

**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.

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Docket No. 010345-TP

Filed: July 9, 2001

**REPLY TO BELLSOUTH'S OPPOSITION TO MOTION TO  
CLARIFY AND AMEND AT&T'S PETITION FOR  
STRUCTURAL SEPARATION**

AT&T Communications of the Southern States, Inc., TCG South Florida, Inc., and MediaOne Florida Telecommunications, Inc. (collectively, "AT&T"), submits this Reply to BellSouth's Opposition to Motion to Clarify and Amend AT&T's Petition for Structural Separation and states as follows:

1. On July 2, 2001, BellSouth Telecommunications, Inc. ("BellSouth") filed its Opposition to Motion to Clarify and Amend AT&T's Petition for Structural Separation.

2. The longstanding policy in Florida is that leave to amend pleadings shall be liberally given. *See Carter v. Ferrell*, 666 So. 2d 556, 557 (Fla. 2d DCA 1995). *Accord Atlantic Coast Line R.R. Co. v. Edenfield*, 45 So. 2d 204, 205 (Fla. 1950); *New River Yachting Center, Inc. v. Bacchiocchi*, 407 So. 2d 607, 609 (Fla. 4th DCA 1981). Absent exceptional circumstances, leave to amend pleadings should be granted so that the case may be heard on the merits; to rule otherwise is an abuse of discretion. *See Scott v. Trevett*, 751 So. 2d 616 (Fla. 4th DCA 1999)(holding that trial

court abused its discretion by denying a party's third motion for leave to amend, raised on the first day of trial); *Wayne Creasy Agency, Inc. v. Maillard*, 604 So. 2d 1235, 1236 (Fla. 3d DCA 1992)("A denial of leave to amend a pleading is an abuse of discretion where the proffered amendment indicated that a plaintiff can state a cause of action.").

3. This Commission has repeatedly recognized Florida's strong policy in favor of permitting amendments. *See, e.g., In re: Petition by Telenet of South Florida*, Order No. PSC-98-0332-PCO-TP, issued February 26, 1998, Docket No. 970730-TP, 1998WL178840 (copy attached). In *Telnet*, the petitioner sought to amend, nearly five months after the filing of its original petition, to "make more clear the relief it pursues and to facilitate a Commission decision that is fully dispositive of the parties dispute." *Id.* at p. 5. BellSouth, the respondent in the proceeding, opposed the proposed amendment. Relying upon Florida Rule of Procedure 1.190 and numerous judicial decisions interpreting Florida law as it relates to amendment of pleadings, the Commission granted petitioner's motion for leave to amend, stating:

the courts inform that the Commission has broad discretion to allow amendment of pleadings and that the Commission should follow a policy of allowing pleadings to be freely amended, if the privilege to amend has not been abused, in order that disputes may be resolved on their merits

*Id.* at 2. The holding in *Telnet*, based on a well settled body of Florida caselaw dealing with amendments of pleadings, makes clear that BellSouth's opposition to the present motion is without legal basis.

4. The grounds for allowing the amendment in this proceeding are at least as strong as in *Telenet* because the proposed amendment comes at a time when BellSouth has not yet even responded to the factual allegations in AT&T's petition. Pursuant to Florida Rule of Civil Procedure 1.190, which this Commission has expressly relied upon as authority in deciding motions for leave to amend, parties have an unconditional right to amend a pleading in the preliminary stage of a case where an opponent has not yet answered the allegations of the original pleading. *See Fla.R.Civ.P. 1.190* ("A party may amend a pleading once as a matter of course at any time before a responsive pleading is served . . ."). This rule simply codifies the practical reality that no substantial prejudice arises from the amendment of a pleading when the opposing party has not yet even admitted or denied the allegations of the pleading as to which amendment is sought.

5. Rather than confront the overwhelming legal precedent holding that leave to amend is warranted under the circumstances of this proceeding, BellSouth directs the Commission to one decision (from 1949) which deals with circumstances that have no bearing on this case, *Ward v. Drawdy*, 41 So. 2d 877 (Fla. 1949). In *Ward*, the Court declined to allow the plaintiff to amend her pleadings after she had testified at trial because the factual testimony she presented at trial contradicted the allegations of her pleadings (and her own pretrial testimony), observing that, "by the time she got around to submitting the amended bill the liberality in allowing such amendments had diminished to the point where she was entitled to very little consideration on the part of the chancellor." *Id.* at 879. *Ward* has no application in this proceeding, where the respondent has not even answered the allegations against it, no pretrial testimony or other discovery has been taken, no

trial date has yet been scheduled and the amendment relates only to the remedy sought and not to the factual basis of the underlying pleading.

