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May 2, 2001

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 010345-TP

Dear Ms. Bayo:

On behalf of the Florida Competitive Carriers Association, enclosed for filing and distribution are the original and 15 copies of the following:

- The Florida Competitive Carriers Association's Response in Opposition to Motion to Dismiss, or in the Alternative, Motion to Strike of BellSouth Telecommunications, Inc.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Joe A. McGlothlin

Joseph A. McGlothlin

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. For Structural Separation of BellSouth Telecommunications, Inc.
_______________________________________/

Docket No. 010345-TP

Filed: May 2, 2001

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION TO STRIKE OF BELLSOUTH TELECOMMUNICATIONS, INC.

Pursuant to rule 28-106.204, Florida Administrative Code, the Florida Competitive Carriers Association (FCCA), hereby files its Response in Opposition to BellSouth Telecommunications, Inc.'s (BellSouth) Motion to Dismiss, or in the Alternative, Motion to Strike FCCA'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 (FCCA). For the following reasons, BellSouth's motion should be denied.

I. PROCEDURAL BACKGROUND

On March 21, 2000, AT&T Communications of the Southern States, Inc. (AT&T) filed a Petition for Structural Separation of BellSouth.

On April 10, 2001, FCCA filed a Petition to Intervene and a Request for Commission Investigation Concerning the Use of Structural Incentives to Open Local Markets in Support of AT&T's Petition.

On April 10, 2001, BellSouth filed a Motion to Dismiss, or in the Alternative Motion to Strike AT&T's Petition. On April 17, 2001, BellSouth filed a Motion to Dismiss, or in the

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Alternative Motion to Strike FCCA's Petition. In this pleading, BellSouth incorporated by reference its entire response to the AT&T Petition.

On April 26, 2001, AT&T filed a Stipulation of Time to File Responses, wherein the parties agreed that AT&T's response and FCCA's response to BellSouth's motions to dismiss would be due on May 2, 2001.

ARGUMENT

II. THE COMMISSION HAS JURISDICTION TO CONSIDER AT&T'S PETITION AND FCCA'S REQUEST IN SUPPORT OF THE PETITION AND TO INVESTIGATE THE OPTION OF A STRUCTURAL INCENTIVE APPROACH.

A. Chapter 364 Gives this Commission Jurisdiction to Address FCCA's Petition

BellSouth first moves to dismiss FCCA's petition because it claims that the Commission has no authority to investigate a structural incentive approach designed to facilitate the development of local competition. However, this Commission has exclusive jurisdiction to enforce Chapter 364, Florida Statutes, in furtherance and protection of the public welfare. In that chapter, the Florida Legislature has *explicitly* authorized the Commission to facilitate the entry of ALECs into the Florida local exchange market and to facilitate vigorous local competition. To that end, § 364.01, Florida Statutes, expressly provides:

> The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure. The Legislature finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition . . . .[1]

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[1] § 364.01(3), Florida Statutes (2000).

Despite the Florida Legislature's vision, local competition has failed to materialize to any meaningful degree. The Commission must take additional steps to reach the legislative objective.

The Telecommunications Act of 1996 (Act) contemplates that state public service commissions will facilitate and enforce its local exchange competition policies and goals. *See,* 47 U.S.C. §§ 251(d)(3), 252(b)(1), 253(b),271(d)(2)(B). Chapter 364 clearly serves that role. For example, the law grants to this Commission broad jurisdiction to "protect the public, health, safety and welfare by ensuring that basic telecommunications services are available to all residents of the state at reasonable and affordable prices."[2] This "public welfare" jurisdiction has been construed expansively by the Florida Supreme Court. In *Teleco Communications Co. v. Clark,* 695 So.2d 304 (Fla. 1997), the Florida Supreme Court affirmed this Commission's ruling that ordered an ALEC that illegally owned telecommunications facilities without Commission authorization to divest those assets. In so ruling, the Florida Supreme Court "conclud[ed] that the PSC had the implied authority under section 364.01(3)(a) to order the transfer of title."[3]

In this proceeding, FCCA seeks an investigation of the use of structural incentives to open local markets, a remedy less drastic than the divestiture of assets that the Florida Supreme Court

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[2] § 364.01(4)(a), Florida Statutes (2000). BellSouth argues in its motion (at pp. 7-9) that Chapter 364 cannot be used as authority for a remedy for a violation of the Act, because Chapter 364 was enacted prior to the passage of the Act in 1996. However, § 261 of the Act specifically authorizes states to utilize pre-Act regulations in implementing the policies of the Act. *See* 47 U.S.C. §261(b). Given the 1995 amendments to Chapter 364, no post-1996 amendments to Chapter 364 were necessary to expand this Commission's jurisdiction.

