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Mrs. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

010345-TP

Dear Mrs. Bayo:

Enclosed for filing are an original and fifteen (15) copies of the 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.

Copies of the foregoing are being served on parties of record in accordance with the attached Certificate of Service.

Thank you for your assistance with this matter.

Sincerely,

Marsha Rule

Marsha Rule

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Enclosure

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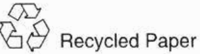
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via hand delivery to the following parties of record on this 21st of March , 2001.

Nancy B. White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Marsha Rule
ATTORNEY

**BEFORE THE**
**FLORIDA PUBLIC SERVICE COMMISSION**

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| 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<br>Filed: March 21, 2001 |

**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.**

Petitioners, AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. (collectively, "AT&T") hereby petition the Florida Public Service Commission ("FPSC" or "Commission"), pursuant to its authority under Chapter 364, Florida Statues, to institute appropriate proceedings and to enter an appropriate order requiring the structural separation of BellSouth Telecommunications, Inc. ("BellSouth") into two distinct wholesale and retail corporate subsidiaries.

## INTRODUCTION AND SUMMARY

On February 8, 1996, the Telecommunications of Act of 1996 (the "Act") was signed into law. The Act was intended to open all telecommunications markets to competition, including local telephone markets. That competition, in turn, was intended to bring benefits to consumers, including a wider selection of services and faster access to technology. Now, more than five years after the Act's passage, one conclusion is inescapable: the promise of local telephone competition has not been fulfilled in Florida.

For most of Florida, the cause of this delay can be laid at the doorstep of one company: BellSouth. BellSouth is the largest incumbent local exchange carrier ("ILEC") in Florida, and

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still controls well over 90% of the access lines in its service territory. Although numerous alternative local exchange companies ("ALECs") are certificated in Florida, ALECs have been singularly unable to make any meaningful inroads into BellSouth's monopoly markets. This is because BellSouth has refused, consistently and repeatedly, to comply with the Act's requirements to provide ALECs with nondiscriminatory access to BellSouth's facilities and services at commercially reasonable rates. As a result, Floridians, by and large, have not yet obtained the benefits of having the choices for local telephone services they were promised more than five years ago.

BellSouth's stone-walling and anti-competitive actions are driven by its conflicting incentives and an inherent conflict of interest. BellSouth has two contradictory roles: (1) operator of the local telephone network that virtually all ALECs rely upon (in some form or fashion) to provide their own local telephone service; and (2) the principal competitor of those same ALECs in the very same retail markets. The last five years have shown that whatever incentive BellSouth has to fulfill its legal obligations to open its network, it has a stronger incentive to preserve its local monopoly and prevent its retail competitors from succeeding in capturing local market share. Because it controls the facilities necessary for ALECs to provide services, BellSouth has both the ability and the willingness to discriminate in favor of its own retail services by charging competitors anticompetitive rates for access to those facilities and providing those facilities in a nondiscriminatory fashion. *In Re Applications of Ameritech Corp. and SBC Communications, Inc. for Consent to Transfer Control of Corporation Holdings Commission Licenses and Lines*, Memorandum Opinion and Order, CC Docket No. 98-141, FCC No. 99-279, (Rel. October 8, 1999) ("Ameritech-SBC Merger Order"); *see also* Burns, *et al.*, *Market Analyses of Public Utilities: The Now and Future Role of State Commissions*, 9

(National Regulatory Research Institute July, 1999) (describing how incumbent monopolists can use control of bottleneck facilities to give "preferential treatment [to] affiliates or discriminate against affiliates' competitors").

Any assumption that the prospect of obtaining long distance entry would somehow resolve the inherent conflicts underlying BellSouth's roles and compel it to comply with the requirements of the Act has been shattered by BellSouth's conduct over the course of the last five years. BellSouth has continued to challenge virtually every important rule promulgated by the Federal Communications Commission ("FCC") to implement the requirements of the Act. And when its scorched earth litigation tactics have failed, BellSouth has foreclosed competition by providing competitors with inadequate and discriminatory access to its network facilities. BellSouth already has sought long distance relief from the FCC no less than three times. and it has been rejected each time. None of those rejections, however, has had any appreciable impact in compelling BellSouth to fully comply with the Act. Instead, BellSouth has engaged in a relentless campaign to resist the Act's requirements at every turn. As a result, there is little local competition in the states in BellSouth's region, including Florida.

BellSouth's control of bottleneck facilities and the impact of that control on the development of local telephone competition has been a longstanding public policy concern of this Commission. However, it is now evident that current rules and regulations cannot overcome the inherent conflicts driving BellSouth's actions. Instead, action must be taken to eliminate BellSouth's conflict of interest by establishing a corporate structure that would separate BellSouth's retail and wholesale activities into two separate subsidiaries. Specifically, this Petition requests that the Commission order the establishment of a retail company with

independent management that would interact with the wholesale company on the same arm's length, non-discriminatory basis it would with any other competitor.

The time for the Commission to act is running short. This is a critical time for local telephone competition, as more and more ALECs are unable to compete with BellSouth and thus are withdrawing from the market. Yet at the same time, BellSouth continues to reap tremendous profits from its local telephone companies. As a result, if local telephone markets are not opened to competition soon, it may be too late for competition ever to develop. This will mean not only the continued monopolization of traditional local telephone services, but also the more serious prospect of the monopolization of the next generation of advanced telecommunications services (*i.e.*, high speed access to the Internet) because these services also are largely dependent upon access to BellSouth's network.

AT&T urges the Commission to order the structural separation of BellSouth into distinct wholesale and retail corporate subsidiaries. Through structural separation, the Commission would require that BellSouth's retail organization (which sells to end user customers) be reconstituted as a publicly owned corporate affiliate separate from its wholesale organization (which owns and operates network facilities). The wholesale organization would be required to make network facilities available to ALECs and Bellsouth's retail organization at the same prices and on equal terms and conditions, including access to the network and related operations. Such structural separation would provide "the minimum level of transparency to police the price and nonprice discrimination concerns." *In the Matter of Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services,* Report and Order at ¶ 61, WT Docket No. 96-162, FCC No. 97-352, (Rel. October 3, 1997) ("CMRS Structural Separation Order").

