

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 010345-TP

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In the Matter of

PETITION BY AT&T COMMUNICATIONS OF  
THE SOUTHERN STATES, INC., TCG  
SOUTH FLORIDA, AND MEDIAONE FLORIDA  
TELECOMMUNICATIONS, INC. FOR  
STRUCTURAL SEPARATION OF BELLSOUTH  
TELECOMMUNICATIONS, INC. INTO TWO  
DISTINCT WHOLESALE AND RETAIL  
CORPORATE SUBSIDIARIES.



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VOLUME 1  
Pages 1 through 109

PROCEEDINGS: WORKSHOP

BEFORE: CHAIRMAN E. LEON JACOBS, JR.  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER LILA A. JABER  
COMMISSIONER BRAULIO L. BAEZ  
COMMISSIONER MICHAEL A. PALECKI

DATE: Monday, July 30, 2001

TIME: Commenced at 9:30 a.m.  
Concluded at 5:40 p.m.

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: KORETTA E. STANFORD, RPR  
Official FPSC Reporter  
(850) 413-6734

1 IN ATTENDANCE:

2 JASON FUDGE, FPSC Division of Legal Services.

3 KIM LOGUE, Division of Competitive Services .

4 CURTIS J. WILLIAMS, Division of Policy Analysis &  
5 Intergovernmental Liaison.

6 DOUGLAS LACKEY, representing BellSouth  
7 Telecommunications, Inc.

8 KIMBERLY CASWELL, representing Verizon Florida, Inc.

9 JOSEPH A. MCGLOTHLIN and JOE GILLAN, representing  
10 Florida Competitive Carriers Association.

11 GEORGE N. MEROS, JR., JOSEPH W. HATCHETT, WILLIAM B.  
12 GRAHAM and GEORGE N. MEROS, JR., BILL LEHR, PETER BRADFORD,  
13 JUDY SHELDREW, WILLIAM GRAHAM and JIM LAMOUREAUX, representing  
14 AT&T Communications of the Southern States, Inc.

15 H. RUSSELL FRISBY, JR., representing Competitive  
16 Telecommunications Association.

17 GARY BALL, representing WorldCom.

18 ROBERT JOHNSON, representing Consumers' Voice.

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CHAIRMAN JACOBS: Good morning. We're here this morning to say grace, I guess, for an important purpose and to learn more about docket number 010345-TP. Counsel, read the notice.

MR. FUDGE: Pursuant to a notice issued June 20th, 2001, this date and place was set for a hearing to hear BellSouth's petition for structural separation of BellSouth.

CHAIRMAN JACOBS: Now, I believe, we have an agenda that's been set out, and I do not believe that there are any significant revisions in that agenda. Most of the parties have been identified according to their times of presentation. We want -- I thought initially we might take appearances, but I'm thinking now we won't do that. We'll just follow the agenda as it has been prescribed. And what I'd like to do, first of all, is kind of give, I guess, the opening comments, opening remarks.

As you well know, the petition has been filed in this matter and this process has been undertaken very much as a way of education by the Commission, very much interested in what the sense of the community is first regard to our authority to entertain this petition and, second of all, about what the real issues are in addressing this petition.

I'm sure all the parties are aware this is a matter of grave and important public interest, and indicative of the

1 fact that we've taken out the time, all the Commission and the  
2 Commission Staff, we think it deserves proper and merits proper  
3 attention by the quality of representation and presentations  
4 that we see before us today, we see that the parties share in  
5 that assessment, so we're going to be attentive over the next  
6 two days.

7           Let me say up front I will have to be absent  
8 tomorrow, but the process will go on, but we will be attentive  
9 and we will be interested in hearing the issues. There is much  
10 that I know that is of concern and of controversy regarding  
11 other dockets that are open. Please be aware that we cannot  
12 discuss matters in open dockets, and that is an important  
13 restriction on these proceedings.

14           We understand that necessarily there'll be some  
15 tangential areas that might bridge over. We ask you to use  
16 your discretion. And if you need counsel, advice of counsel,  
17 please get that advice of counsel before you broach into areas  
18 that might delve into other dockets. And with that, I'll leave  
19 it to other Commissioners, if any other Commissioners have any  
20 opening comments.

21           Staff, do you have any comments or directions for us  
22 from here?

23           MS. LOGUE: Yes, Mr. Chairman, we do. Good morning,  
24 Chairman Jacobs and Commissioners. For the next two days we'll  
25 be examining the dynamics of the proposed structural separation

1 of BellSouth into two distinct entities, retail and wholesale.  
2 Some of the topics to be discussed during the workshop are  
3 going to include, but given the parties involved will certainly  
4 not be limited to jurisdiction, alternative approaches,  
5 benefits and costs and legal impediments. Staff believes the  
6 Commission will find this workshop to be both educational and  
7 trendsetting.

8           This workshop has received a great deal of visibility  
9 and notoriety, and I am certain that once again the Florida  
10 Public Service Commission will be paving the way for other  
11 Commissions to emulate. The first presenter today on behalf of  
12 the Commission will be Mr. Curtis Williams from the Policy  
13 Analysis & Intergovernmental Liaison Division.

14           MR. WILLIAMS: Mr. Chairman, Commissioners, thank you  
15 for allowing Staff to share with you information we've  
16 collected on structural separation. The presentation we  
17 prepared for you this morning provides a general overview of  
18 structural separation, initiatives and developments, primarily  
19 in other states.

20           In addition, in your workshop briefing binder, we  
21 prepared a more thorough analysis and we ask that you continue  
22 to refer to that document for additional detail. Also, we will  
23 not make a recommendation this morning, and we will avoid  
24 addressing arguments for or against structural separation at  
25 this time. If it's your pleasure, I can proceed with Staff's

1 presentation.

2           Commissioners, obviously, this year we've seen a rise  
3 in structural separation initiatives at the state level. In  
4 some states legislation has been introduced, in some states  
5 formal petitions have been filed, and interestingly in other  
6 states, both legislation has been introduced and petitions have  
7 been filed.

8           Our presentation will address developments in the  
9 following 18 states impacting the original bell operating  
10 companies of Qwest Communications, SBC Ameritech, Verizon, and  
11 BellSouth. We'll focus most of our attention on the  
12 Pennsylvania Commission. The Pennsylvania Commission is the  
13 only state Commission that has issued orders endorsing  
14 structural separation.

15           The Pennsylvania Commission's September 30th, 1999,  
16 global order resolved 20 interrelated issues to jump-start  
17 competition. One of those issues addressed full structural  
18 separation. There are two key points I would like to identify.  
19 One is the issue of submitting -- the Pennsylvania Commission  
20 requiring Verizon to submit a plan and, secondly, the issue of  
21 a complete transfer of assets.

22           It's important to point out that the Commission did  
23 not require Verizon to immediately implement structural  
24 separation, full structural separation, but it directed the  
25 company to come forth with a plan on how it should be

1 implemented and the complete transfer of assets, basically,  
2 defines full structural separation.

3           The Commission's March 22nd, 2001, order was also  
4 very important. The order actually presented Verizon with an  
5 offer to accept functional separation. In effect, this order  
6 modified the Commission's position supporting full structural  
7 separation. Key points include a requirement that Verizon  
8 functionally separate its wholesale and retail divisions  
9 through the application of a code of conduct; secondly, a  
10 provision for increased penalties; and also, the Commission  
11 made it clear that if competition did not develop it would go  
12 back and order full structural separation.