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

upheld in the *Teleco* case. Accordingly, the Commission may exercise its authority in this proceeding, in accordance with its broad powers under Chapter 364 to fashion appropriate relief in the interest of the public welfare.

Section 364.01(4)(g) provides an additional jurisdictional basis for the investigation sought by FCCA. It directs the Commission to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary restraint." The lack of meaningful local competition indicates that competitors do not have non-discriminatory access to BellSouth's infrastructure as required under both Chapter 364 and the Act. Therefore, to overcome anticompetitive behavior, the Commission properly may investigate structural remedies and fashion appropriate relief.

The Pennsylvania Public Utility Commission (PUC) recently addressed virtually all of the arguments advanced in support of BellSouth's Motion to Dismiss. It determined that in the absence of voluntary commitments by the ILEC, a separation of the ILEC local exchange carrier would be both necessary and appropriate.[4] *See Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Utility Comm'n,* 763 A.2d 440 (Pa. Commw. Ct. 2000) (*Bell Atlantic*). BellSouth attempts to distinguish *Bell Atlantic* by arguing that the jurisdiction of the PUC is more expansive than that of this Commission. The amendments to the Pennsylvania public utility laws enacted in 1996 to implement the Act included an express provision addressing the remedy of structural separation (66 Pa.S.C. §

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[4] In its motion, BellSouth argues that the PUC "declined to exercise its authority to order the structural separation." Motion at 4. In fact, the PUC's April 11, 2001 Order requires that Bell Atlantic-Pennsylvania, Inc. (BAP) "agree" to a complete functional separation of wholesale and retail operations, including a requirement that the wholesale and retail functions deal with each other on an arms-length basis and comply with a "Code of Conduct." The PUC Order further states that the PUC will order a structural separation if BAP does not agree to this functional separation by May 20, 2001. A copy of the PUC's April 11, 2001 Order is being filed with AT&T's response.

3005(h)).[5] However, prior to 1996 the Pennsylvania agency had only limited powers. Pennsylvania's law did not contain the "public welfare" and "anticompetitive behavior" criteria of Chapter 364. Given the relatively limited general powers bestowed upon the PUC, it is not surprising that its legislature added the measure relating to structural separation. However, this Commission's general powers are far broader. In light of the broad powers possessed by this Commission upon the enactment of the federal Act, no such amendment was necessary for Florida.

This Commission has had occasion in the past to take action to address competitive concerns in the local arena. For example, in *In Re Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth Telecommunications, Inc.'s Service Territory*, the FCCA and others requested certain pro-active and declaratory relief in order to promote local competition in BellSouth's service territories. As here, BellSouth filed a motion to dismiss, arguing that this Commission had "no legal authority to implement procedures other than those provided by the Act." Motion to Dismiss at 2. This Commission denied BellSouth's motion:

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

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[5] The Pennsylvania PUC enabling statute provides that "[i]n addition to any powers expressly enumerated in this part, the commission shall have the full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part." 66 Pa. C.S. § 501 (2000). As is the case in Florida, the PUC does not have the power to award damages or decide private contract disputes. *See, e.g., Allport Water Authority v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978).

> ***the procedures prescribed by the Act, then the relief is well within the legal authority of the Commission.***[6]

The Commission should reach the same result here.

B. BellSouth's Chapter 364 Arguments are Without Merit and Should Be Rejected.

BellSouth cites *SouthernBell Telephone and Telegraph Co. v. Mobile America Corp., Inc.*, 291 So.2d 199 (Fla. 1974) for the proposition that, because this Commission is without authority to award monetary damages, it necessarily lacks subject matter jurisdiction to order structural separation. However, *Mobile America Corp.* does not support this proposition.