As the FCC has observed, and as the United States Court of Appeals for the Sixth Circuit has affirmed, there is nothing "novel" about the use of structural separation. *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000). Structural separation is a regulatory tool that has been routinely used by state regulatory commissions and the FCC to facilitate a smooth, fair transition from regulatory monopolization to full, vibrant competition. In fact, in 1999 the Pennsylvania Public Utility Commission ("Pennsylvania PUC") compelled the structural separation of Verizon-Pennsylvania, finding that this step was necessary to achieve competition in the state of Pennsylvania. Opinion and Order, *Joint Petition of Nextlink Pennsylvania, Inc.*, Dkt. No. P-00991648 (Sep. 30, 1999) ("*Pennsylvania Structural Separation Order*"), *aff'd*, *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Commission*, 763 A.2d 440, 464, 466-69 (Pa. Commw. Ct. 2001).

For the same reasons that led the Pennsylvania Commission to structurally separate Verizon, this Commission should initiate a proceeding to order the structural separation of BellSouth.

**BACKGROUND**

With adoption of the Act, Congress endorsed a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly" the opening of "all telecommunications markets to competition." House Rep. No. 104-458. However, Congress recognized that it would be impossible for ALECs to duplicate the ubiquitous local networks of ILECs like BellSouth (at least in the near term). Thus, in section 251 of the Act, Congress mandated that ILECs lease the piece-parts of their networks (called "unbundled network elements" or "UNEs") to ALECs at efficient, cost-based rates and on non-discriminatory terms and conditions. In this way, ALECs

would be able to use BellSouth's facilities to provide retail services to provide not only traditional voice services, but also advanced, high-speed broadband services.

However, Congress recognized that this regime would have little chance of succeeding unless the ILECs were given an adequate incentive to cooperate. Specifically, Congress knew that ILECs would be loath to make their network facilities available to competitors on reasonable and efficient terms, because such cooperation would result in competition for local telephone services – competition that would end the ILECs' ability to earn anticompetitive rates for their services and to leverage their control over traditional voice services into emerging markets for advanced services. Accordingly, in the Act, Congress offered a "carrot" to the Bell Operating Companies ("BOCs") that complied with the Act's mandates. Pursuant to section 271 of the Act, BOCs that irreversibly opened their local telephone markets to competition would be permitted to enter the long distance market.

Unfortunately, the need to comply with the Act in order to provide long distance services has thus far failed to spur BellSouth to open its local telephone markets to competition. Apparently, BellSouth has found the ability to enter the highly competitive long distance market an insufficient incentive to surrender its local monopoly, and, instead, has engaged in a relentless campaign of non-cooperation and litigation. As the FCC has observed, "incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act." *Ameritech-SBC Merger Order* ¶ 107. BellSouth can "raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides." *Ameritech-SBC Merger Order* ¶ 107 (also noting risk of

"delay[ing] interconnection negotiations and resolution of interconnection disputes" and "limit[ing] both the methods and points of interconnection and the facilities and services to which entrants are provided access").

BellSouth has effectively used all these strategies to forestall and injure competitors in the retail local phone market. For example, BellSouth challenged virtually every important rule promulgated by the FCC to open local markets to competition. In the appeal of the FCC's landmark *Local Competition Order*[1], BellSouth asked the Eighth Circuit to vacate the *entire* order. (Brief for Petitioner Regional Bell Companies and GTE, No. 96-3221, at 80-81 (8th Cir. filed Nov. 18, 1996)). Even after the United States Supreme Court upheld the jurisdiction of the FCC to issue its UNE pricing and other pro-competitive rules, BellSouth continued to press the 8th Circuit to vacate those rules. (Brief for Petitioners Regional Bell Companies and GTE, No. 96-3321 (and consolidated cases)(8th Cir. filed July 16, 1999)). Then, even after the 8th Circuit decision, BellSouth furthered its anti-competitive crusade by successfully convincing the FCC to dilute several of its UNE rules and regulations. (*In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order, Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC No. 99-238, Rel. November 5, 1999) ("UNE Remand Order")).

Even now, nearly five years and several steps in the appellate process later, BellSouth still argues against the FCC's forward-looking pricing methodology. Only a few months ago, in Florida, BellSouth referred to the FCC's pricing standard as "an utterly unrealistic variant," and also complained of the parade of horribles that will occur if the Commission complies with the

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[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC No. 96-325 (Rel. August 8, 1996).

FCC's UNE pricing rules and adopts the "drastically reduced prices" proposed by the ALECs. *BellSouth's Post-Hearing Brief*, Docket No. 990649-TP at 3-4, 9 (filed Nov. 21, 2000). Incredibly, BellSouth now proposes a rate for 2-wire loops in Florida that is $3.00 (nearly 20%) ***higher*** than the rate the Commission originally approved more than four years ago – and which has proven far too high to support competition. Inflated UNE prices, of course, remain one of BellSouth's strongest tools for preventing competition.

Additionally, BellSouth has been particularly aggressive – and successful – in preventing ALECs from using combinations of network elements (called "the platform" or "UNE-P") to provide local telephone services. The ability of ALECs to use combinations of UNEs to provide local telephone service is "integral to achieving Congress' objective of promoting competition in the local telecommunications markets." *In The Matter off Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State Of New York*, Memorandum Opinion and Order at ¶ 230, CC Docket No. 99-295, FCC 99-404, (Rel. December 22, 1999) ("Bell Atlantic New York 271 Order")). The Consumer Federation of America similarly has concluded that "the ability to rent the combined set of wires and connections from the customer premise to the central office is critical to allowing competitors entry into the market." *Florida Consumers Need Real Local Phone Competition, Fair Access to Monopoly Wires is the Key,* Mark Cooper, Director of Research, Consumer Federation of America, at 9 (Jan. 2001). As the FCC explained, "[u]sing combinations of unbundled network elements provides a competitor with the incentive and ability to package and market services in ways that differ from the BOCs' existing service offerings in order to compete in the local telecommunications market." *Id.* The FCC has consistently emphasized that local markets cannot be considered irreversibly open to competition

unless new entrants can purchase network element combinations. *Id.; see also Application of BellSouth Corp. el al. Pursuant to Section 271 to Provide In-Regional InterLATA Services in South Carolina,* Memorandum Opinion and Order at ¶ 195, CC Docket 97-208, FCC No. 97-418 (Rel. December 24, 1997); *Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan,* Memorandum Opinion and Order at ¶ 332, CC Docket No. 97-137, FCC No. 97-298 (Rel. August 19, 1997).