13           Commissioners, going back to the Pennsylvania order,  
14 there's just one point I would like to make and that is the --  
15 Verizon actually appealed the Pennsylvania Commission's order  
16 and the Pennsylvania Commonwealth of Court issued ruling which  
17 upheld the Pennsylvania Commission's order, but I will defer to  
18 our talented legal staff to address those issues more  
19 thoroughly.

20           The debate -- as I indicated earlier, we've avoided  
21 addressing the arguments for our against structural separation,  
22 but we would like to present several of the key arguments, and  
23 these arguments will be addressed on a state-by-state basis as  
24 we go through the state-by-state analysis.

25           The proponents argue that structural separation is



1 necessary to foster local competition and to expand customer  
2 choice. The local loop is a natural monopoly, and the only way  
3 to have effective competition is through structural separation,  
4 and an inherent conflict of interest exists with the ILECs  
5 operating as both supplier and competitor.

6           The opponents argue -- and keep in mind,  
7 Commissioners, there are a host of arguments. You will hear  
8 these arguments throughout the workshop. These are just some  
9 of the key arguments. The opponents, a large part of their  
10 argument centers around cost, and the issue of cost would be  
11 increased.

12           In the Pennsylvania docket, Verizon argued that a  
13 one-time cost of \$800 million would be incurred to implement  
14 full structural separation with a continuing cost of \$300  
15 million per year. I need to point out that because the  
16 Pennsylvania Commission decided to move forward with functional  
17 separation, there was not a thorough record developed on the  
18 issue of cost, so the proponents of structural separation would  
19 challenge these numbers here.

20           The federal perspective -- before proceeding into the  
21 state-by-state analysis, we did want to provide you with a  
22 little background on federal issues. Commissioners, there has  
23 been no legislation filed in support of structural separation  
24 at the federal level. Senator -- let me also add,  
25 Commissioners, that there are some that would argue that during

1 the rewrite of the Telecommunications Act, there was some  
2 discussion about structural separation, but it was not included  
3 in the Act, and those -- some would argue that it was  
4 Congress's intent that that not occur.

5           Senator Hollings supports structural separation,  
6 Representative Tauzin has gone on record opposing structural  
7 separation, and FCC Chairman Powell has also gone on record  
8 opposing structural separation. During Chairman Powell's  
9 recent senate confirmation proceeding he also stated that he,  
10 basically, felt that more enforcement efforts and penalties  
11 should be taken as opposed to structural separation.

12           At this time, Commissioners I will briefly go through  
13 the state-by-state analysis. Alabama is interesting, because  
14 the Alabama Commission received a petition which requested  
15 intervention in its 271 proceeding as part of a structural  
16 separation filing. Interestingly, the Alabama Commission  
17 granted the petition and the Section 271 application in  
18 structural separation are pending before the Alabama  
19 Commission.

20           In Georgia a petition has been filed. The petition  
21 argues that Georgia has authority. The petition is pending  
22 before the Georgia Commission.

23           In Illinois, legislation was introduced and rejected.  
24 The legislation was part of a comprehensive rewrite of Illinois  
25 state telecommunications laws. The General Assembly also, even

1 though they did not pass structural separation legislation,  
2 they stated that -- well, they actually passed legislation  
3 which provided the Illinois Commission with greater enforcement  
4 authority.

5 In Indiana, a petition has been filed. The petition  
6 is pending before the Indiana Commission, and the proceeding  
7 has been scheduled.

8 Maryland is an interesting state, because the issue  
9 of structural separation actually goes back to 1994 when the  
10 Maryland Commission issued an order in response to a petition  
11 that was filed by the Office of People's Counsel. The OPC  
12 petition advocated separating Bell Atlantic, Verizon, currently  
13 into core and noncore functions, similar to the structural  
14 separation petitions we see today. The Maryland Commission  
15 rejected that proposal and also, recently, legislation was  
16 filed; however, that legislation was withdrawn based on a lack  
17 of support.

18 In Michigan, legislation was introduced, and the bill  
19 is pending before the Michigan House. Also, in Minnesota  
20 legislation was introduced. The bill was filed late and is  
21 being carried over to the 2002 session and the Senate Regulated  
22 Industries Committee is currently scheduling hearings.

23 In New Hampshire the Commission initiated an internal  
24 review. In New Jersey, a petition was filed and legislation  
25 introduced. Both are pending. As we indicated earlier, the

1 Pennsylvania Commission has issued affirmative orders. In  
2 Tennessee, a petition filed and it's also pending before the  
3 Commission. Virginia is interesting because Virginia has taken  
4 the opposite view of Pennsylvania in that the Virginia  
5 Commission determined that it did not have statutory authority  
6 to approve structural separation.

7           And in Wisconsin, it's also interesting that a  
8 broader initiative is under way. A 16-member coalition was  
9 formed whose members include AT&T, AARP, the Citizens Utility  
10 Board, the Wisconsin Merchants Federation, and the Wisconsin  
11 Realtor Association. Known as Wisconsin CALLS, the coalition  
12 supports a five-part legislative initiative, which covers  
13 various areas to promote competition but, specifically for our  
14 purposes, requests that the Wisconsin Commission order  
15 structural separation if competition does not develop. A  
16 petition was also filed -- actually, it was a motion requesting  
17 structural separation as well.

18           And finally, in Kentucky, Louisiana, Mississippi,  
19 North Carolina and South Carolina, letters were filed by Access  
20 Integrated Networks, requesting structural separation, and  
21 those are pending.

22           Commissioners, we would like to leave you with four  
23 key points: One, there has been no congressional legislation  
24 filed in support of structural separation. The Pennsylvania  
25 Commission is the only state Commission that has endorsed

1 structural separation. The Illinois, Maryland, and -- in  
2 Illinois, Maryland, and Virginia they've rejected structural  
3 separation and 14 states, 15 including Florida, are currently  
4 considering structural separation.

5 Commissioners, again, thank you for allowing Staff to  
6 tee the issue up, and I can address any questions you may have.

7 CHAIRMAN JACOBS: I don't think I have anything.

8 COMMISSIONER DEASON: You did such a good job,  
9 Curtis, we have no questions.

10 MR. WILLIAMS: Thank you, Commissioners.

11 MS. LOGUE: Commissioners, next on the agenda is the  
12 topic near and dear to everyone's heart, jurisdiction. The  
13 companies represented during the jurisdiction discussion phase  
14 will be BellSouth, AT&T, FTCA, and Verizon.

15 MR. LACKEY: Mr. Chairman, Commissioners, thank you  
16 for allowing me to appear here before you today. I'm Doug  
17 Lackey. I'm an attorney with BellSouth Telecommunications.  
18 I'm here representing BellSouth Telecommunications, which is a  
19 Georgia Corporation, holding certificates of public convenience  
20 and necessity that allow it to provide telephone service in the  
21 state of Florida.

22 This is a different situation for me. I've been  
23 coming down here and appearing before this Commission for 16  
24 years, and I believe that this is the first time that I've ever  
25 participated in a workshop like this. Today, what I'm going to

1 do is talk to you a little bit about the jurisdiction and the  
2 jurisdictional issues that are involved in this proceeding, and  
3 then tomorrow I've been elected to speak to you again  
4 presenting some of the policy issues and some of the factual  
5 issues that arise here.