In *Mobile America Corp.*, a mobile home financing company brought a tort claim against SouthernBell for its failure to provide efficient telephone service. The trial court dismissed the action, ruling that the matter should be brought before the Commission. The Florida Supreme Court disagreed, holding that the Commission ***does not have primary jurisdiction in tort actions*** and that this Commission lacks authority to award monetary damages resulting from Southern Bell's failure to meet service standards. The case is simply inapposite. The issue in this case is the Commission's ability to take the actions necessary to bring the benefits of local competition to Florida consumers, not its jurisdiction to adjudicate an alleged tort.

Similarly inapposite is *Radio Telephone Communications, Inc. v. Southeastern Telephone Co.*, 170 So.2d 577 (Fla. 1965), which BellSouth cites for the proposition that "in order for a statute to give implied authority, the implied authority must have been within the contemplation of the Legislature when it passed the statute."[7] In that case, the Florida Supreme Court addressed the issue

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[6] Order No. PSC-99-0769-FOP-TP at 5 (emphasis added), Docket No. 981834-TP, April 21, 1999.

[7] Motion at 7.

of whether a radio company, whose operations fit within the literal description of "operating a telephone line" contained in § 364.33 was properly regulated by this Commission. In determining whether the statute was to be given its plain meaning, the Court reasoned that radio communication services:

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

Radio Telephone Communications, Inc. at 581 (emphasis supplied). Therefore, the holding that radio service communications were not subject to Commission regulation was based on a finding that Chapter 364 did not apply to the radio service communication industry because such regulation would be "directly opposed to the policy of the state in its regulation of public utilities." *Id.* at 581.

Radio Telephone Communications, Inc. has no application here because, as set forth above, it is clear that the Florida Legislature intended that BellSouth's obligations as an ILEC would be subject to Chapter 364. Moreover, the Legislature did ***expressly*** consider the encouragement of competition in the local telephone markets by its amendment to Chapter 364 in 1995 (via Laws 95-403), including its explicit intent to foster LEC competition in § 364.01(3). Consequently, the remedies that the FCCA requests the Commission to investigate are consistent with, rather than "directly opposed to," the policy articulated by the Legislature.

Finally, BellSouth contends that this Commission is without power to order structural separation because such a remedy would impede certain rights BellSouth allegedly enjoys pursuant

to its "charter," citing *State v. Western Union Telegraph Co.*, 118 So. 478 (Fla. 1928). There, the Florida Supreme Court simply held that requiring Western Union Telegraph to place a telegraph station in a specific location was not justified by the evidence of that case. *Id.* at 478. This limited holding does not mean that this Commission may do nothing that adversely affects the alleged rights that BellSouth enjoys under its corporate charter. "Being creatures of statute, corporations are amenable to ***all reasonable regulations imposed by statute, both as to their internal operation*** and as to the rights of those who own them, their stockholders." *Florida Telephone Corp. v. State*, 111 So.2d 677, 679 (Fla. 1st DCA 1959) (emphasis supplied).

In sum, Chapter 364 provides ample authority for this Commission to grant the relief requested in FCCA's petition.

III. THE COMMISSION"S INVESTIGATION OF STRUCTURAL SEPARATION OPTIONS IS CONSISTENT WITH THE ACT AND THE COMMERCE CLAUSE.

BellSouth argues that the FCCA's Petition should be dismissed because the relief it seeks is inconsistent with federal law. Contrary to BellSouth's claim, this Commission's traditional authority over local, intrastate telephone competition was preserved, not preempted, by the Act. The Commission's adjudication of FCCA's Petition is consistent with the Act. It does not violate the Commerce Clause because the proposed remedy would help achieve the Act's mandate.

A. The InvestigationWould Not Implicate Federal Preemption Concerns.

Federal law may preempt state law in three ways: (1) when, in enacting federal law, Congress explicitly defines the extênt to which it intends to preempt state law; (2) when, in the absence of express preemptive language, Congress indicates an intent to occupy an entire field of regulation and has left no room for states to supplement the federal law; and (3) when compliance with both state

and federal law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. *See, Michigan Canners and Freezers Ass'n., Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 470 (1984). Here, the proposed state action does not implicate preemption in any of these ways because (1) the Act explicitly preserves this Commission's authority over local telephone market competition, (2) the Act does not "occupy the entire field of regulation," but instead expressly leaves room for the State commissions to continue to act in furtherance of the goal of opening local telephone markets to competition, and (3) the proposed option of structural separation will help achieve the Act's goal of local competition.