BellSouth, however, has fought tooth-and-nail to block the availability of network element combinations to ALECs. For nearly five years, BellSouth has done everything in its power to deny ALECs access to UNEs in combined form at forward-looking, cost-based prices. In virtually every proceeding since the Act was passed, BellSouth has attempted to limit ALECs to either buying discrete UNEs or reselling BellSouth's retail services, and thus succeeded at forestalling any serious challenge to its monopoly over local telephone service in Florida and all other states.

At first, despite the mandates of the Act and the FCC's rules and regulations, BellSouth simply refused to allow ALECs to purchase UNEs in combined form at cost-based rates if those UNEs could be used to replicate a BellSouth retail service. BellSouth consistently and successfully maintained this position for the entirety of the first year following passage of the Act. The Eighth Circuit eventually put an end to this obstructionist tactic when it upheld the FCC's rules and regulations allowing ALECs to provide service entirely through UNEs, and to pay UNE rates, thus rendering BellSouth's outright refusal illegal.

Not surprisingly, however, the Eighth Circuit's decision did not deter BellSouth. Instead, in response to the Eighth Circuit's decision, BellSouth evolved its strategy to one of forcing ALECs to purchase uncombined, discrete UNEs, which then had to be reassembled at great

expense in collocation space purchased by the ALECs before they could be used to provide telephone service. In essence, BellSouth once again forced ALECs either to buy discrete UNEs or resell BellSouth's retail services, this time by making the use of UNEs "in combined form" uneconomical, impractical, and inferior in service. BellSouth used that tactic for yet another year, thus further preventing ALECs from using UNE-P.

Of course, the United States Supreme Court also eventually declared this approach by BellSouth illegal. In reversing the Eighth Circuit, the Supreme Court clearly and unequivocally affirmed the longstanding FCC requirement that BellSouth must provide in combined form those UNEs that BellSouth currently combines in its network. Logically, the Supreme Court's decision should have conclusively eliminated the legal basis for BellSouth's recalcitrance on this issue. After all, the Court said that ALECs could provide service entirely through UNEs and that ALECs could buy UNEs in combined form, and it upheld the jurisdiction of the FCC to issue its rules governing the provision of UNEs, including pricing. Moreover, the Court affirmatively rejected the arguments, repeated *ad nauseum* by BellSouth, that provision of UNEs in combined form at cost-based rates in any way effects the distinction between resale and unbundled access (BellSouth's so called "sham unbundling" campaign). Thus, after three years, numerous proceedings before virtually every Commission in its region, and a trip all the way to the United States Supreme Court, it appeared that ALECs would finally gain access to one of the most potent tools available for developing meaningful broad based competition for local telephone service.

However, in reality, the mandate of the Act remains as unfulfilled today as it was when the Act passed in 1996. Although BellSouth's opposition to UNE-P has been declared illegal, BellSouth not only continues its opposition, but cleverly has created new obstacles to overcome.

Indeed, BellSouth still continues its "all-out" attack on UNE-P. Most recently, BellSouth argued that unless the discrete elements that comprise a combination are physically combined at the time of purchase ***and*** are being used by BellSouth to provide service to the specific customer the ALEC wishes to serve, BellSouth will not provide UNEs in combined form to allow ALECs to provide second lines, to serve new customer locations, or to provide services in addition to those currently being provided by BellSouth. This is the case even though BellSouth routinely and ordinarily uses those very same UNEs in combined form in order to provide those very same services to its own customers. Apparently, there is simply no end to how far BellSouth will engage in litigation and regulatory gamesmanship to forestall the use by ALECs of the one vehicle that has some chance of bringing competition to Floridians[2].

Additionally, there are at least four other critical barriers to local telephone competition erected by BellSouth. These are: (1) discriminatory access to operations support systems ("OSS"); (2) discriminatory access to unbundled network elements; (3) discriminatory rates; and (4) aggressive anti-competitive pricing and win-back programs. All of these barriers are natural outgrowths of the inherent conflict of interest driving BellSouth.

The fundamental problem in OSS parity is that BellSouth uses internal, well-established and decades-old OSS to provide services to its own customers, while competitors must use new, fragile OSS whose development and maintenance have been held hostage by BellSouth's actions and inactions. ALECs using BellSouth's OSS must wait much longer than BellSouth's retail arm to obtain access to BellSouth's network and to provide local telephone services, and their

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[2] Not surprisingly, few ALECs can afford to engage in the protracted litigation necessary to resist BellSouth's anticompetitive tactics.

customers are subjected to confusion, outages, and errors. This is a significant barrier to competition, as the FCC has recognized:

> [c]ompeting carriers must have access to the functions performed by the incumbent's OSS in order to formulate and place orders for network elements or resale services, to install service for their customers, to maintain and repair network facilities, and to bill customers. . . . [W]ithout nondiscriminatory access to the BOC's OSS, a competing carrier 'will be severely disadvantaged, if not precluded altogether, from fairly competing' in the local exchange market.

*SBC Kansas-Oklahoma Section 271 Order*, *Joint Application by SBC Communications, Inc. et al., for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* Memorandum Opinion and Order at ¶ 104, CC Docket No. 00-217, FCC No. 01-29, (Rel. January 22, 2001) (quoting *Bell Atlantic New York 271 Order*).

Five years of experience proves that this disparity will not be voluntarily remedied by BellSouth without forceful action by the Commission. BellSouth simply has not devoted sufficient technical and related resources necessary to develop OSS which provide parity to ALECs, and it has little incentive to do so. Rather, BellSouth's strategy has been to devote absolutely minimal resources to the development of OSS – just enough, it hopes, to secure approval of a Section 271 application. Most importantly, BellSouth determines and controls the timetable for any OSS improvement, development and implementation. Structural separation would provide a remedy for this serious competitive impediment: If BellSouth had to use the same OSS to serve its customers as that which it provides to ALECs, not only would BellSouth lose the competitive advantage it gains from provision of substandard OSS, but in the longer term, OSS would improve for all providers.

