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August 7, 2001

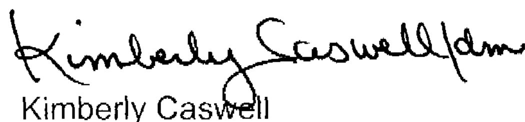
Ms. Blanca S. Bayo
Division of Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 010345-TP
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.

Dear Ms. Bayo:

Please find enclosed for filing an original and 15 copies of Verizon Florida Inc.'s Brief of Jurisdictional Issues in the above matter. Also enclosed is a diskette with a copy of the Brief in Word 97 format. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at 813-483-2617.

Sincerely,



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## 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: August 7, 2001 |

## VERIZON FLORIDA INC.'S BRIEF OF JURISDICTIONAL ISSUES

On March 21, 2001, AT&T Communications of the Southern States, Inc. and its affiliates (AT&T) filed a petition asking the Commission to order the separation of BellSouth Telecommunications, Inc. (BellSouth) into "distinct wholesale and retail subsidiaries." (Petition of AT&T Communications of the Southern States, Inc., *et al.* for Structural Separation of BellSouth Telecommunications, Inc. (AT&T Petition), at 4). The Commission held a workshop to discuss AT&T's proposal on July 30 and 31. During the workshop, BellSouth pointed out that if the Commission granted AT&T's request, then the Commission would have no intrastate jurisdiction over the new wholesale company. At the conclusion of the workshop, the Commission asked interested parties to brief the issue of the scope of the Commission's jurisdiction, if any, over the separated entities.[1]

As Verizon Florida Inc. (Verizon) explains below, BellSouth was correct. If the Commission splits BellSouth into retail and wholesale entities, the Commission would have no jurisdiction over the wholesale company, under either state or federal law.

[1] The jurisdictional issue briefed here is separate from the question of whether the Commission has jurisdiction to even order structural separation. It does not, as explained in BellSouth's Motion to Dismiss AT&T's Petition, as well as in BellSouth's and Verizon's workshop presentations.

## I. The Commission Would Have No Jurisdiction over the Wholesale Company.

This Commission's jurisdiction is limited to regulation of "telecommunications companies." (Fla. Stat. ch. 364.01.) The definition of "telecommunications company" includes:

> Every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. The term "telecommunications company" does not include:
> (a) An entity which provides a telecommunications facility exclusively to a certificated telecommunications company.

(Fla. Stat. ch. 364.02(12).)

Under the plan advanced by AT&T and other alternative local exchange carriers (ALECs), BellSouth would be forced to establish fully separate wholesale and retail affiliates. The wholesale entity would continue to own and operate the network facilities necessary to provide local service, while the retail company would offer finished retail services to end users. As AT&T explains, "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." (AT&T Petition at 23.)

In other words, the new wholesale company would provide facilities exclusively to certificated telecommunications companies, and would not provide any two-way telecommunications services to the public for hire. Plainly, then, the wholesale company would fall outside the above-quoted definition of telecommunications

company, and outside the scope of this Commission's jurisdiction. It would be an unregulated entity.[2]

As for the retail company formed upon structural separation, while it would still be regulated, it would likely be regulated as an ALEC, not an ILEC. Indeed, at the workshop, Mr. Gillan acknowledged that, under his structural separation proposal, the separate retail entity would be just another ALEC. This status would require resolution of carrier-of-last-resort obligations and universal service issues.

In short, under Florida law, structural separation would mean elimination of this Commission's regulation of the wholesale operation and a change in regulation for retail operations. By definition, the wholesale operation could not be regulated by this Commission under Chapter 364.

## II. The 1996 Act Does Not Grant the Commission Authority Over a Wholesale Company.

At the workshop, the ALECs' lawyers were unable to rebut the straightforward conclusion that Chapter 364 gives the Commission no authority over a strictly wholesale entity, because it would not be a telecommunications company. Instead, AT&T's Mr. Meros speculated that, even if Florida law did not confer jurisdiction to regulate the wholesale company, the 1996 amendments to the Communications Act of 1934 would. That is incorrect.

[2] Given that the wholesale entity would be deregulated, it is nonsensical to conclude that the Commission has the authority to order structural separation in the first instance. As Mr. Lackey pointed out, in order to find that the Commission has the implied authority to break up BellSouth, one must assume that the Legislature intended to allow the Commission to prevent anti-competitive behavior by deregulating the entity accused of that behavior.

There is no authority holding or even suggesting that the federal Act provides a state Commission independent jurisdiction over companies it cannot regulate under its own state law. To the contrary, the Act assumes the Commission already has authority over the companies subject to the obligations in the Act. (*See, e.g.*, 47 U.S.C. secs. 251(d)(3) and 252(f)(2).) But "the Commission derives its power solely from the legislature.... If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." United Telephone Co. of Florida v. Public Service Comm'n., 496 So. 2d 116, 118 (Fla. 1986); see also City of Cape Coral v. GAC Utils., Inc. of Florida, 281 So. 2d 493, 496 (Fla. 1973). As explained above, the Legislature did not give the Commission authority to regulate a strictly wholesale company.