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

The regulation of utilities is one of the most important functions traditionally associated with states' police power. *See, e.g., Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). In the Communications Act of 1934, Congress created a dual federal and state regulatory structure which granted the federal government jurisdiction over interstate communications, 47 U.S.C. § 152(a), while reserving to the states existing jurisdiction over intrastate communications. 47 U.S.C. § 152(b). In February 1996, the Act amended the 1934 Act. Pub. L. No. 104-404, 1996 U.S.C.C.A.N. (110 Stat.) 56, codified at 47 U.S.C. § 151, *et. seq.* (1996). In the Act, Congress created a framework to open all local (intrastate) telephone markets to competition. The Act does not preempt the states' traditional authority over local (intrastate) telephone regulation. Nor does it repeal the dual system of federal and state regulation over telephone markets codified in § 152(b) of Title 47.

On the contrary, the Act includes express provisions designed to preserve the role of the states in ensuring that local markets are competitive. For instance, in § 251 of the Act, Congress acted to ensure the continued role of state commissions in the regulation of local telephone markets:

> In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[8]

Further, § 252(e), which sets forth procedures for negotiation, arbitration by *state* commissions, and approval of interconnection agreements between incumbent carriers and their competitors, specifically provides to the states the role of approving interconnection agreements in furtherance of the goal of achieving local competition. This section also contains a limited preemption provision, providing for federal preemption in the area of interconnection agreements only "if a State fails to carry out its responsibility under [Section 252])." [9] Obviously, this limited preemption provision is not implicated in this proceeding.

Similarly, § 253, which requires the removal of barriers to entry into interstate and intrastate telephone markets, also reserves an important role for state commissions:

> [n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

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[8] 47 U.S.C. §251(d)(3).

[9] 47 U.S.C. §252(e)(5).

47 U.S.C. § 253(b). Section 253 also contains an anti-preemption provision 47 U.S.C. (§ 253(d)) allowing for the FCC to preempt state commission action only if the FCC, after notice and an opportunity for public comment, determines that a state commission's action violates § 253.

In addition, § 261(c) provides a "catch-all" anti-preemption provision:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, so long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part.

47 U.S.C. § 261(c).[10] Finally, in § 601(c) of the Act, Congress provided that the Act is not to be understood as superseding state laws by implication.

BellSouth does not dispute that § 261(c) -- reserving to the states the authority to impose requirements deemed necessary to further competition -- is applicable. BellSouth disputes whether the relief sought by FCCA's request is consistent with the Act's goals of furthering this particular local competition. BellSouth's argument, involves whether the relief sought is *appropriate*; it has nothing to do with this Commission's authority to consider these issues in the first instance.[11] This

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

[11] Much of BellSouth's motion consists of policy arguments and challenges to the severity of the relief sought, both of which are inappropriate and irrelevant on a motion to dismiss prior to the development of a factual record. In any event, the relief sought in the Petition is similar to that mandated in Pennsylvania and considered by many other states, including (1) a December 10, 1999 report from the New Mexico Office of Technology and Policy recommending a structural separation

Commission retains its traditional authority over matters relating to local telephone markets, and the Act in no way precludes the Commission from adjudicating FCCA's request.

2. The Proposed Remedy Is Consistent With the Act

BellSouth's argument that the issues raised FCCA's Petition are somehow preempted because the relief sought is inconsistent with the Act is similarly without merit. A structural separation order is not inconsistent with the Act. In fact, at this point in Florida, a structural separation order appears to be the *only* available remedy adequate to achieve local competition.