6           At bottom, this proceeding is one about whether  
7 BellSouth Telecommunications ought to be broken up, whether  
8 there ought to be a second divestiture, whether there ought to  
9 be two companies, a BellSouth retail company that has a  
10 relationship with end users and sells retail services to those  
11 end users and a separate wholesale company that owns the  
12 network in Florida in BellSouth's territory and provides access  
13 to those network services to all retail companies. There's no  
14 other word for it. It is a second divestiture. What I'm going  
15 to do this morning is try to put this matter in context for  
16 you.

17           COMMISSIONER DEASON: Excuse me, Mr. Lackey, let me  
18 ask you a question. When you use the term divestiture, I take  
19 that as a meaning that the companies are split and stockholders  
20 over time become two different groups of people. I think, in  
21 the AT&T divestiture there was -- new stock was issued and, I  
22 think, the stockholders of AT&T got equal shares, if they so  
23 chose and then they -- obviously, the market began to function  
24 and people sold certain shares and bought others, and so you've  
25 got different owners now.

1 MR. LACKEY: Yes, sir.

2 COMMISSIONER DEASON: And that's what I understand  
3 divestiture to be. So relate that to -- would there be  
4 something similar or would the ownership of the two operating  
5 units, wholesale and retail, continue to be the same?

6 MR. LACKEY: At this point, all I can tell you is  
7 what AT&T asks for in their petition. I don't know what they  
8 will say to you today, but when they filed their petition what  
9 they, obviously, contemplated were two separate corporations  
10 and they contemplated that the retail corporation would have  
11 public ownership, it would be a publicly-held corporation.  
12 Now, they suggested that BellSouth could continue to own shares  
13 in that corporation but they clearly had a public ownership  
14 requirement.

15 And what I envisioned, I suspect or I think, is that  
16 BellSouth Corporation is presently a holding company that owns  
17 BellSouth Telecommunications in its entirety. What I  
18 understood them to be recommending is that there would be a  
19 second corporation or third corporation, actually, formed that  
20 would be retail company, retail co, and BellSouth Corporation  
21 would own shares in retail co, with the retail company, but  
22 that the public could own shares in that company as well. I  
23 have a slide that quotes from their presentation that, I think,  
24 lays that out pretty clearly.

25 Now, I will certainly say to you that I don't think

1 it's a complete divestiture in the sense that the AT&T  
2 divestiture required complete separation. I think, they at  
3 least are going to be generous enough to allow BellSouth  
4 Corporation to hold on to some of those assets or some of that  
5 stock, but the requirement of public ownership clearly  
6 indicates a separation, a legal separation, and different  
7 entities.

8           As I was saying, what I'd like to do is make some  
9 general remarks, try to put this matter in context to share  
10 with you BellSouth's view of what's going on and then move into  
11 the legal issues that we need to talk about this morning.

12           There is no question that this is an important  
13 proceeding. It's clearly important to BellSouth. We do not  
14 want to be divested. We do not want to be split into separate  
15 corporations. It's, obviously, equally important to AT&T and  
16 the other parties who are right out here. And I began to  
17 understand exactly how important it was when the pleadings  
18 started to come into this case.

19           When the petition was filed in this case there was  
20 something remarkable about it, so remarkable that I actually  
21 commented on it. We got it and I looked at it and I read it  
22 and I got to the back page and there was only one person  
23 listed on the back page. It was an AT&T in-house lawyer from  
24 here in Tallahassee. They didn't have any outside counsel.  
25 They didn't even have any of their Atlanta lawyers on the



1 pleading. I thought it was really remarkable. I'd never seen  
2 anything like it. And then we filed our motion to dismiss, and  
3 suddenly I found myself in the midst of a list of the cream of  
4 the Tallahassee bar.

5           When the motion opposing our dismissal came in, it  
6 was outside counsel on it. The lead counsel was Judge  
7 Hatchett, distinguished jurist, Chief Justice of the Florida  
8 Supreme Court, Chief Judge in the 11th Circuit Court of Appeals  
9 and his firm. The AT&T lawyer was still on the petition, but  
10 she was down in the corner. Then, the motion to compel came  
11 along, and then I had three distinguished Tallahassee firms.  
12 As a matter of fact, one of them was listed twice, because they  
13 had a Miami office on it as well. And we had lawyers on there  
14 that I didn't know personally but I'd read about in the  
15 newspapers, some very prominent lawyers. And I started  
16 wondering what's going on? Why is this happening? And I  
17 realized just exactly how important this case was to AT&T.

18           AT&T, two years ago in Pennsylvania, had a structural  
19 separation order, the one you heard about this morning. The  
20 Pennsylvania Commission had said let's break Verizon up; you've  
21 got a year to do it, come up with a plan. A year later, the  
22 administrative law judge in that case said let's break them up,  
23 let's split them up. And then in -- I'm not sure whether it  
24 was March or whether it was April, the Pennsylvania Commission  
25 issued its order in the case and said no, we're not going to

1 require structural separation. We're going to require  
2 functional separation. That's what they required, not  
3 structural separation.

4           So, AT&T had lost what they had won. Now, they -- I  
5 read their press release over the weekend. They said it was a  
6 wonderful victory. We all do that. Everytime a decision comes  
7 out we all -- first line says we won, but you have to get three  
8 or four paragraphs down into it until you get to the point  
9 where it says we're disappointed. They lost in Virginia. The  
10 petition there was just tossed out.

11           As you saw from the slide that the Staff put up, they  
12 lost in Illinois, they lost in Maryland, they've lost  
13 everywhere. Now, it's pending in a number of states. They're  
14 trying the same issue in Alabama. As we're here today, someone  
15 in Alabama is going through the same thing in a case up there.

16           The bottom line is AT&T can't afford to lose this  
17 case. Florida, certainly the biggest state in the southeast,  
18 probably one of their biggest states in the country. Your  
19 lawyer said it in her remarks, that this is trendsetting, and  
20 that's what the issue is here. AT&T can't afford to have this  
21 matter go out on motion to dismiss, because it'll be  
22 trendsetting.

23           Well, the truth of the matter is if the laws's not on  
24 your side, you can bring in some of the brightest and best  
25 people there are, and that's what AT&T has. They have some of

1 the best lawyers in the state of Florida that are going to talk  
2 to you today, and the bottom line is it's not going to make any  
3 difference, because if the law doesn't allow you to do what  
4 they're asking, the matter's at an end.

5 Now, I'm not a linguist, but the Japanese have a word  
6 and it's origami, it's the art of paper folding, and it's where  
7 they start out with a sheet of paper and they fold it and they  
8 twist it and they turn it, and when they're done they've got a  
9 beautiful bird or a beautiful paper flower. And I expect, with  
10 all the distinguished members of the bar we have here this  
11 morning, this afternoon, tomorrow, we're probably going to see  
12 the law turn, shifted, twisted, rearranged. And when it's done  
13 it's probably going to be a piece of art, but it's sort of like  
14 the birds and the flowers, it's not going to be real, because  
15 when you get to the bottom line, the law doesn't allow what  
16 they are asking you to do.

17 Now, I said we were going to talk about the law today  
18 and the facts this afternoon and the facts some more tomorrow,  
19 and there's another adage that I want to bring to your  
20 attention, because I think it's going to be appropriate. I  
21 tried to find somebody to attribute this to and nobody was  
22 willing to claim it, and it's a saying that goes something like  
23 this: When you have the law on your side, argue the law. When  
24 you don't have the law, argue the facts. When you have neither  
25 the law nor the facts, pound on the table. I suspect by

1 tomorrow afternoon this podium's probably going to be in  
2 pieces, because there's going to be a lot of pounding, because  
3 not only do they not have the law on their side, they don't  
4 have the facts on their side.