And the current OSS problems threaten to be just the tip of the iceberg. In the future, OSS discrimination will certainly be even more subtle. For instance, BellSouth need only provide a few untimely, inaccurate or incomplete bills to ALECs in order to wreak havoc and,

perversely, enhance its own competitive position. This is because customers likely would blame the ALECs for billing and other errors and would switch back to BellSouth, even if the billing errors were caused by BellSouth. Being in the local business itself, BellSouth is keenly aware that billing errors, perhaps more than any other single aspect of customer service, can easily sabotage competitors' efforts to recruit and retain local customers. In other words, BellSouth knows that if it cannot retain its local monopoly by stopping customers from leaving in the first place, it can do so on the rebound when customers get dissatisfied with their new telephone service provider.

A second critical obstacle has been BellSouth's unwillingness to provide UNEs in the manner requested by ALECs and on the same terms and conditions as BellSouth provisions its own retail services. BellSouth's failure to provision UNE-P and UNE loops in the same manner in which it serves its own retail customers has been the subject of numerous arbitrations, complaints, and three rejections by the FCC and other state commissions of BellSouth's 271 applications. And more fundamentally, BellSouth is continuing its non-discriminatory provisioning approach with respect to advanced services such as xDSL services. Even after definitive direction from the FCC, BellSouth continues to refuse to permit line splitting and is not taking any active steps to ensure that ALEC customers served by UNE-P can receive xDSL service in the manner permitted by the Act and specifically required by the FCC (see Third Report and Order on Reconsideration, CC Docket No. 98-147 and Fourth Report and Order on Reconsideration, CC Docket No. 96-98 (January 19, 2001)). Again, structural separation would eliminate this obstacle to competition because every provider – including BellSouth – would serve customers through the same efficient methods.

A third critical obstacle is the pricing barrier. Sections 251 and 252 of the Act require BellSouth to price unbundled network elements at cost and on a non-discriminatory basis, and this Commission is in the process of developing cost-based UNE rates. However, even after the Commission concludes this proceeding, BellSouth's "internal" pricing will remain just that – "internal." This is because the prices which BellSouth must charge itself are not formalized by structural separation. As a result, BellSouth will never actually "charge" itself any UNE rate. Rather it will continue to be able to establish retail prices to the detriment of ALECs in Florida. Without structural separation, BellSouth will continue to have every incentive to discriminate in favor of its own retail services, and to hide that discrimination from the Commission. There is no solution for this pricing discrimination except establishing a separate BellSouth affiliate for serving retail customers and requiring this retail officiate to deal at arm's length with the BellSouth wholesale affiliate offering network facilities.

A fourth, and equally important obstacle, relates to anti-competitive pricing programs and win back provisions. BellSouth has a pattern of attempting to stamp out competition by offering attractive pricing arrangements to high value customers, before they are lost to the competitors, and also with generous "win back" offers if any customers are lost to competitors. For support of the former, one need look no further than BellSouth's multi-year program to lock customers into long-term "Contract Service Agreements" ("CSA's") and thus keep them from being interested in dealing with competitors. Additionally, BellSouth has every incentive to share customer information across its various organizations, such that when a competitor places an order with BellSouth to switch a customer, the customer almost immediately receives a letter or call to the customer seeking to have them "return to BellSouth." Only if BellSouth is divided into two companies—both of which must deal with one another at arm's length -- will the

incentive be reduced for BellSouth to keep customers "under wraps" through CSAs. Likewise, the incentive for BellSouth to internally share "win back" information would be eliminated.

To date, state commissions and the FCC have addressed these and other issues piecemeal. as they arise. Such an approach obviously has not worked. It also has played directly into BellSouth's strategy to "divide and conquer" at every turn, because there is no end to the potential methods and arguments at BellSouth's disposal to hinder competition. Specifically, the sheer number and repetitiveness of arbitrations, complaints and other commission proceedings during the past five years in Florida alone attest to this. Moreover, piecemeal resolution of issues under the "divide and conquer" theory of regulatory compliance allows BellSouth to throw its regulatory resources and attendant policy justifications at every proceeding that arises. The only way to avoid these tactics is to require BellSouth's retail arm to be provided with the same prices, terms and conditions and access to network facilities as are provided to all other ALECs and remove the inherent conflict of interest that comes with being both a wholesale provider and retail competitor at the some time.

That BellSouth's anticompetitive practices have succeeded in forestalling local competition is confirmed by the relevant evidence. The most recent market share data from the FCC shows that, five years after the Act, ALECs serve only 6.7 percent of local telephone lines. *Local Telephone Competition* (December 2000). By virtue of its demographics, competition in Florida should be among the leaders in competition across the county, but, instead, Florida lags behind the national average: ALECs have only a 6.1 percent market share in the state. *Competition in Telecommunications Markets in Florida*, FPSC Report at 7 (December, 2000). And even these modest shares are overstated. According to the FCC, about half of the lines served by competitive LECs are resold lines, *id.*, a strategy which many ALECs have announced

they are abandoning.[3] In Florida, well over half of the ALECs responding to FPSC inquiries identified resale as their method of providing service. *Id.*[4]

In short, "By any measure, competition in Florida's local phone marker is virtually absent." *Florida Consumers Need Real Local Phone Competition, Fair Access to Monopoly Wires is the Key,* Mark Cooper, Director of research, Consumer Federation of America, at 1 (Jan. 2001). In fact, earlier this year, the Consumer Federation of America concluded that the "local monopolies have managed to maintain their stranglehold on Florida's local telephone market by continually resisting any attempts to open the market up for new entrants." *Florida Consumers Losing Out Over Failure of Local Phone Competition*, Press Release (Jan. 23, 2001).