First, BellSouth argues that structural separation would be inconsistent with § 253 of the Act because it would allegedly create an "impermissible barrier to entry" and would not be "competitively neutral." BellSouth says that § 253 prohibits any action which prevents "any entity to provide any interstate or intrastate telecommunications service," and that structural separation would prohibit BellSouth's retail entity from providing wholesale services, and vice-versa.[12] The same argument was considered and rejected in *Bell Atlantic*. Here, the Court held that where "the state agency mandate is that Bell provide retail services through a structurally separate *affiliate*, albeit operating independently, it cannot be said that Bell as a business organization is being precluded on the whole from providing retail services." *Id.* at 463. BellSouth also argues that a structural separation would not be competitively neutral, in that structural separation has not been

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of US West's retail and wholesale operations; (2) an April 15, 1999 Notice of inquiry concerning the structural separation of Ameritech Illinois; (3) a February 11, 1998 Notice of Inquiry by the Oklahoma Corporation Commission concerning the structural separation of LEC monopolies; (4) a June 25, 1997 Order of the Connecticut Department of Public utilities approving a plan for the structural separation of Southern New England Telephone's retail and wholesale business units, and (5) an [ongoing] review by the Massachusetts Department of Telecommunications and Energy of the structural separation of Bell Atlantic-Massachusetts as part of that ILEC's § 271 application.

[12]Motion at 21-22.

requested for other ILECs who also allegedly enjoy unfair advantages over ALECs. However, the "competitively neutral" requirement in § 253 is designed to ensure universal service and to protect consumers' rights to reap the benefits of competition in the local telephone market. Its purpose is not, as BellSouth suggests, to allow an ILEC to maintain an unfair advantage over ALECs.[13] As the *Bell Atlantic* court stated in rejecting this same argument:

> [E]xamination of the [competitively neutral] requirement shows that the wholesale-retail separation is just that -- competitively neutral in the practical sense that its intent is to insure neutrality in competition and thereby protect consumers' rights to choice of suppliers without encountering the higher costs which ensue from lack of competition.

Id. at 463. The proposed action is not inconsistent with § 253 of the Act.

Next, BellSouth argues that structural separation would be inconsistent with the Act, because the Act expressly contemplates structural separation in certain contexts only, *e.g.*, equipment manufacturing, certain long-distance and information services, and electronic publishing services. *See* 47 U.S.C. § 272(a)(2); 47 U.S.C. § 274. BellSouth argues that because the Act does not expressly authorize a structural separation in connection with intrastate services, structural separation is prohibited by negative implication. However, the fact that the Act expressly mentions structural separation only with respect to certain services does not mean that this Commission is prohibited from considering a structural separation for other services. *See, e.g., Bell Atlantic,* 763 A.2d at 463. As demonstrated above, this Commission is empowered to do what it deems appropriate to implement Chapter 364 and the Act.

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[13] *See, e.g.,* Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, 8801 ¶ 47 (1997) (Universal Service Order) (subsequent citations omitted) ("competitive neutrality means that universal support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another").

BellSouth argues that because the Act contemplates the unbundling of "certain network elements," the Act must, by negative implication, prohibit the unbundling of "an entire network" pursuant to a structural separation. The attempt to equate structural separation to "complete unbundles" is misplaced. Even so, the Act contains no such prohibition. Rather, § 251 provides that in determining the network elements to be unbundled, the FCC is to consider whether (1) access to such network elements is necessary and (2) the failure to provide access to such elements would impair the ability of an ALEC to provide the services it seeks to offer. *See* 47 U.S.C. § 251(d)(2).[14] The Act does not prohibit the FCC from unbundling *all* elements of a network if, such relief is necessary.

BellSouth also suggests that because the Act contemplates that ILECs must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail," the Act by implication prohibits the structural separation of an ILEC's wholesale and resale operations. However, as noted in *Bell Atlantic*, nothing in the federal law requires the states to share the Congress' expectations that competition would be furthered by imposing resale obligations on ILECs. *See, Id.* at 464. Rather, the Act expressly reserves to the states the authority to impose additional requirements designed to further local competition. *See,* 47 U.S.C. § 261(c); 47 U.S.C. § 601(c). That is what is sought in this proceeding. Neither the Act, nor other federal legislation, preempts the field.

B. Structural Separation Does Not Violate the Commerce Clause.

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[14] As mentioned above, § 251(d)(3) preserves the state commissions' authority to also take action consistent with the Act.