5           Now, they want you to break BellSouth up. Our  
6 position is, is that the legislature did not give you  
7 permission or authority to do that, so let's explore that from  
8 a -- the first issue is what is the relief that AT&T is  
9 requesting of you? This is taken from their petition. AT&T  
10 urges the Commission to order the structural separation of  
11 BellSouth into distinct wholesale and retail corporate  
12 subsidiaries. Through structural separation the Commission  
13 would require that BellSouth's retail organization -- that  
14 BellSouth's retail organization, which sells to end users, be  
15 reconstituted as a publicly-owned corporate affiliate, separate  
16 from its wholesale organization which owns and operates network  
17 facilities. Commissioner Deason, that's where I got the notion  
18 that they want to have a third corporation that's publicly  
19 held.

20           Now, could they be any clearer about what they want?  
21 Generally speaking, structural separation means that BellSouth  
22 would establish a retail affiliate which would provide finished  
23 services to consumers and have the customer relationship, just  
24 as any other ALEC, and establish a separate wholesale affiliate  
25 which would continue to own and operate the network facilities

1 necessary to provide local telephone services in Florida.  
2 Seems pretty clear to me. I don't think there's any doubt  
3 about what they have asked you for.

4           So, the question that that raises is can the Florida  
5 Public Service Commission grant the relief that's been  
6 requested? One more time. There are two sources of authority  
7 that you can look to, to determine whether you have, indeed,  
8 the authority to break up BellSouth. Obviously, there is the  
9 state law that you are constituted under and operate under and  
10 there's also the federal law. I'm going to talk about them  
11 separately. I'm going to talk about the state law first.

12           As everybody knows, and I don't mean to be identic  
13 about it, the Commission's a creature of the legislature and  
14 you only have those powers granted to you, either expressly or  
15 by necessary implication, and I want to make sure that I  
16 acknowledge that. I understand that your power can be  
17 expressed, the legislature can write a statute and tell you  
18 what you can do, and I understand you can have it by necessary  
19 implication, and I'm going to talk about both of those.

20           This is one of the cases we've cited in our motion  
21 that talks about the same thing that I just acknowledged; that  
22 is, you can get your authority from any one or either one of  
23 two sources. It's the same thing that AT&T acknowledges as  
24 well, so there's no dispute between the parties. This  
25 Commission isn't just given the authority to generally regulate

1 utilities. What happens is you're given specific authority and  
2 direction about which utilities you can regulate and what you  
3 can do.

4 Now, the Florida legislature could have expressly  
5 authorized you to break up BellSouth, and they wouldn't have  
6 said it that way. They didn't have to say in a statute the  
7 Commission can break up BellSouth. What they could have done  
8 was they could have passed a statute that said, "The Commission  
9 can require BellSouth to provide competitive services through a  
10 separate affiliate." That would have been direct authority  
11 and, indeed, that's exactly what happened in Pennsylvania.

12 This is the Pennsylvania statute that was at the  
13 heart of the case that was mentioned this morning and that I'm  
14 sure you all are going to hear about in probably agonizing  
15 detail over the next two days.

16 As you can see, in Pennsylvania the legislature  
17 specifically authorized the Commission to require that a  
18 competitive service be provided through a subsidiary which is  
19 fully separated from the local exchange company; no ifs, no  
20 ands, no buts, no questions; doesn't mean that Verizon didn't  
21 challenge it, but it's pretty clear to me they had the  
22 authority to do it, and it was pretty clear to the Pennsylvania  
23 court, because the Pennsylvania court, when Verizon took the  
24 order separating the global order, found that because Bell was  
25 a local exchange company meeting certain qualifications, it's

1 clearly subject to that law, and the Court concluded that the  
2 Pennsylvania Commission could require structurally-separate  
3 subsidiaries, if it wanted to.

4 Now, the problem is Florida doesn't have that law.  
5 AT&T, in one of its pleadings, tries to argue that Section  
6 120.80 13 sub-d gives you direct authority to do this. What  
7 that section, in fact, does is it gives you the authority to --  
8 there's no point in me not quoting it exactly. Let me get it  
9 precise. I don't want to -- let me quote it to you exactly.

10 "Notwithstanding the provisions of this chapter in  
11 implementing the Telecommunications Act of 1996, the federal  
12 Act, the Public Service Commission is authorized to employ  
13 procedures consistent with the Act," okay, so the legislature  
14 in Florida said you all have the authority to employ procedures  
15 consistent with the federal Act.

16 Now, that's not a separate grant of authority to  
17 split up BellSouth. That's authority to do what you need to do  
18 that's consistent with the federal Act. And when I get to the  
19 federal Act, we'll talk about what the federal Act authorizes  
20 the states to do. There simply is no statute that gives you  
21 the express authority to do this.

22 Well, since you don't have the express authority to  
23 do it, the only remaining state issue is whether the  
24 legislature intended to give you the implied power to do it.  
25 We're going to have to figure out what the legislature

1 intended. Did they intend to let you do it or did they intend  
2 to prohibit you from doing it?

3 This again, simply another quote from the AT&T  
4 memorandum where they make that same argument, the last  
5 sentence: "The power of the Commission, however, is not  
6 confined to the duties specifically set forth in the statutes.  
7 It also has implied authority." And this quote citing a case  
8 on that particular topic, and it talks about the Commission has  
9 broad regulatory powers with regard to the telecommunications  
10 industry, and the Commission has broad authority to regulate.

11 Well, I've got to tell you, when lawyers start  
12 talking about broad authority and broad powers, that means they  
13 can't find anything specific, so they're going to have to ask  
14 you to read something into the law, and that's what the case is  
15 here. They're going to try to read something into the law.

16 Now AT&T, in its response, petition in response,  
17 cites a number of laws which they claim provide the basis for  
18 the implied power that this Commission has to break up  
19 BellSouth. And I'm going to just look at one of them that they  
20 cite, and this is 364.01(4)(g) and, basically, it says, "The  
21 Commission shall exercise exclusive jurisdiction in order to  
22 prevent anticompetitive behavior in eliminating unnecessary  
23 regulatory restraint."

24 I think, it's really the preventing anticompetitive  
25 behavior that AT&T focuses on, and their argument is pretty



1 simple and that is, given that BellSouth has perpetuated its  
2 monopoly by failing to provide access and doing all these other  
3 bad things, the Commission is required to prevent that  
4 anticompetitive activity, and the way to do that is to break  
5 them up, and that's about as simple as it gets.

6 Now, let's talk about what BellSouth -- can we back  
7 up one -- let's talk about what BellSouth agrees with AT&T on.  
8 We agree that the Commission has jurisdiction to prevent  
9 anticompetitive behavior. The statute expressly says that,  
10 it's clear. So, does that mean that the Commission, if it  
11 doesn't adopt AT&T's proposal, that it has the inherent  
12 authority to break up BellSouth, it's powerless to carry out  
13 the duties that have been given it by the legislature? No,  
14 we're not saying that.