Perhaps most telling about this sorry state of competition in Florida is the abandonment by the ILECs of their own efforts to compete with one another. On March 3, 2001, SBC announced that it was scaling back plans to offer telecommunications services in 30 markets outside its traditional service areas in the Midwest and Southwest. *See SBC Communications to Scale Back Plan to Expand Telecom Service Offerings,* The Philadelphia Enquirer (Mar. 3, 2001). As part of its "scale back" effort, SBC closed its call center in Tampa, laying off 400 workers there. *SBC's Expansion Plans Get Hung Up; Ameritech Buyer Is Cutting Costs,*

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[3] *See* D. Moffat, *Weighing In With Wall Street*, Telephony (June 7, 1999) ("In the resale CLEC model, assets and infrastructure are kept to a minimum. At this point, however, it is probably safe to discount the viability of the straight resale model. The basic premise of the resale strategy was to acquire a base of resale customers and later migrate this customer base onto a CLEC infrastructure. What generally happened was that CLEC resale players garnered insufficient resale margins and found that resale customers were tough to migrate. They also found they had little control over network costs. Many CLEC resellers are already on the ropes."). *See also Troubles of USN Call into Question Viability of Local Resale at Current Discounted Rates*, Telecommunications Reports, at 5 (Sept. 14, 1998) (reporting that competitive LECs are abandoning resale).

[4] Of the seventy-five respondents that identified their market entry method, 40 (57%) identified resale as their sole market entry vehicle. An additional 15 respondents declined to make their market entry method public. *Competition in Telecommunications Markets in Florida*, FPSC Report, (December, 2000)

Chicago Tribune (Mar. 07, 2001); *see also SBC Telecom to Close Tampa, Fla., Call Center*, Tampa Tribune (Mar. 06, 2001) and *Bells are Failing to Compete as They Promised*, Network World, (March 05, 2001). Ironically, while BellSouth had originally trumpeted SBC's plans as proof of competition, BellSouth "declined to comment" on SBC's most recent announcement scaling back those plans. *SBC Retreats from Atlanta*, Atlanta Journal-Constitution (Mar. 3, 2001).

This lack of competition stands in stark contrast to BellSouth's financial reports. BellSouth recently reported an earnings per share increase from 55 cents in the fourth quarter of 1999 to 59 cents in the fourth quarter of 2000. Additionally, BellSouth reported earnings per share in 2000 of $2.23, compared with $1.80 in 1999, and BellSouth continues to forecast earnings per share growth of 7-9%. *Id.* While wireless, data, and international services certainly account for some of these figures, BellSouth also grew its local service revenues in 2000 on a GAAP basis by 3.4%. While ALECs struggle to gain each customer, BellSouth increased its total equivalent access lines in service 25.3% from 1999 to 2000. Its annual growth rate in access line equivalents since 1995 has been 14.9%. It also grew its convenience feature revenue more than 12% from 1999 to 2000. Moreover, BellSouth has averaged an astounding 22.0% growth rate in convenience feature revenue since 1995. Regarding deployment of advanced services, it is particularly telling that while other DSL carriers struggle and fail, BellSouth reports beating its own targets for DSL deployment. In the 4$^{th}$ Quarter 2000 alone, BellSouth added 81,000 DSL customers, an increase of 60.4% in three months.

Meanwhile, the ALEC industry stands on the verge of collapse.[5] This is because most ALECs do not "own the strategic assets" necessary to compete but must "rely on the ubiquitous Bell network" – a network that remains largely closed to new entrants.[6] "[I]nvestors [have] los[t] confidence in the fundamentals of the CLEC business model,"[7] "there has been 'carnage' among CLEC stocks,"[8] and numerous ALECs have filed (or are on the verge of filing) for bankruptcy.[9]

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[5] In no market segment is this trend more apparent, or has the descent into "free fall" been sharper, than among "data LECs" that sought to provide competitive DSL services. These former "stock market darlings" are now on the verge of extinction. Analysts have concluded that the data LECs are "unequipped to compete with the giants of the industry" – the incumbent local carriers – who "have clearly captured the upper hand in the battle to roll out DSL service." *See* J. Hall, *NorthPoint's Stock Plunges After Verizon Nixes Deal*, Reuters (Nov. 30, 2000) (quoting Michael Bowen).

[6] J. Whitman, *New Entrants: Battling the Bells*, Wall Street Journal, at R17 (Sept. 18, 2000). *See also* B. Ploskina, *It's Open Season For CLEC Consolidators*, Interactive Week (Oct. 11, 2000) (reporting that competitive LECs are "facing hard times" because they are forced to rely "on incumbent carriers").

[7] M. Farrell, *ICG Tanks, Depressing Other CLECs*, Multichannel News (Oct. 2, 2000).

[8] J. Mulqueen, *ICG Hit Hard by Revenue Shortfall, Resignations*, Interactive Week (Oct. 8, 2000). *See also id.* ("Another piece of the crumbling new carrier industry has plummeted to the ground").

[9] *FBN Telecom Year In Review - 2*, Federal Filings Newswire (Jan. 2, 2001) ("[W]eaker CLECs may go under and play out their final days in a bankruptcy court, market observers say."); S. Levine, *et al.*, *2001: We make Eight Predictions for the Year in Telecom*, America's Network, at 40 (Jan. 1, 2001) (The "new Millennium" has been "dismal" for competitive LECs.); R. Fisher, *From the Desk of . . . Robert Fisher*, Communications Today (Dec. 22, 2000) ("As has been widely reported in the press the telecom industry as a whole and the CLEC industry in particular have come upon some difficult times.") P. Sherer, *Deals & Deal Makers: Too Much Telecom*, Wall Street Journal, at C1 (Aug. 15, 2000) ("[T]he telecom landscape is littered with troubled firms."); J. St.Onge, *Amer MetroComm Asks to Abandon Cisco Gear It Calls Faulty*, Dow Jones News Service (Oct. 10, 2000) (reporting on Aug. 23 Chapter 11 filing and ongoing bankruptcy proceedings); J. St. Onge, *A Bankruptcy Boom Is Starting To Have Ripple Effects*, Dow Jones News Service (Oct. 5, 2000) ("[I]n just the past few months, dozens of [ISPs] and telecom start-ups have filed for bankruptcy."); H. Draper, *ICG's Tumble A Wake-Up Call to Telecom Firms*, Denver Rocky Mountain News, at 1G (Sept. 24, 2000) ("Certainly, ICG is at risk of bankruptcy and other CLECs will be in the same boat"); J. Mulqueen, *Carrier's Purchasing Plans In Question*, Interactive Week (Oct. 1, 2000) ("Several [securities analysts] noted that some competitive local exchange carriers were not meeting revenue projections, some had gone bankrupt and that the capital markets, especially junk bonds, were closed to new carriers."); *Darwin Claims Another CLEC*, Communications Today (Oct. 4, 2000) ("Nettel is just the latest telecom casualty in the dog-eat-dog CLEC arena."); J. Whitman, *McLeodUSA's CapRock Buy May Mark New Consolidation Round*, Dow Jones News Service (Oct. 3, 2000) (many competitive are "likely to face bankruptcy").