Even if the Commission accepted the novel theory that the federal Act is an independent source of state jurisdiction, the "ILEC" obligations of the Act would not extend to the new wholesale company. The Act's federal regulatory scheme hinges on the definition of "incumbent local exchange carrier" (ILEC). Under the Act, only ILECs are subject to the obligations of section 251(c). (47 U.S.C. sec. 251(c).)[3]

Under the Act,

> the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—
> (A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and
> (B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

[3] As the Commission knows, section 251 is the source of the duties to interconnect with competitors' networks (47 U.S.C. sec. 251(c)(2)); to provide unbundled access to network elements (47 U.S.C. sec. 251(c)(3)); to offer telecommunications services for resale at wholesale rates (47 U.S.C. sec. 251(c)(4)); and to provide physical collocation (47 U.S.C. sec. 251(c)(6)).

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(47 U.S.C. sec. 251(h)(1).)

The new wholesale company would not be an ILEC. The wholesale company AT&T proposes, of course, does not exist. Thus, it could not have been providing exchange service when the Act was adopted as required by section 251(h)(1)(A). Indeed, a strictly wholesale company would not meet the ILEC criteria even if it had been established before the Act was adopted, because those criteria contemplate a company providing retail local exchange service—not a company specifically constituted *not* to provide such service. The United States District Court for the District of Connecticut has held in regard to a structural separation proposal for Southern New England Telephone Company (SNET) that the divided SNET wholesale entity would not have 251(c) obligations. *MCI TeleComms. Corp. v. Southern New Eng. Tel. Co.*, 275 F.Supp. 2d 326 (1998).

There's no room to argue, either, that the FCC could rule that the wholesale company should be treated as an ILEC under section 251(h)(2).[4] Even if it were classified as a "local exchange carrier," (which is dubious, at best), it would not replace the ILEC or occupy a comparable market position. Again, the proposed wholesale company would be a completely separate entity expressly designed *not* to replace the ILEC providing retail local exchange services.

Because the wholesale company would not be an ILEC, it would not be subject to the provisions of section 251(c). So even aside from the issue of state jurisdiction,

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[4] The FCC may, by rule, determine that a "local exchange carrier" is to be treated as an ILEC if the carrier occupies a market position "comparable to the position occupied by the [ILEC] and it has "substantially replaced an ILEC." (47 U.S.C. sec. 251(h)(2).)

the Commission could not, in any event, compel the wholesale company to comply with the Act's resale, unbundling, collocation, or other open-access obligations.

Certainly, Congress did not intend this outcome when it adopted the Act. The Act's provisions were carefully created to achieve a sensible and sustained transition to full competition in the local exchange, while maintaining universal service. Moreover, the ALECs' structural separation position was rejected in drafting the Act. As Mr. Leach pointed out during the workshop, the Act's drafters had extensive discussions about the wisdom of requiring the ILECs to split themselves along wholesale and retail lines, and declined to take any such mandatory action.

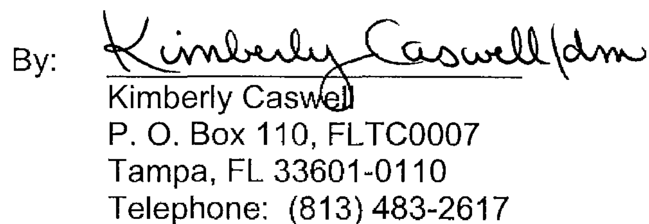
As then-Chairman Kennard observed, "Congress had an opportunity to adopt a wholesale-retail distinction", but chose not to do so. "That's not the way the Telecom Act was set up." (*See* Verizon's workshop handouts, structural separation quotes, *citing* Comm. Daily, Jan. 2001.) Attempting to graft a separate subsidiary requirement onto the Act, where it so clearly does not belong, will open a Pandora's box of litigation and cause irreversible disruption of the telecommunications industry in Florida.

Finally, if a state commission were to impose structural separation, the FCC would be required by the terms of the Act to preempt it. Section 253 of the Act requires the Commission to preempt any state legal requirement that "may . . . prohibit the ability of any entity to provide any . . . telecommunications service." While the structural separation proposal presented to the Commission was notably short on detail, it is grounded on the concept that the newly created wholesale company would be prohibited from providing retail service. And that wholesale company would undeniably

be an "entity," as a matter of both plain language and Commission precedent.[5] Thus, under the plain language of section 253, foreclosing the wholesale company from providing retail service is legally impermissible.

In conclusion, the position advanced by AT&T would divest the Commission of intrastate authority of the wholesale entity and the 1996 Act does not fill the void.

Respectfully submitted on August 7, 2001.



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[5] *See, e.g.*, Random House Webster's College Dictionary 446 (1995) (defining "entity" as "something that exists as a distinct, independent, or self-contained unit"); *accord In re Ameritech*, 12 FCC Rcd 3855, 3859, ¶9 (1997) (defining "entity" for purposes of §275(a)(2) as requiring "an independent legal existence"), *vacated and remanded*, *Alarm Indus. Communications Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997) (Commission's understanding of "entity" was too *narrow*; the term must be interpreted in light of statutory purpose to limit expansion of BOC alarm monitoring services through acquisitions, and it could refer to "a particular and discrete unit" of a company, even if that unit was not separately incorporated), *decision on remand*, *In re Ameritech (Order on Remand)*, 13 FCC Rcd 19046, 19052, ¶10 (1998) (considering statutory purpose, Commission would apply broader definition of "entity" as "any organizational unit").

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of Verizon Florida Inc.'s Brief of Jurisdictional Issues in Docket No. 010345-TP was sent via U.S. mail on August 7, 2001 to the parties on the attached list.

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