15 As a matter of fact, the legislature has specifically  
16 provided for remedies for violations of the law and for  
17 violations of the Commission's orders and regulations, and  
18 that's in Section 364.285. That's the section that allows the  
19 Commission to impose a fine of \$25,000 a day per instance per  
20 day for a violation of the law. That's the law that allows the  
21 Commission to revoke or amend BellSouth's certificate for a  
22 violation of the law. That's the section that allows the  
23 Commission to go to court and enjoin BellSouth from violating  
24 the law. You are not powerless. The question is do you have  
25 the power to do what AT&T wants you to do?

1           CHAIRMAN JACOBS: Mr. Lackey, so you would argue that  
2 364.285 is the exact limit of our remedial power here?

3           MR. LACKEY: Clearly, it is not the total limit on  
4 your authority. It is, in my opinion, your limit in this case  
5 for reasons that I'm going to get to.

6           I know when I'm talking about express remedies, AT&T  
7 is jumping up and down and they're screaming Teleco  
8 Communications Company vs. Clark which, as they correctly  
9 pointed out in their motion, I missed in ours. And Teleco  
10 Communications vs. Clark is a case that probably most of you  
11 were involved in, involved a case where Teleco obtained  
12 ownership or control over some inside wire in a condominium  
13 arrangement from the condominium association and Teleco wasn't  
14 a certificated carrier and it wasn't authorized to do it. And  
15 so, the Commission issued an order requiring Teleco to divest  
16 itself of its interest in the inside wire in the condominium  
17 association. And the Court, on appeal, found that you, in  
18 fact, had the inherent authority to require the divestiture of  
19 those assets.

20           In my view, that case is completely different but  
21 that, the court found, was a proper exercise of your inherent  
22 authority. In that case you had a company that had no  
23 authority to operate. You had a company that couldn't get the  
24 authority to operate. You had a company that had control of an  
25 essential part of the telephone system.

1           Without inside wire, you don't have telephone  
2 service. And this Commission found that under its authority to  
3 protect the welfare of the telephone subscriber that you had  
4 the authority to require those people to give the inside wire  
5 back to somebody who could properly own it and utilize it and,  
6 therefore, could be responsible to provide telephone service.  
7 I agree you had the inherent authority to do that. Obviously,  
8 fines and things like that after the fact would not have put  
9 the local subscribers back into service or provided service to  
10 them. I would point out though --

11           COMMISSIONER DEASON: Mr. Lackey, let me ask you a  
12 question.

13           MR. LACKEY: Yes, sir.

14           COMMISSIONER DEASON: The facts of that case, did  
15 Teleco have the ability to become a certificated telephone  
16 company or not?

17           MR. LACKEY: My recollection of the case was that it  
18 did not have the ability.

19           COMMISSIONER DEASON: That it chose not to or that it  
20 could not meet the requirements?

21           MR. LACKEY: I've got the case, and I could look at a  
22 again, but I thought it was that it could not.

23           COMMISSIONER DEASON: It could not?

24           MR. LACKEY: On reflection, I'm not precisely sure  
25 why, but that was my reading. I'm sure that somebody will be

1 happy to correct me, but in any event, it seems like to me that  
2 if they could have, they would have, and the problem would have  
3 gone away, but I could be wrong about that.

4 I would point out one other thing in the Teleco case,  
5 though, because there was another issue there. The Commission  
6 also provided that condominium association didn't have to pay  
7 Teleco the money it owed it for what it had done up to that  
8 point, and the Court found that the Commission did not have  
9 jurisdiction to order that.

10 And so, my point is that clearly you have inherent  
11 jurisdiction or inherent authority. Don't let anybody tell you  
12 that I'm trying to tell you you don't. I've been around a long  
13 time. I understand that you do have certain inherent  
14 authority, but it's got to be reasonably related to your  
15 authority and what you're charged to do. It was there, at  
16 least in part. With regard to the contract, the Court said it  
17 wasn't, so there in one case you've got an example of when you  
18 do and when you don't.

19 So, if this is all there is, how do we resolve this?  
20 I'm sitting here telling you the legislature said you can't do  
21 it. AT&T's going to come up here in a little while and they're  
22 going to say, yeah, you can. Look at Teleco. Clearly, it's  
23 within your authority to do it.

24 Remember what AT&T is asking for, structural  
25 separation. They want you to split us up into a wholesale and

1 retail company. And you remember from our earlier discussion,  
2 they want it to be two separate corporate entities, and they  
3 want the retail company to be, at least in part, publicly held.  
4 I want to make sure we all understand, you know, we're not just  
5 talking about some little friendly code of conduct or something  
6 like that. We're talking about let's break the thing up.

7           Now, I think that there's clear evidence that the  
8 legislation didn't intend for you all to do that, and I hope to  
9 convince you of that with these next sections of the law.  
10 Here's the first one. This is the definition of a  
11 telecommunications company that's found in 364.02. And it's  
12 very important. It's really interesting. Nobody ever looks at  
13 definitions anymore. In all honesty, I didn't look at these  
14 definitions until just a week or so ago. It's just the way we  
15 are. I guess, I should be better at it, but look at the  
16 definition of a telecommunications company. It includes every  
17 corporation offering two-way telecommunications service to the  
18 public for hire within this state by use of a  
19 telecommunications facility.

20           If you split us into two companies and I have a  
21 retail company that sells to the public and I have a wholesale  
22 company that can only sell to retail companies, I am not a  
23 company offering two-way telecommunication service to the  
24 public for hire. Now, surely, I'm making that up. Look at the  
25 exceptions that follow that definition. The term

1 telecommunications company does not include an entity that  
2 provides a telecommunications facility exclusively to a  
3 certificated telecommunications company.

4           If all my wholesale company can do is provide  
5 facilities to other retail companies, I am not a  
6 telecommunications company in the state of Florida. Well,  
7 what's that mean? Look at your authority. You regulate  
8 telecommunications companies. If I'm not a telecommunications  
9 company, you don't regulate me.

10           I've got to tell you, I have mixed feelings about  
11 this. I could have stood up here and said, you know, I change  
12 my mind, I give up. Go ahead and break me up. But the truth  
13 of the matter is I don't think that's what the legislature  
14 intended. In order to do what AT&T wants under state law,  
15 you're going to have to find the Commission has the implied  
16 authority to break up BellSouth. And in doing so, you have to  
17 assume that the legislature intended to allow the Commission to  
18 prevent anticompetitive behavior by deregulating the entity  
19 accused of that behavior.

20           Now then, I've got to tell you, I do not believe that  
21 was the intent of the legislature of this state. If you have  
22 the implied power to break us up and you break us up, just like  
23 AT&T asks you to do, my wholesale company in the state of  
24 Florida, the company that owns the retail network, is going to  
25 be deregulated. This is the same matter you all were talking

1 about in Agenda with regard to Level 3 just last Tuesday. A  
2 carrier's carrier is not subject to the regulation of this  
3 Commission. Now, again, I told you I had mixed feelings about  
4 it but, I think at bottom, the legislature of this state did  
5 not intend to give you the power to break us up when that is  
6 going to be the result.

7 Well, if you don't have any authority under the state  
8 law where else can you get authority? Well, you can get  
9 authority from the federal law, so let's talk about the federal  
10 law a little bit, and you've really got the same exact issues.  
11 The federal law could expressly give you the authority to do it  
12 or it could imply that you have the authority, but in the  
13 federal law, unlike the state law, Congress actually  
14 contemplated the structural separation of telephone companies.  
15 They have made specific provision for it in Section -- in three  
16 situations.