Some analysts even predict that ILECs have been so successful in resisting implementation of the Act that "none of the CLECs will be able to survive."[10]

## ARGUMENT

### I. THE COMMISSION SHOULD ORDER THAT BELLSOUTH BE STRUCTURALLY SEPARATED INTO DISTINCT WHOLESALE AND RETAIL COMPANIES

This is a critical transition time for local competition. The courts only recently have confirmed that ALECs have the right to purchase combinations of UNEs, which is the only near-term vehicle that can support competitive entry at the mass market level. At the same time, many ALECs have been pushed into or are on the verge of bankruptcy. As a result, UNE-based competition is both just emerging and very fragile. If BellSouth is able to block the emergence of UNE-based competition, as it has successfully done for five years now, it may never develop. This is particularly true once BellSouth has established itself as the only carrier that can offer on a mass market basis a packaged offering of local and long distance voice and data services – especially as it signs up more and more customers to long-term contracts for DSL service. More fundamentally, in light of current market conditions, an ALEC that "earns" a poor reputation for service because of discrimination by BellSouth may never fully recover in the marketplace.[11] Similarly, BellSouth can further deter entry by establishing a reputation for willingness to engage

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[10] W. Wade, *Stumbling Carriers Jar Rollout of DSL*, Electronic Engineering Times, at 1 (Dec. 4, 2000).

[11] *UNE Remand Order* ¶ 87 (noting competitive LECs are at a reputational disadvantage because "competitive LECs must establish a brand name and develop a reputation for service quality before they can overcome the incumbents' long-standing relationships with their customers."); *Ameritech-SBC Merger Order* ¶ 237 (reputational harms inflicted by incumbent LECs limit the ability of competitive LECs to enter the local telephone services market). *See also* Complaint, Decision and Order, *In re Digital Equipment Corporation*, FTC Docket No. C-3818, 1998 FTC LEXIS 75 (July 14, 1998); Proposed Consent Order and Analysis to Aid Public Comment, 63 Fed. Reg. 24544 (May 4, 1998). *See generally* Neal R. Stoll, *Current Developments in Federal Antitrust Enforcement: Solutions, Settlements and Surrender*, 795 PLI/Corp 413 (1992).

in predatory conduct.[12] BellSouth's trench warfare tactics have already resulted in many rivals having to rethink their attempts to serve residential customers.[13]

For precisely these reasons, the Pennsylvania Public Utility Commission ("Pennsylvania PUC") compelled structural separation of Verizon-Pennsylvania's wholesale and retail services and imposed on Verizon-Pennsylvania a "Code of Conduct" to ensure that it did not discriminate in favor of its retail affiliate. *Pennsylvania Structural Separation Order* at 235-36. In affirming this order, the Commonwealth Court of Pennsylvania upheld both the Pennsylvania PUC's authority to require structural separation and its conclusion that structural separation and a strict Code of Conduct are necessary to achieve competition in Pennsylvania. *See Bell Atlantic-Pennsylvania*, 763 A.2d at 464, 466-69. Petitioners urge the Commission likewise to order the structural separation of BellSouth Telecommunications, Inc. into distinct wholesale and retail units.

Generally speaking, structural separation means that BellSouth would establish a retail affiliate which would provide finished services to consumers and have the customer relationship, just as any other ALEC, and establish a separate wholesale affiliate which would continue to own and operate the network facilities necessary to provide local telephone services in Florida. Thus, in order to provide finished retail services, the retail affiliate would have to negotiate an

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[12] *See* J. Ordover & C. Saloner, *Predation, Monopolization, and Antitrust*, in Handbook of Industrial Organization 550 (R. Schmalensee & R. Willig eds., 1989) (discussing the benefits derived by the dominant firm through its reputation earned due to its predatory pricing activities); G. Hay, *The Economics of Predatory Pricing*, 51 Antitrust L.J. 361, 365 (1982) (demonstrating predatory pricing based on the reputational effects of the dominant firm).

[13] *See, e.g., Armstrong Warns AT&T May Pull Out Of Local Phone Markets*, Communications Daily, at 7 (Feb. 8, 2000); D. DeKok, *State College, Pa., Telecom Firm Blames Verizon for Phone Delays*, Knight-Ridder Tribune Business News: The Patriot-News - Harrisburg, (Sept. 29, 2000) (2000 WL 27468843).

interconnection agreement with the wholesale affiliate, pay cost-based UNE rates to the wholesale affiliate, and access that affiliate's OSS, just like every other ALEC.

But true structural separation requires more than a mere accounting gimmick. Through a number of mechanisms, structural separation, properly done, would ensure that the newly separate affiliates are *functionally* separate, so that regulators, as well as competitors, can identify the rates, terms, and conditions on which services will be available to all potential purchasers. Such separate corporate affiliates would, for example, maintain separate books, records, and accounts from the wholesale arm, maintain separate facilities, and deal at arms length, in writing, with the wholesale arm. *Accord, CMRS Structural Separation Order* ¶ 38(1)-(3) (detailing separate affiliate requirements to be applied to LECs' commercial mobile radio services affiliates). Structural separation, however, does not "require divestiture of the wholesale function." *Pennsylvania Structural Separation Order* at 216.

Regarding the authority of this Commission to order structural separation of BellSouth, the Act expressly contemplates that state utility commissions will take independent action under state authority consistent with the pro-competitive policies of the Act. *See, e.g.,* Act § 253 (b) (States maintain ability "to impose, on a competitively neutral basis and consistent with section 254, requirements to 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.") Additionally, §261 of the Act provides "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.".); Furthermore, §601 (c) of the Act provides

that the Act and the amendments made by the Act "shall not be construed to modify, impair, or supercede. . . State. . . law unless expressly so provided in such Act or amendments.").