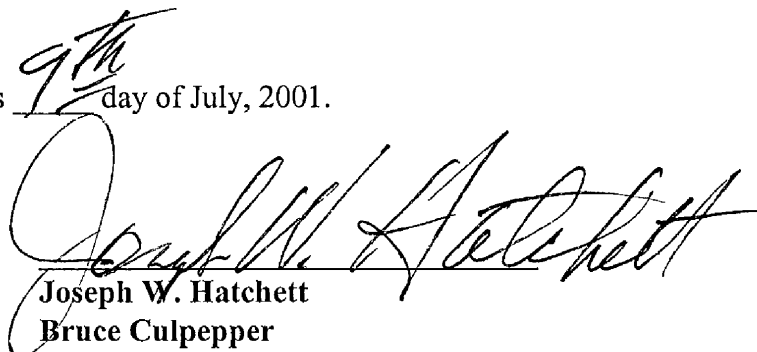
6. BellSouth's remaining objections to the amendment are equally without merit. Its claim of prejudice from having "expended considerable time and effort preparing its defense to only a request for structural separation" doesn't even make sense. BellSouth has declined to answer the factual allegations of AT&T's petition. Instead, BellSouth has challenged the jurisdiction of the Commission to even consider AT&T's allegations. If BellSouth believes that this Commission is legally without power to order structural separation, even upon a factual showing that this remedy is essential to the emergence of meaningful competition in the market for local telephone service in Florida, with all of its attendant benefits to Florida consumers, an amendment to AT&T's petition does nothing to alter the record or the issues upon which BellSouth's jurisdictional motion will be decided. An amendment to AT&T's petition has no effect whatsoever on the Commission's jurisdiction to consider structural separation, a purely legal issue. Furthermore, the factual allegations of AT&T's petition are unchanged and any defense BellSouth has prepared to those allegations will apply equally to both the original and amended petition.

7. Although BellSouth accuses AT&T of "dilatory" tactics, its opposition to the motion for leave to amend has no legal basis and can only be explained by a desire to delay these proceedings. Notwithstanding the rhetoric of its recent filings, BellSouth presumably recognizes that this Commission may find, based on the specific allegations of AT&T's petition, that the conflict of interest inherent in its dual roles as a wholesaler of local telecommunications services to ALECs,

and as a competitor of those same ALECs in the retail market for the sale of local telecommunications services to consumers, is the single most important reason why "competition in Florida's local market is virtually absent." Petition at pp. 15-16. Moreover, BellSouth must recognize the futility of arguing that this Commission should decide, at a stage of the proceedings where it must assume all of the allegations in AT&T's petition to be true, that it cannot order any remedy to address circumstances which, on their face, completely undermine the Commission's mandate to foster local competition. These are the reasons BellSouth has taken the extraordinary step of declining to consent to an amendment at this early stage of the proceedings. BellSouth fears that the amendment deprives it of the arguments upon which its motion to dismiss (and the associated delay of proceedings on the merits) depend.

8. Accordingly, for the reasons discussed herein and in its earlier filed motion, AT&T respectfully request that this Commission grant the Motion to Clarify and Amend AT&T's Petition for Structural Separation.

Respectfully submitted this 9<sup>th</sup> day of July, 2001.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and correct copies of the foregoing were served U.S. mail

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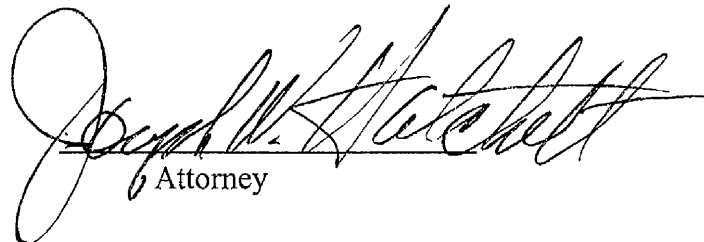
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