

JAMES MEZA III
Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5561

August 7, 2001

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

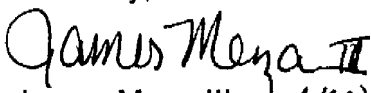
Re: Docket No. 010345-TP (Structural Separation of BellSouth)

Dear Ms. Bayó:

Enclosed is an original of BellSouth Telecommunications, Inc.'s Post Workshop Comments, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


James Meza III (KA)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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**CERTIFICATE OF SERVICE
Docket No. 010345-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

U.S. Mail this 7th day of August, 2001 to the following:

Jason Fudge
Beth Keating
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Time Warner Telecom of Florida, L.P.
c/o Carolyn Marek
233 Bramerton Court
Franklin, Tennessee 37069
Tel. No. (615) 376-6404
Fax. No. (615) 376-6405
carolyn.marek@twtelecom.com

Peter M. Dunbar, Esq.
Karen M. Camechis, Esq.
Pennington, Moore, Wilkinson,
Bell & Dunbar, P.A.
P.O. Box 10095 (32302)
215 South Monroe Street, 2nd Flr.
Tallahassee, FL 32301
Tel. No. (850) 222-3533
Fax. No. (850) 222-2126
Counsel for Time Warner
Pete@penningtonlawfirm.com
Karen@penningtonlawfirm.com

Ms. Rhonda P. Merritt
AT&T Communications
AT&T Digital Phone
TCG South Florida
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
Tel. No. (850) 425-6342
Fax. No. (850) 425-6361
rpmerritt@att.com

Michael A. Gross
Florida Cable Telecomm. Assoc.
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303
Tel. No. (850) 681-1990
Fax. No. (850) 681-9676
mgross@fcta.com

Maxcess, Inc.
Ms. Doris Franklin
315 South Calhoun Street
Suite 314
Tallahassee, FL 32301-1837
Tel. No. (850) 513-1020
Fax. No. (850) 513-1022
dfranklin@maxcess.net

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman,
Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
jmcglothlin@mac-law.com
vkaufman@mac-law.com
Attys. for FCCA
Attys. for ACCESS

Brian D. Sulmonetti
MCI Telecommunications Corp.
Concourse Corporate Center Six
Six Concourse Parkway, Suite 3200
Atlanta, GA 30328

Matthew Feil
Florida Digital Network, Inc.
390 North Orange Avenue
Suite 2000
Orlando, FL 32801
Tel. No. (407) 835-0460
mfeil@floridadigital.net

Michael Sloan
Swidler Berlin Shereff Friedman, LLP
3000 K Street
Suite 300
Washington, D.C. 20007-5116
Tel. No. (202) 295-8458
mcsloan@swidlaw.com

Richard D. Melson
Hopping Green Sams & Smith, P.A.
P.O. Box 6526
Tallahassee, FL 32314
Tel. No. (850) 425-2313
Atty. for MCI WorldCom

Donna McNulty
MCI WorldCom, Inc.
325 John Knox Road
Suite 105
Tallahassee, FL 32303
Tel. No. (850) 422-1254

Joseph W. Hatchett
Fred R. Dudley
Bruce Culpepper
Akerman, Senterfitt & Edison, P.A.
301 South Bronough, Suite 200
Tallahassee, Florida 32301-1707
Tel. No. (850) 222-3471
Fax. No. (850) 222-8628
Attys. for AT&T, TCG & MediaOne

John F. O'Sullivan
SunTrust International Center
28th Floor
One Southeast Third Avenue
Miami, Florida 33131-1704
Tel. No. (305) 374-5600
Fax. No. (305) 374-5095
Attys. for AT&T, TCG & MediaOne

George N. Meros, Jr.
Lori S. Rowe
Gray, Harris & Robinson
301 South Bronough, Suite 600
Post Office Box 11189
Tallahassee, FL 32302
Tel. No. (850) 222-7717
Fax. No. (850) 222-3494
Attys. for AT&T

Thomas A. Cloud
Gray, Harris & Robinson
301 East Pine Street, Suite 1400
Post Office Box 3068
Orlando, FL 32802-3068
Tel. No. (407) 843-8880
Fax. No. (407) 244-5690
Atty. for AT&T

William B. Graham, Esq.
McFarlain & Cassidy, P.A.
215 South Monroe Street
Suite 600
Tallahassee, FL 32301
Tel. No. (850) 222-2107
Fax. No. (850) 222-8475
Atty. for AT&T

IDS Telcom L.L.C.
1525 Northwest 167th Street
Second Floor
Miami, Florida 33169

Suzanne Summerlin, Esq.
1311-B Paul Russell Road
Suite 201
Tallahassee, Florida 32301

Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Purnell &
Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302-0551
Tel. No. (850) 681-6788
Fax. No. (850) 681-6515
Represents US LEC

Mr. Jeremiah T. Needham
Regulatory Manager
US LEC Corporation
Morrocroft III
6801 Morrison Boulevard
Charlotte, NC 28211
Tel. No. (704) 319-1944
Fax. No. (704) 602-1944

Covad Communications Company
Ms. Catherine F. Boone
10 Glenlake Parkway
Suite 650
Atlanta, GA 30328-3495
Tel. No. (678) 222-3469
Fax. No. (240) 525-5673
cboone@covad.com

Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson
Decker Kaufman Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
Atty. for Covad
vkaufman@mac-law.com

Maureen Flood
CompTel
Director of Regulatory and State Affairs
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
Tel. No. (202) 296-6650
Fax. No. (202) 296-7585

Robert J. Aamoth
Andrew M. Klein
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Washington, D.C. 20036
Tel. No. (202) 955-9600
Fax. No. (202) 955-9792
RAamoth@KelleyDrye.com
AKlein@KelleyDrye.com

D. Mark Baxter
Stone & Baxter, LLP
557 Mulberry Street, Suite 1111
Macon, Georgia 31201-8256
Represents ACCESS

James Meza III

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of AT&T Communications of) Docket No. 010345-TP
the Southern States, Inc., TCG South)
Florida, and MediaOne Florida)
Telecommunications, Inc. for)
Structural Separation of BellSouth)
Telecommunications, Inc.) Filed: August 7, 2001

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
POST WORKSHOP COMMENTS**

Pursuant to the Florida Public Service Commission's ("Commission") request at the workshop held in Docket No. 010345-TP on July 30, and 31, 2001, BellSouth Telecommunications, Inc. ("BellSouth") submits the following comments on the specific issue of whether the definition of relevant terms in Section 364, Florida Statutes and the Telecommunications Act of 1996 ("Act") evidences a lack of intent by the Florida Legislature to grant the Commission the power to order the structural separation of BellSouth.

A. Section 364, Florida Statutes

It is well settled that the Commission is a creature of statute. City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973). "As such, the Commission's powers, duties, and authority are those and only those that are conferred expressly or impliedly by statute of the State. Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof." Id.

There can be no question that the Commission does not have the express authority to order structural separation. Thus, the relevant inquiry is whether the Commission has the implied authority to break up BellSouth. Any implied

authority must be derived from "fair implication and intendment incident to" any express authority. See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917); State v. Louisville & N. R. Co., 49 So. 39 (Fla. 1909).

In order to determine the scope of the implied power that has been given to the Commission, particularly in conjunction with its duties under Section 364.01, the intent of the legislature must be ascertained. See State, Dep't. Transp. v. Mayo, 354 So. 2d 359, 360 (Fla. 1978) (ascertaining Legislature's intent in determining whether the Commission had the authority to use rate making as a means of regulating the safety and operations of motor carriers). To determine legislative intent, the Commission must view the entire statute and give full effect to all statutory provisions. State v. Kliphouse, 771 So. 2d 16 (Fla. 4th DCA 2000). If the legislature did not intend the results mandated by the statute's plain language, then the appropriate remedy is for it to amend the statute. Seagrave v. State, 2001 WL 776269 *4 (Fla. 2001).

A review of the pertinent sections of Chapter 364, which BellSouth addressed in its original memorandum in support of its Motion to Dismiss, establishes that the Legislature did not intend to give the Commission the power to structurally separate BellSouth. However, during the recently completed workshop an issue was raised as to whether there was even more, and additional, evidence that the Legislature did not intend to give the Commission the implied authority to break up BellSouth, involving the language of Section 364.02, Florida Statutes. The purpose of these comments is to address that additional evidence.

Section 364.01, relating to the authority of the Commission, provides in pertinent part that the Commission (1) “shall exercise over and in relation to **telecommunications companies** the powers conferred by this chapter”; and (2) “[i]t 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**.” § 364.01(1), (2), Florida Statutes (emphasis added).

Section 364.02(12) defines a “telecommunications company” as “every corporation, partnership, and person . . . offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility.” § 364.02(12), Florida Statutes. Taken at face value, if a company does not provide two-way telecommunications services, such a company would not be a telecommunications company subject to the regulation of the Commission. To make this point even more clear the Legislature went further, and explicitly excluded from the definition of “telecommunications company” “an entity which provides a telecommunications facility exclusively to a certificated telecommunications company.” § 364.02(12)(a), Florida Statutes.