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

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

Where, as here, a state requirement such as a structural separation order does not directly regulate interstate commerce, and has only indirect or incidental effects on interstate commerce, and regulates evenhandedly, the state requirement is upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This principle is reflected in *Southern Pacific Co. v. State of Arizona,*325 U.S. 761 (1945), the case upon which BellSouth principally relies, where the Court noted that "when the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation. . . such regulation has been held to be within state authority." *See, Southern Pacific Co,* 325 U.S. at 767 (1945).[15]

In *Southern Pacific*, the Supreme Court determined that Arizona's stated "safety" interest in limiting the length of interstate passenger and freight trains which passed through the state was outweighed by the strong competing national policy of promoting efficient railway service. *Southern Pacific,* 325 U.S. at 773.[16] Accordingly, the state's requirement that *Southern Pacific* reconstitute its trains in the interest of local public "safety" when passing through the State imposed an undue burden on interstate commerce and the national interest of achieving efficient rail service, particularly where the state did not adequately present facts showing a correlation between train length and safety. *See Id.*

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

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

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

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

The fact that BellSouth may potentially face varying requirements in different states has no merit. As a public utility, subject to the jurisdiction of each state's public utility commission,

BellSouth is no doubt already subject to varying requirements among the states in which it operates. In exchange for the privilege of being able to provide telephone service, BellSouth is subject to the varying regulatory requirements imposed by the states in accordance with each state's determination of what the public interest requires. If the potential for varying state requirements resulted in an "undue burden" for Commerce Clause purposes then *every* state-specific requirement imposed by every public utility commission would potentially violate the Commerce Clause.

BellSouth's remaining argument is that a structural separation would require the issuance of stock and that this relief violates the Commerce Clause to the extent applied "to a company doing business in multiple states."[17] However, even if the issuance of stock was required in this proceeding, such relief would not violate the Commerce Clause. Indeed, the cases BellSouth offers in support do not apply to the circumstances of this case, and do not support the position that the Commission's action in this instance over a matter primarily involving intrastate local competition would violate the Commerce Clause.

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

[17] Motion at 21.

BellSouth's presence in Florida is not so minimal as to fall within the ambient of these cases nor would the Commission action requested here, relating to local telephone competition, violate the Commerce Clause.

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

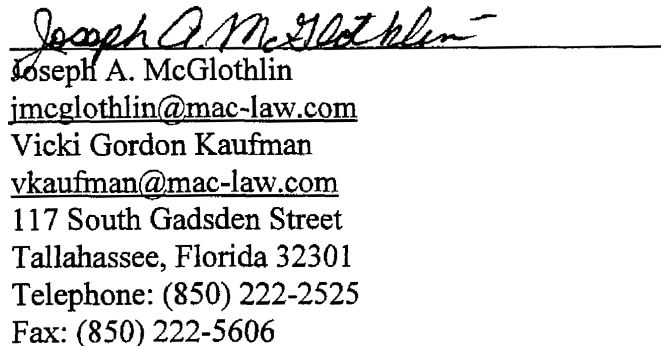
IV. FCCA'S PLEADING COMPLIES WITH COMMISSION RULES. BELLSOUTH'S MOTION TO STRIKE SHOULD BE DENIED.

In its Motion to Dismiss or Strike AT&T's Petition, which it incorporated by reference when it responded to FCCA's pleading, BellSouth claims that AT&T's pleading does not comply with Commission rules and therefore should be stricken and refiled. To the extent BellSouth intends to direct this contention to FCCA, FCCA's pleading does conform to the applicable Commission rules. Rule 25-22.036(3)(b), Florida Administrative Code, requires that a petition contain the rule, order,

or statute that has been violated; the actions that constitute the violation; the name and address of the person against whom the complaint is lodged; and the specific relief requested, including any penalty sought. FCCA's pleading does just that (in the course of supporting the petition filed by AT&T) and therefore conforms to the Commission's rules.

V. CONCLUSION

BellSouth's Motion to Dismiss and Alternative Motion to Strike FCCA's request for an investigation of structural incentives, filed by FCCA in support of AT&T's Petition, should be denied.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Florida Competitive Carriers Association's Response in Opposition to Motion to Dismiss, or in the Alternative, Motion to Strike of BellSouth Telecommunications, Inc. has been furnished by U.S. mail or by hand-delivery (*) this 2nd day of May, 2001 to the following:

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