Moreover, there can be no question that this Commission has authority under existing Florida law to order structural separation of BellSouth into distinct wholesale and retail corporate subsidiaries. Specifically Section 364, Florida Statutes, gives the Commission broad and exclusive authority over incumbent local exchange companies, including BellSouth. In particular §364.01(2) of the Florida Statute provides, "It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the Florida Public Service Commission in regulating telecommunications companies . . . ."), and §364.01(3) provides that "The Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory over sight to protect consumers and provide for the development of fair and effective competition...") Furthermore, §364.01(4) provides that "The Commission shall exercise its exclusive jurisdiction in order to: . . . (c ) Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation [and] (i) Continue its historical role as surrogate for competition for monopoly services provided by local exchange telecommunications companies." Additionally, the retail/wholesale distinction already exists in Florida's statutes: §364.051 provides a regulatory scheme for retail services provided by ILECs, while §364.163 establishes a separate regulatory methodology for wholesale network services.

This Commission should use its broad and specific authority to order a wholesale/retail corporate structure whereby BellSouth would separate completely its retail and wholesale activities. A retail service company ("Retail Co.") would be established that is separate from the

current local network operations. All retail local and any long distance telecommunications services would be housed in the Retail Co., while the wholesale company ("Wholesale Co.") would manage the local network and sell it on a "carrier to carrier" basis to all retailers, including Retail Co., interfacing with every retail service provider on the same basis and using the same personnel and systems. The separation of Retail Co. from Wholesale Co. would be absolute, other than sharing the same parent company. Retail Co. and Wholesale Co. (or any of their affiliates) would not share officers, directors, personnel, equipment, buildings, services or other resources and would interact in writing. In addition, Section 272 separation requirements of the Act also would apply to Retail Co.

The role of Wholesale Co. would be to own and operate the existing local exchange network, and it would be required to make that network and related operational support available on a nondiscriminatory basis to Retail Co. and all ALECs. All Wholesale Co. offerings purchased by Retail Co. would be via tariff (or some other generally available mechanism), with prices established by the Wholesale Co.'s board of directors subject to the non-discriminatory requirements of the Act. The Retail Co. would have to pay the same price for UNEs as ALECs. Because structural separation includes the mandate that the Retail Co. would not be permitted to sell services below its costs, BellSouth's Wholesale Co.. would have incentive to moderate its UNE rates downward so that its retail arm could effectively compete against ALECs. This would be a first for establishing cost based and nondiscriminatory pricing for all competitors, including BellSouth's retail operations.

The role of Retail Co. would be to offer all the end-user services which compete with ALECs. Thus, the Retail Co. could offer any retail service to any end user. Retail Co. would interface with Wholesale Co. in precisely the same manner as other ALECs do (because the

Retail Co. would not own any network facilities) and could only provide services by negotiating an interconnection agreement at arm's length with Wholesale Co. Retail Co. would need to switch every local customer just as any other ALEC would again, using the same OSS interfaces used by ALECs), and would purchase wholesale inputs from Wholesale Co. at the same rates, terms and conditions as other ALECs. Fundamentally, Wholesale Co. would not be permitted to develop or offer any interfaces or OSS equipment to Retail Co. which Wholesale Co. also does not make available to other ALECs. Finally, Retail Co. would pay access charges, UNE rates and reciprocal compensation to Wholesale Co., just as ALECs do.

As the Pennsylvania Commission understood, structural separation also requires the adoption of a Code of Conduct for both Wholesale Co. and Retail Co. to establish a higher degree of transparency in the wholesale-retail relationship. The Commission could adopt a number of different requirements as part of such a Code of Conduct, such as banning discrimination and cross-subsidization, requiring that BellSouth not provide information to its retail affiliate without simultaneously sharing information with its retail rivals, requiring that the wholesale arm and retail affiliate maintain separate buildings and separate employees, barring the wholesale arm from providing operations, installation, and maintenance for the retail affiliate, and barring the wholesale arm from making misrepresentations about the relative quality of the retail affiliate's repair or provisioning service.

Overall, structural separation "is a pragmatic and moderate attempt to enable dominant producers or suppliers whose participation in a given market raises special problems to participate, while reducing the risks that their customers or competitors will be disadvantaged by such participation." *Computer II*, 77 FCC.2d 384, ¶ 205 (1980). In particular, structural separation of the wholesale and retail arms of BellSouth would reduce both its ability and

incentive to engage in price and non-price discrimination strategies discussed above. Currently, BellSouth has incentive to charge competitors the highest rates it can for UNEs, because, no matter what it charges others, its incurs only the actual economic cost (or less) of using its network.[14] If BellSouth were structurally separated, the retail arm would have to pay the same price for UNEs as ALECs.

Likewise, structural separation would help prevent non-price discrimination by decreasing BellSouth's incentives to engage in such discrimination and by making it easier to detect such discrimination should BellSouth attempt it. As currently constituted, BellSouth has the incentive to deny competitive LECs equal, nondiscriminatory access to the technical provisioning it gives itself. *See Bell Atlantic-GTE Merger Order (In re Application of GTE Corporation and Bell Atlantic for Consent to Transfer Control,* Memorandum Opinion and Order at ¶¶ 201-05, CC Docket No. 98-184, FCC No. 00-221 (Rel. June 16, 2000)). If this Petition is adopted, however, the retail affiliate would not own any network facilities, but could only provide services by negotiating at arm's length an interconnection agreement with the wholesale affiliate just like other ALECs presently do with BellSouth. To the extent that the retail arm negotiates beneficial terms, under the FCC's "pick and choose" rules BellSouth would be required to give those very same terms to ALECs. *See* 47 U.S.C. §§ 251(c)(2)(C), (d), (i). By forcing the retail and wholesale units to deal at arm's lengths, structural separation would assist the Commission in detecting discrimination by making it easier to benchmark the way in which the wholesale unit provisions UNEs. This would be helpful in developing performance measurements, benchmarks and financial penalties for failure to meet the same. Specifically,

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[14] *See Bell Atlantic-GTE Merger Order* ¶ 166 ("[T]he incumbent LEC may profit from imposing high loop charges, or access charges, on both its affiliates and its competitors, because the charges to its affiliates constitute only an internal transfer.").

requirements that the separate affiliates use separate buildings and separate employees and interact in writing and prohibitions against the wholesale arm providing operations, installation and maintenance for the retail arm also would make it more difficult for the wholesale arm to favor the retail arm or to pass along information to the retail arm in a discriminatory manner.[15] Overall, by reducing the underlying conflict of interest that pervades BellSouth today, structural separation would reduce or eliminate the incentives BellSouth has to impede competition and thus reduce or eliminate the constant barrage of police actions required of the Commission now to maintain the piecemeal approach of getting BellSouth to comply with the Act.

