petitioners remains. No party has suggested that the Commission lacks jurisdiction over these "lesser included" remedies. In fact, the FCCA petition did not request structural separation, but rather "structural incentives," which clearly are within the Commission's jurisdiction. Nevertheless, the majority sends the petitioners on their way, without first having afforded the petitioners a clear and effective point of entry into the administrative process.

It is apparent that the Commission has resolved a good number of disputed issues of material fact adversely to the petitioners without affording them an opportunity to present evidence to the Commission. Several of the arguments made at our agenda conference in favor of dismissal speak to the merits of the case. These include arguments that structural separation:

1) would lead to additional costs to Florida ratepayers;

2) would discourage innovation and investment;

3) would impair a utility's ability to react to national emergencies such as occurred on September 11th;

4) would interfere with our existing efforts to promote competition;

5) is unnecessary because BellSouth and the competitive local exchange carriers (CLECs) have amicably reached numerous agreements; and

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fall under the definition. As early as 1912, the Supreme Court in United States v. Terminal R.R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912), used structural separation as a tool to prevent incumbents, whose facilities could not practicably be duplicated by competitors, from using those facilities as a bottleneck to foreclose competition and injure consumers. There, the Court required that non-owner railroads be provided use of the Terminal Railroad Association's facilities upon such just and reasonable terms as would place every such company upon as nearly equal plane as that occupied by the proprietary companies. The Court further noted that failure to achieve this result would lead the Court to order "complete disjoinder" of the Terminal Railroad Association from any ownership by the proprietary railroads.

6) is a draconian measure.

These are not issues appropriately considered in deciding a motion to dismiss. During discussion of this matter at our agenda conference, I had a great deal of difficulty separating these issues, many of which were also discussed during an earlier 2-day informal workshop, from the matter at hand -- the motion to dismiss and the applicable standard. We allowed the parties to make numerous arguments addressing the merits of the case. Our decision seemed more like a vote after a hearing than a vote on a motion to dismiss. Unfortunately, neither the arguments made at the informal workshop or at our agenda conference constitute sworn testimony or provide a point of entry under the law. At this time, the Commission has heard no evidence in the form of sworn testimony to either support or counter arguments of the parties. We should not prejudge disputed issues of material fact without having first given all parties the opportunity to present such evidence.

Where we have jurisdiction (and with respect to the "lesser includeds," no one argues that we do not), Florida administrative law requires that we hear what the petitioners have to say. Thus, we have not only dismissed the prayer for structural separation on jurisdictional considerations, we have denied all other prayers for relief on the merits. We have jurisdiction over these matters, and we have afforded no point of entry.

A Modest Proposal

In the pursuit of robust local competition in the telecommunications industry, we have witnessed excessive litigation and regulation since the Telecommunications Act of 1996. Refereeing disputes between incumbent local exchange carriers (ILECs) and CLECs and micromanaging the conduct of the ILECs toward the CLECs in minute detail, have become primary occupations of this Commission.

Currently, BellSouth serves its own retail customers with one set of systems and processes and the CLEC customers with a separate, discreet set of systems and processes. In numerous Commission dockets, the CLECs have claimed that these systems do not work and do not allow them to fairly compete. The Commission has responded repeatedly with additional regulation designed to

improve BellSouth's service to the CLECs. Yet, we have been unable to diminish the level of complaints and litigation.

The instant docket would have provided a vehicle to explore options or modifications to our current command and control approach. One option that could have been explored in a full and fair hearing is whether BellSouth could serve both the retail side of its business and the CLECs through the same systems and processes. Evidence may show that under such a plan, it would be in BellSouth's self-interest to make sure the systems work properly so that its own customers are served properly, and CLECs (using the same systems) would, in turn, be served properly. Such an approach may give CLECs the perception that they are treated equally with the retail side of BellSouth, that they are all going through the same processes and lined up at the same ticket window. This may well mitigate the current level of costly litigation and regulation. BellSouth, the CLECs, consumers, and the taxpayers of this state stand to benefit from reduced litigation and increased competition. I believe this docket afforded us with an opportunity to consider testimony on these matters.

The following are some issues that the Commission might have been able to consider within this docket:

- Since implementation of the Telecommunications Act of 1996, what has been the expense to BellSouth, its shareholders, and the ratepayers of establishing separate and distinct systems and processes to provide service to CLECs?

- Are any benefits derived from BellSouth serving CLECs through systems and processes that are separate from the systems and processes it uses to serve the retail side of its own business?

- Could BellSouth serve both the retail side of its business and the CLECs through the same systems and processes, and at what cost?

- What costs have BellSouth, the ratepayers, and the taxpayers incurred as a result of regulation and litigation (before the commissions, the FCC, and

the courts) regarding BellSouth's conduct toward the CLECs?

- Could this Commission eliminate the current brittle system of trying to deter in advance every act of misconduct between BellSouth and the CLECs by asking BellSouth to evaluate its systems and processes and propose how they could be designed so that the retail side of its business would use the same systems and processes as the CLECs?

- Will ratepayers benefit through head-to-head competition, in which BellSouth retail and the CLECs are served through the same systems and processes?

No Point of Entry

No existing Commission docket gives AT&T and FCCA a point of entry to explore these issues. Upon inquiry during the agenda conference, BellSouth acknowledged that a non-docketed "collaborative process" was probably the best vehicle currently before the Commission to explore these issues. Unfortunately, this "collaborative process" does not provide a point of entry for petitioners to present their case.

Conclusion

The recommendation of our staff that the Commission hear the evidence and determine the appropriate remedy, based on the record in its entirety, is a reasonable one. Given this Commission's broad authority, including specific legislative directives to foster competition in the telecommunications industry, I cannot support the majority's dismissal of the petitions.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.