17 They require a separate affiliate in manufacturing,  
18 the origination of interLATA telecommunications services, and  
19 then interLATA information services. Those are the three.  
20 Now, you can look and look and look, and you're not going to  
21 find any other requirement in the Telecommunications Act that  
22 an incumbent telephone company be broken up and be required to  
23 provide wholesale and retail service.

24 Now, I want to digress here just for a minute and  
25 make a point. And again, it's about the Pennsylvania case.

1 COMMISSIONER JABER: Mr. Lackey, may I interrupt you?

2 MR. LACKEY: Yes, ma'am.

3 COMMISSIONER JABER: You read the section in 120 that  
4 you were quoting from. Can you read me the section -- can you  
5 read 272 for me, because I don't have that in front of me.

6 MR. LACKEY: If you'll give me just 30 seconds, I'll  
7 go pick it up. One of the problems with a body mike is you're  
8 never going to know when it's going to pick up. 272. 272 is  
9 quite long. Let me just, I guess, read it. Section 272,  
10 subparagraph A, separate affiliate required for competitive  
11 activities.

12 "One, in general, a bell operating company, including  
13 any affiliate, which is a local exchange carrier that is  
14 subject to the requirements of Section 251(C) may not provide  
15 any service described in Paragraph 2, unless it provides that  
16 service through one or more affiliates that, A, are separate  
17 from any operating company entity that are subject to the  
18 requirements of 251(C); and B, meet the requirements of  
19 subsection B." And then subsection 2 says, "The services for  
20 which a separate affiliate is required, the services for which  
21 a separate affiliate is required by Paragraph 1 are  
22 manufacturing activities as defined, origination of interLATA  
23 telecommunications services, other than incidental services,  
24 which is the cellular exception, out-of-region services and  
25 previously authorized activities, and then the last one is



1 interLATA information services other than electronic  
2 publishing," and it goes on from there, and alarm services, and  
3 then it's got a Section B. Do you need -- have I touched on  
4 the point?

5 COMMISSIONER JABER: And then Section 120 that you  
6 read to us says that the state Commission can implement any  
7 procedures it needs to implement any provisions of the federal  
8 Act?

9 MR. LACKEY: The '96 Act, yes, ma'am.

10 COMMISSIONER JABER: And that was 120 what?

11 MR. LACKEY: That was 120.80 paren 13, closed paren  
12 sub D.

13 COMMISSIONER JABER: Thank you.

14 MR. LACKEY: And the point that I was trying to make  
15 was that the legislature has authorized you to implement the  
16 federal Act, but Congress only contemplated a structural  
17 separation in those three cases. And, indeed, when you look at  
18 other sections of the Act it clearly contemplates that both  
19 wholesale and retail services will be provided by a single  
20 company since the same company is required to sell its services  
21 at a discount.

22 COMMISSIONER JABER: So, did the Pennsylvania  
23 Commission make a finding that one of these three scenarios, if  
24 not all, existed prior to requiring functional separation?

25 MR. LACKEY: And you have gone to the exact point

1 that I was trying to digress to making and did not, so let me  
2 make it now. The point I wanted to make is that in their  
3 petition, the memorandum the AT&T folks sort of gently chide at  
4 me for not being clear about what the Philadelphia court had  
5 done with regard to these same arguments.

6 And the point I wanted to make here in the way that  
7 I'm presenting this argument, if you will, is that in  
8 Pennsylvania they had a state statute that said break them up,  
9 you can break them up. And Verizon can speak for itself, but  
10 what I saw Verizon do is they went to court and said the  
11 federal law says you can't do that, you're preempted from doing  
12 that under the state statute.

13 I'm not arguing federal preemption. What I'm saying  
14 is there's no state law that allows you to do it. Is there a  
15 federal law? And I'm saying no, it's an entirely different  
16 situation. The only thing that would have been analogous would  
17 have been if you had had a state statute that said you could  
18 break BellSouth up and I was standing here saying, oh, no, the  
19 federal law says you can only do these three things, then you  
20 would have had the Pennsylvania situation. That's not the case  
21 here. There is no statute that allows you to do it. I'm not  
22 arguing that the federal law limit you to those three things  
23 and thus, precludes you from operating under a state statute.  
24 That's the difference.

25 COMMISSIONER JABER: Okay. So, the answer to my

1 question is the Pennsylvania Commission did not make a finding  
2 that these three situations existed, and they're relying on the  
3 federal law and their own state statute.

4 MR. LACKEY: It's my understanding that Pennsylvania  
5 was relying on their state statute.

6 COMMISSIONER JABER: There's no reference or reliance  
7 in Section 272 in the Pennsylvania order?

8 MR. LACKEY: I'm sorry, I can't answer that. It's a  
9 long order. It may be. What the Pennsylvania court said,  
10 though, was that these three things that are listed in the  
11 federal Act did not preclude the state when it had otherwise,  
12 had authority from adding additional requirements. That was  
13 the point.

14 COMMISSIONER JABER: Just as a matter of general law,  
15 can a state Commission rely on a federal provision in reaching  
16 its decisions in telecommunications?

17 MR. LACKEY: You added the caveat. I would have said  
18 normally no, but in this case, clearly, the federal Act has  
19 given the state Commissions authority to act in certain  
20 specified ways. They've given you the authority to arbitrate  
21 disputes under the federal law, for instance. You have all the  
22 authority that we've talked about in all the arbitrations, so  
23 clearly the federal law has given you some authority.

24 COMMISSIONER JABER: Where do we get our authority to  
25 approve your 271 filing? Is that in state law or federal law?

1 MR. LACKEY: Well, actually, that's an interesting  
2 question, but the truth of the matter is that your approval is  
3 not required for our 271 petition. What the law actually  
4 requires is that after we file the petition at the FCC, the FCC  
5 is required to consult with you. And what's that sort of  
6 evolved in everywhere is everybody wants to come to the state  
7 Commission, present their case to them, get them fully up to  
8 speed on what they're doing, because the way the FCC rules work  
9 is we file on day one. On day 20, they're sitting down here  
10 saying, well, tell us what you want us to do, and so it  
11 actually is sort of --

12 COMMISSIONER JABER: And that's procedure, though.  
13 Regardless of whether we approve it or not, that procedure is  
14 set out where --

15 MR. LACKEY: But procedure for the approval is in the  
16 federal Act.

17 COMMISSIONER JABER: And state Commissions don't have  
18 specific authority to implement that procedure, other than  
19 120.80, sub 13, sub D.

20 MR. LACKEY: I think, you could make that argument.  
21 The truth of the matter is if you just want to use your general  
22 power to hold a proceeding to try to figure out what you wanted  
23 to tell the FCC, I don't believe any incumbent company would be  
24 foolish enough to tell you you couldn't do it.

25 COMMISSIONER JABER: And state-specific authority

1 does not exist for that process, right?

2 MR. LACKEY: I'm sorry, but I don't believe it could,  
3 because it's obviously this approval is contemplated by the  
4 federal Act. I think, 120.80(13) comes as close as you can  
5 get. But again, I can't imagine anybody would dispute your  
6 authority to conduct such a proceeding since the result might  
7 be untenable, if we did. My point though, again, is that  
8 Congress considered structural separation, and they only  
9 required it in those three circumstances.

10 So, my point is you can't gather any strength from  
11 the federal Act. There is no express authority under the  
12 federal Act for you to break us up either. And in terms of the  
13 implied authority, again, I point out that clearly the Act  
14 contemplated providing service; one company providing retail  
15 service that it had to sell at a discount and providing  
16 interconnection to its network. The Act doesn't make any  
17 sense, otherwise. If we had a wholesale company, what would  
18 our resale obligation be?