The exception clearly addresses the situation with which the Commission is very familiar, where a company is a “carrier’s carrier.” That is, the definition, and this Commission’s past practices, excludes from the Commission’s regulation, companies that do not sell services directly to the public, but that only sell service to other companies that are certificated by this Commission to sell services to end users. The Commission has previously recognized that, the

policy behind this exception is that “where a certificated telecommunications company is serving the public, there is an absence of regulatory need to certificate a telecommunications facility exclusively serving that certificated company.” Petition for Declaratory Statement Regarding Designation as Telecommunications Company for Providing Proposed Carrier-to –Carrier, POP-to-POP Transport to Telecommunications Companies by Interstate FiberNet, Order No. PSC-95-1270-FOF-TP, Docket No. 950890, Oct. 17, 1995, 1995 WL 620181 at *1.

Indeed, in accordance with the clear language of Section 364.02(12), the Commission recently held that a company, which intended to provide a central interconnection point that permitted the real time provisioning and delivery of bandwidth between sellers and purchases of bandwidth capacity, would not be a “telecommunications company” under Section 364.02(12) if that company provided facilities to a certificated “telecommunications company.” In re: Petition for Declaratory Statement by LightTrade, Inc., Pursuant to 120.565, F.S., Concerning Applicability of the Term “Telecommunications Company” as that Term Is Defined in Section 364.02(12), F.S., to Its Planned Activities, Order No. PSC-01-0369-DS-TP, Docket No. 001672-TP, Feb. 12, 2001, 2001 WL 193730 at 2 (“LightTrade Order”).

The intent of the Legislature with regard to the implied power of the Commission to break up BellSouth can clearly be ascertained from the Legislature’s decision to exclude “carrier’s carriers” from the Commission’s regulation. If the Commission structurally separated BellSouth, the new

wholesale company ("NEWCO") would only be providing telecommunication facilities to certified carriers in Florida. NEWCO would not be providing facilities to the public. As a result, based on the definitions the Legislature adopted in Section 364, NEWCO would not be a "telecommunications company" because (1) it would not be providing "two-way telecommunications service to the public for hire"; and (2) it would be providing telecommunications facilities exclusively to certificated telecommunications carriers. If NEWCO is not a "telecommunications company," then the Commission does not have jurisdiction or authority over NEWCO, because, as stated above, the Commission only has the power to regulate "telecommunications companies."

Therefore, to find that the Commission has the implied power to order the structural separation of BellSouth would require a finding that the Legislature intended to allow the Commission to deregulate NEWCO. The inconsistency is unpalatable. AT&T and the FCCA ask that BellSouth be broken up because the wholesale portion of BellSouth is engaging in alleged anticompetitive activity in favor of its retail operations. If the Commission does break BellSouth up, the wholesale entity would not be subject to the jurisdiction of the Commission. When attempting to ascertain the intent of the Legislature, it appears unreasonable that the Legislature would have intended the Commission to deregulate the very entity that AT&T and the FCCA accuse of anticompetitive behavior.

Clearly, in implementing Chapter 364 and its goal to promote competition in the State of Florida, the Legislature did not intend to remove from the

Commission's authority the ability to regulate the sole entity that enables competitors to provide telecommunications service in BellSouth's territory. For this reason, it is clear that the Legislature did not intend to grant the Commission the implied power to order the structural separation of BellSouth.

Is there any other way to read the definitional sections of the law cited by BellSouth, such that a different conclusion could be reached? BellSouth expects that AT&T and the FCCA will attempt to interpret the law in a manner that results in the wholesale company remaining regulated, even in the face of the clear statutory language, probably by citing to Section 364.33, Florida Statutes, and Teleco Comm. Co. v. Clark, 695 So. 2d 304 (Fla. 1997). Neither Section 364.33 nor Teleco Comm. Co., however, supports such a conclusion.

Section 364.33 provides that "[a] person may not begin the construction or operation of any telecommunications facility . . . for the purpose of providing **telecommunications services to the public** . . . without prior approval" by the Commission. § 364.33, Florida Statutes (emphasis added). As stated above, NEWCO would only be operating telecommunications facilities for the purpose of providing telecommunications services to certificated telecommunication companies and not to the public. As made clear by the LightTrade Order, such service does not constitute providing service "to the public." Consequently, Section 364.33 and its requirement that a company obtain Commission approval through certification before operating telecommunications facilities would not apply to NEWCO because NEWCO would not be providing service "to the public."