In light of the steadily decreasing number of incumbents (via mega-mergers in the telecom industry) that regulators may use as benchmarks by which to measure how each incumbent provides service to its affiliates and to competitors, it is especially crucial that BellSouth's regulators and competitors be able to determine and assess the terms by which BellSouth provisions its affiliates and rivals. *Cf. Ameritech-SBC Merger Order* ¶¶ 165-70 (noting the decreased ability of regulators to benchmark BOC provisioning against other BOCs because of recent mergers). Structural separation fosters such benchmarking by achieving a "minimum level of transparency [that permits regulators] to police the price and nonprice discrimination concerns." *Id.* ¶ 61.

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[15] *See, e.g.*, *Re Affiliated Activities, Promotional Practices, and Codes of Conduct of Regulated Gas and Elec. Cos.*, 202 P.U.R.4th 177 (Md. P.S.C. 2000) (instituting code of conduct in order to: "prevent regulated service customers from subsidizing unregulated affiliates; prevent affiliates from gaining any improper advantage in their competitive markets as a result of their affiliation to a regulated utility; minimize inappropriate communication between a utility and its affiliates regarding confidential information; protect the privacy of consumers; and prohibit discrimination in the provision of regulated services"); *SCANA Corp.*, 198 P.U.R.4th 158 (N.C.U.C. 1999) (implementing code of conduct in order "to avoid even the possibility of affiliate abuse and, in essence, to prevent the possibility of SCANA exercising market power by raising rivals' costs")

Finally, Petitioners note that the relief sought here is a regulatory tool that has been routinely applied to other regulated industries to facilitate a smooth, fair transition from regulatory monopolization to full, vibrant competition. For example, various levels of structural separation, ranging from Codes of Conduct[16] to the actual economic divestiture of power generation facilities,[17] have been employed by state regulatory commissions in the gas and electric utility industries. These commissions have all reasonably concluded that some type of structural separation of bottleneck transmission facilities from power generation facilities is necessary to prevent monopoly abuse of transmission facilities that would prevent the emergence of a competitive generation market.

Likewise, in the area of telecommunications "there is nothing novel about . . . separate subsidiary requirements." *GTE Midwest*, 233 F.3d at 345. The FCC has found structural separation requirements a useful tool for preventing cross-subsidization and protecting against monopoly power abuses in a number of contexts. Thus, the FCC has ordered structural

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[16] *See, e.g.*, *Re Affiliated Activities, Promotional Practices, and Codes of Conduct of Regulated Gas and Elec. Cos.*, 202 P.U.R.4$^{th}$ 177 (Md. P.S.C. 2000) (instituting two codes of conduct for gas and electric company "core service" and "non-core service" affiliates); *SCANA Corp.*, 198 P.U.R.4$^{th}$ 158 (N.C.U.C. 1999) (requiring gas utility to follow regulatory conditions and code of conduct, including cost allocation and pricing standards, non-discrimination requirements, and other protective measures designed to prevent affiliate abuse); *Delmarva Power & Light Co.*, 193 P.U.R.4$^{th}$ 514 (Del. 1999) (instituting code of conduct for gas distribution affiliate participating in marketing program); *Affiliated Transactions and Affiliate Standards of Conduct of Cos. Providing Gas or Electric Serv. in Maryland*, 183 P.U.R.4$^{th}$ 277 (Md. P.S.C. 1998) (instituting codes of conduct and cost accounting requirements for gas and electric affiliates); *Amended Substitute House Hill 476*, 1996 WL 694706 (Ohio P.U.C. September 26, 1996) (requiring affiliates to engage in "separation plan" through either structural and physical separation or proof of following a code of conduct); *Retail Competition Pilot Program*, 1996 WL 1070168 (N.H.P.S.C. June 3, 1996) (applying code of conduct to electric utility affiliates after utilities engaged in affiliate abuse).

[17] *See, e.g.*, *Public Service Electric and Gas Company's Rate Unbundling Stranded Costs and Restructuring Filings*, 748 A.2d 1161, 1186-87 (N.J. Super. Ct. App. Div. 2000) (affirming the New Jersey Board of Public Utilities' decision to require divestiture of electric utility's generation-related assets).

separation of ILEC landline and commercial mobile radio services, structural separation of BOC consumer premises equipment services, and structural separation requirements as to advanced services.[18]

There should be no doubt: structural separation can and should be accomplished. In sum, this Commission should conclude that it is both appropriate and necessary to require structural separation for BellSouth's wholesale and retail arms. Such action must be taken to assure that true competition arrives in Florida's local exchange market – for the benefit of competitors and consumers alike – before it is too late.

## CONCLUSION

For the reasons stated above, the Commission should institute a proceeding to order the structural separation of BellSouth into distinct retail and wholesale units. In this proceeding, the Commission should consider the appropriate means and mechanisms (including imposition of a Code of Conduct) for accomplishing structural separation.

[18] *See, e.g., id.* at 348 (affirming FCC rules requiring structural separation of LECs' landline and commercial mobile radio services); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 472 (7th Cir. 1984) (affirming FCC regulation requiring structural separation of BOCs' consumer premises equipment services); *Computer and Communications Indus. Assoc. v. FCC*, 693 F.2d 198, 218-19 (D.C. Cir. 1982) (affirming *Computer II*, 77 FCC.2d 384 (1980), structural separation requirements as to advanced services), *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 732 (2d Cir. 1973) (affirming *Computer I*, 28 FCC.2d 267 (1971), structural separation requirements as to data processing services); *Bell Atlantic-GTE Merger Order* ¶¶ 260-73 (requiring structural separation of advanced services affiliates); *Ameritech-SBC Merger Order* ¶¶ 363-70 (same).

Respectfully submitted this 21st day of March, 2001.

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