19 CHAIRMAN JACOBS: Mr. Lackey, before you move on to  
20 that -- to another point, it seems like in the Pennsylvania  
21 order they took on the discussion as to whether or not 272  
22 limits structural separation to only the services enumerated,  
23 and they kind of tossed that aside. So, you're saying that --  
24 and, I assume, that wasn't addressed by the Court.

25 MR. LACKEY: May I respond to that?

1 CHAIRMAN JACOBS: Mm-hmm.

2 MR. LACKEY: Again, what happened was Pennsylvania  
3 went to the Court and said, look, Court, there are only these  
4 three ways you can have structural separation. Pennsylvania  
5 has imposed a fourth; that is, retail wholesale. The federal  
6 Act preempts them. The Congress only said you could do these  
7 three, you can't do the four. And the Court said no, Congress  
8 said you can do these three, but they didn't prevent the state  
9 that had its own separate authority from imposing a fourth one.

10 CHAIRMAN JACOBS: I see.

11 MR. LACKEY: That's the difference. Verizon was  
12 trying to use the federal Act as a defensive mechanism.

13 CHAIRMAN JACOBS: I see.

14 MR. LACKEY: And what I'm saying is you're not there,  
15 because you don't have the state authority to do it, so I don't  
16 have to worry about the other one. I'm just trying to show you  
17 that you can't go to the federal Act and get this authority  
18 where none exists at the state level. That's the difference.  
19 Clearly, in the case the Verizon court said, no; the argument,  
20 Verizon, you're making is wrong. Congress didn't limit you  
21 when you got separate state authority. That's just not the  
22 issue here.

23 CHAIRMAN JACOBS: Thank you.

24 MR. LACKEY: I'm sorry, if I wasn't clear on that.

25 Now, I said I wasn't going to argue preemption, but I

1 am in a sense. There is no section of the federal law that  
2 applies. There it is -- no, go back. I had it, I just didn't  
3 pick up on it. This is 253(A). 253(A) says, in general, no  
4 state or local statute regulation or other state or local  
5 requirement may prohibit or have the effect of prohibiting the  
6 ability of any entity to provide any interstate or intrastate  
7 telecommunication service. This is the no-barrier rule. You  
8 cannot impose barriers on any company and prevent them from  
9 providing local service. If you split us into a wholesale  
10 retail group and tell the wholesale company it cannot provide  
11 local service, you are violating that law. Couldn't be any  
12 plainer.

13 Now, there is the next section which has an exception  
14 to it. The exception says nothing in this section shall affect  
15 the ability of the state to impose on a competitively neutral  
16 basis and consistent with Section 254 requirements necessary to  
17 preserve and advance universal service, protect the public  
18 safety and welfare, and ensure the continued quality of  
19 telecommunications services and safeguard the rights of  
20 customers.

21 And AT&T and other folks have tried to shoehorn  
22 themselves into this exemption, and this is one that the  
23 Pennsylvania court did buy. The Pennsylvania court did blow  
24 this one away. They were wrong in doing it, and let me explain  
25 why. The linchpin of this argument is that you can impose

1 limitations on a competitively-neutral basis. BellSouth is  
2 essentially -- and I'm not an antitrust lawyer. I'm probably  
3 using the terms incorrectly, vertically integrated. It owns  
4 the network and it provides the retail services.

5           According to the other side, the other folks, there's  
6 some kind of an unfair advantage to that, and so they want us  
7 broken up so we no longer have that advantage. Well, the  
8 problem is, is that there are ALECs out there that are just  
9 exactly like that.

10           AT&T's MediaOne has its own facilities and provides  
11 retail services to its end users over its own facilities. MCI  
12 owns switches, they own network. AT&T owns switches, they have  
13 network. All of those companies are allowed to put their  
14 network and their retail services together and sell them to end  
15 users, but they want you to break up BellSouth and preclude us  
16 from doing it.

17           Now, if they can do it and we can't, how can it  
18 possibly be competitively neutral? Now, of course, the way  
19 this gets spun is, well, gee, let's spin off the retail  
20 organization, and all of the retail organizations will compete  
21 on an even plane, and they'll all buy the same services from  
22 BellSouth, and that's what competitively neutral means.

23           And it's a fine argument except for the fact that it  
24 ignores that there are other facility-based carriers out there  
25 providing retail services to customers who you're not going to



1 be requiring to break up. Are you going to break up MediaOne  
2 and make it have a retail organization to sell its services,  
3 have a wholesale organization that provides its cable? If it's  
4 an advantage for BellSouth, it must be an advantage for  
5 MediaOne. The point of the matter is is you can't erect a  
6 barrier to a wholesale company, unless you do it in a  
7 competitively neutral way, and what is being proposed here  
8 isn't competitively neutral.

9           Now, there are other arguments in our motion. We've  
10 raised the issue of a commerce clause and other things. Those  
11 are fully briefed in the motion, and I don't think there's any  
12 point in my going through those in detail here. Quite frankly,  
13 I think, what the bottom line here is that when you realize  
14 that if you do what AT&T asks you to do, you're going to create  
15 a situation where we have a company that owns a network in  
16 Florida that is not a telecommunications company and,  
17 therefore, not regulated by you, ought to put to an end this  
18 issue of whether you have the power and whether the legislature  
19 intended you to be able to break us up. I don't think you have  
20 to get to the rest of these arguments, but they're there,  
21 they're in the brief.

22           Unless you all have some questions, I think, I will  
23 stop there. I assume, I'll see you again.

24           COMMISSIONER PALECKI: Mr. Lackey, I have one  
25 question.

1 MR. LACKEY: Yes, sir.

2 COMMISSIONER PALECKI: Your argument thus far has  
3 been based solely on the relief that AT&T has requested which  
4 is a full structural separation. Could you address the issue  
5 of functional separation, specifically whether this Commission,  
6 if it determined that a lesser degree of relief in the form of  
7 some sort of functional separation would promote competition in  
8 the state of Florida, would we have authority to do that?

9 MR. LACKEY: I don't want to evade your question,  
10 because I think it's a very good question. I'm not sure.  
11 They're still fooling around with functional separation in  
12 Pennsylvania. They're still fooling around with their code of  
13 conduct in Pennsylvania and I don't know what the outcome of  
14 that's going to be, and until we know the outcome we won't know  
15 whether the Commissions there have stepped over the bounds or  
16 not. I mean, clearly, I believe, there are things that can be  
17 done.

18 BellSouth has an obligation, a legal obligation, not  
19 to discriminate. We have a legal obligation to provide parity.  
20 You've already taken some steps. We have a performance  
21 measurements proceeding that's going on that's going to  
22 establish the performance measurements that will measure  
23 whether we're providing parity or not, and there's a penalty  
24 plan associated with it. And you'll recall that we had a  
25 discussion about whether you had the authority to impose

1 penalties or not, but clearly you have the ability to adopt  
2 standards by which the parties will relay and by which you will  
3 measure that.

4           Clearly, you have the authority to require  
5 third-party testing, which is ongoing now, to determine the  
6 adequacy of our interfaces and whether they work. Clearly, you  
7 have ongoing supervision of our conduct. Whether you could  
8 formulize that and say, okay, you don't have to have two  
9 different corporations, we want you to have two different  
10 divisions, and BellSouth will continue to own the stock but you  
11 can't have common officers, you can't have common employees,  
12 that sort of thing, AT&T didn't raise that issue and so, I'm  
13 not sure that I'm in a position to tell you.