Likewise, Teleco Comm. Co., which was not based on the 1995 revisions to Section 364, is also inapplicable to the case at hand. In that case, the Florida Supreme Court, without any discussion or analysis, affirmed the Commission's decision that Telco Communications Company ("Telco"), which was an uncertified company that owned inside wire to a condominium building and leased it to the condominium owners association, was a "telecommunications company" and thus was required to obtain a certificate from the Commission. 695 So. 2d at 307.

The Commission determined that, based on Section 364.33, Telco was a "telecommunications company" because it owned wire that was used to provide telephone service to the condominium residents. In re: Teleco Communications Company, Order No. PSC-94-1304-FOF-TP, Docket No. 911214-TP, 1994 WL 596246 at *6 (Oct. 21, 1994). The Commission rejected Teleco's argument that it was not a "telecommunications company" under 364.2(12)(a),¹ because (1) the condominium association was not a certificated company; and (2) the exceptions to the definition of "telecommunications company" were not in effect at the time Teleco entered into the lease with the association. Id.

This case is easily distinguishable from the instant matter for the following reasons. First, Teleco was required to obtain a certificate under Section 364.33 because it provided a telecommunications facility, inside wire, to the public. As established above, NEWCO, however would not be providing telecommunications facilities to the public. Instead, NEWCO would only be

¹ At the time of the Commission's Order, 364.2(12)(a) was codified as 364.02(7). Order No. PSC-94-1304-FOF-TP at 6.

providing facilities to certified telecommunication companies. Second, unlike Teleco, NEWCO would come within the exceptions to the definition of “telecommunications company” because (1) the exceptions are currently in effect and thus would be applicable to NEWCO; and (2) NEWCO would only provide facilities to certificated telecommunication companies and not to the public. Accordingly, Teleco Comm. Co., does not support a finding that, if the Commission structurally separated BellSouth, NEWCO would be subject to the Commission’s jurisdiction.

B. The Telecommunications Act of 1996

In addition to the state law questions, there was some suggestion that the 1996 Act might provide shed some light on this aspect of the issues pending before the Commission. That turns out not to be the case. Although not necessary to determine whether the Florida Legislature intended to grant the Commission the authority to structurally separate a company, a review of the definitions contained in the Act leads to the same inescapable conclusion – NEWCO would not be subject to the jurisdiction of the Commission.

“Telecommunications carrier” is defined in the Act as any “provider of telecommunications services” 47 U.S.C. § 153(44). “Telecommunications service” is defined as the “offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). Thus, under the Act, in order to constitute a “telecommunications carrier” a company must be

providing telecommunications service to the public for a fee, essentially the same issue raised by the state statute.

As made clear above, NEWCO would not be providing telecommunications service to public; rather, it would only be providing facilities on a wholesale basis to certified telecommunications companies. Accordingly, even under the definitions set forth in the Act, NEWCO would not be considered a "telecommunications company" or "telecommunications carrier" so as to be subject to the jurisdiction of the Commission.²

CONCLUSION

In addition to the numerous arguments previously made by BellSouth, a review of the definition of relevant terms in both Section 364, Florida Statutes and the Act, further establishes that the Commission lacks the authority to order structural separation. The foregoing practical analysis makes two things very clear: (1) NEWCO would not be subject to the jurisdiction of the Commission; and (2) to find that the Legislature intended to give the Commission the implied authority to order structural separation requires a finding that the Legislature intended to promote competition and the public health, safety, and welfare by deregulating the provisioning source of all telecommunications services in

² Indeed, there is a serious question as to whether NEWCO would be considered a local exchange company subject to the requirements of Section 251 and 252 of the Act. The Act defines a LEC as a "person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26). "Telephone exchange service" is defined as (a) service within an exchange "to furnish subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge;" or (b) comparable service "by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. §153(47). The Act defines "exchange access" as the "offering of access to telephone exchange services or facilities for the purpose of the originate or termination of telephone toll services." 47 U.S.C. §153(16). It is arguable that an entity that only provides facilities to carriers and does not provide telecommunications services to the public would not be providing "telephone exchange service" or "exchange access."

BellSouth's territory. There is nothing in the present law to suggest that the Legislature intended such a result. Since there is nothing in the law that either expressly or by necessary implication authorizes the Commission to break up BellSouth, the Commission should grant BellSouth's Motion to Dismiss AT&T's and FCCA's request for structural separation.

Respectfully submitted this 7th day of August, 2001.

BELLSOUTH TELECOMMUNICATIONS, INC.

NANCY B. WHITE
JAMES MEZA III
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

R. DOUGLAS LACKEY
E. EARL EDENFIELD JR.
PATRICK W. TURNER
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0747

404425