14           I will tell you that you clearly have authority to  
15 regulate us. I'm just not sure where the line is. Clearly,  
16 there's got to be a lesser point that you can go to. I cannot  
17 deny that and will not deny that. I'm just not positive,  
18 standing here today, where that line is. I'm certainly not  
19 trying to suggest to you that you have no control over this,  
20 because you clearly do. I just can't tell you what it is. I  
21 mean, I can't tell you how to slice and dice it today. I can't  
22 tell you where you could go with it, and I apologize for that.

23           COMMISSIONER JABER: Let me ask that same question a  
24 different way. In Pennsylvania, the state Commission made it  
25 clear they were not separating Verizon into two companies;

1 would you agree with me?

2 MR. LACKEY: That they were not structurally  
3 separating it, yes, ma'am.

4 COMMISSIONER JABER: That's right. And, in fact, I  
5 think, Pennsylvania made it a point to say there was some  
6 efficiencies to be gained in how Verizon was providing service  
7 in Pennsylvania, that being that they share the computer  
8 equipment and that they share the employees; is that correct?

9 MR. LACKEY: Yes, ma'am, I believe, that's the  
10 conclusion they reached.

11 COMMISSIONER JABER: Now, let's set Pennsylvania  
12 aside, and let's focus on Florida.

13 MR. LACKEY: Okay.

14 COMMISSIONER JABER: If Florida implemented -- I  
15 think, you used friendly, little friendly code of conduct, if  
16 Florida wanted to require BellSouth to do what BellSouth says  
17 it already does, which is provide separate communications  
18 between its wholesale side and its retail side by making them  
19 enter into a code of conduct you could agree with me that we've  
20 got that authority.

21 MR. LACKEY: Yes. I believe that you have the  
22 authority to impose those kinds of requirements, provided  
23 they're clearly defined, upon any company that's subject to  
24 your jurisdiction.

25 COMMISSIONER JABER: And isn't that, in fact, the

1 only thing that Pennsylvania did?

2 MR. LACKEY: I'm sorry?

3 COMMISSIONER JABER: Isn't that, in fact, the only  
4 thing that Pennsylvania did? They required Verizon to  
5 implement a little friendly code of conduct and made them  
6 accountable for arms-length transactions between its wholesale  
7 and retail divisions.

8 MR. LACKEY: Well --

9 COMMISSIONER JABER: Mr. Lackey, that's all it did,  
10 isn't it?

11 MR. LACKEY: Well, they certainly did not  
12 structurally separate it. They functionally separated, and  
13 they're going to impose a code of conduct on the companies.  
14 It's my understanding, and Verizon can probably address this  
15 better than I, that that is not final yet. They don't know  
16 what that final code of conduct is going to look like.

17 I have read that code of conduct. I've got a copy of  
18 it back in my briefcase. And when I look at it, I'm not sure  
19 what it means in the context of their operations or our  
20 operations. My point is, is that I believe you can do a code  
21 of conduct. I'm just not willing to say that you can take what  
22 Pennsylvania did and just slap it down and say, okay, there it  
23 is, because I don't think that necessarily fits our situation  
24 in terms of our organization or is particularly clear on what  
25 it requires.

1           COMMISSIONER JABER: Okay, but as a matter of law,  
2 you would agree with me, then, for Florida we can certainly  
3 require BellSouth to enter into arms-length transactions  
4 between its already separated wholesale side and its retail  
5 side.

6           MR. LACKEY: As long as I can put the word  
7 appropriate so I don't cut off myself down the road, sure, I  
8 agree. Please, I'm not here to tell you ya'll don't have  
9 jurisdiction over us. All I'm trying to say is that you can't  
10 break us up. That's my message.

11          CHAIRMAN JACOBS: Thank you, Mr. Lackey.

12          MR. LACKEY: Thank you.

13          CHAIRMAN JACOBS: Very good presentation.

14          MR. LACKEY: Appreciate it.

15          CHAIRMAN JACOBS: Why don't we take a break, a very  
16 brief break, because we're on a tight schedule. Mr. Lackey had  
17 a bit more than 45 minutes, but when we come back we'll try to  
18 get the other two parties in before lunch, so we'll try and  
19 keep them on that kind of a timeline, so we'll come back in ten  
20 minutes.

21          (Recess taken.)

22          COMMISSIONER DEASON: Please continue.

23          MS. CASWELL: I'm Kim Caswell with Verizon Florida.

24          Verizon concurs in BellSouth's analysis of the  
25 jurisdictional impediments to ordering structural separation

1 here in Florida, so rather than repeat Mr. Lackey's points,  
2 I'll just offer a few general observations about the issue of  
3 jurisdiction.

4           Verizon has had quite a bit of experience with AT&T's  
5 structural separation attempts in a number of its states. Of  
6 course, none of these attempts have been successful. Although,  
7 each state's laws are different, regulators have not been  
8 willing to take an expansive view of their jurisdiction in the  
9 absence of specific legislation authorizing structural  
10 separation, nor have legislators been willing to grant that  
11 kind of specific authority that Commissions need to order  
12 structural separation.

13           Mr. Lackey and Mr. Williams mentioned the recent  
14 Virginia decision dismissing AT&T's structural separation  
15 petition against Verizon. That decision has particular  
16 resonance for this inquiry. As they have done here, the CLECs  
17 in Virginia tried to convince the Commission that it had  
18 inherently broad jurisdiction to order structural separation.  
19 The Virginia Commission rejected that notion.

20           In its order granting Verizon's motion to dismiss, it  
21 concluded that state statutes authorizing the Commission to  
22 regulate ILECs, promote competition, and protect consumers did  
23 not provide the requisite's specific authority the Commission  
24 needed to consider structural separation. It found nothing in  
25 the federal Act that authorized structural separation either

1 so, again, as Mr. Lackey pointed out, if you don't have  
2 structural separation under state law, then the Act is not  
3 going to give you that authority.

4           The Virginia Commission observed also that structural  
5 separation would impermissibly impair Verizon's property rights  
6 under its existing certificates. It concluded that rather than  
7 launch a separate investigation, it is more expedient and  
8 appropriate to pursue the pending cases addressing competition  
9 in the local exchange market, and that's exactly the approach  
10 that Verizon and BellSouth urge here in Florida.

11           We've heard from Mr. Williams and Mr. Lackey as well  
12 that AT&T has also failed in its attempts to convince  
13 legislators to confer structural separation jurisdiction upon  
14 state Commissions. For instance, in Maryland, structural  
15 separation legislation was withdrawn when it was clear that  
16 that bill was headed towards certain defeat after the  
17 Department of Business and Economic Development told the  
18 legislature that it would place Maryland in a noncompetitive  
19 position in terms of the growth of telecommunications services  
20 through the state and that it would be a disincentive to the  
21 uncumbent carrier to invest in a state at a time when Maryland  
22 seeks to encourage the deployment of broadband and other  
23 telecom technology. Structural separation legislation was also  
24 similarly rejected earlier this year in Illinois when the  
25 legislature declined to include structural separation proposals



1 in its rewrite of the telecommunications law.

2 Now, we've also heard quite a bit about Pennsylvania  
3 this morning, and it is true that the Commission originally  
4 ordered structural separation, but it later rejected that  
5 notion and instead ordered functional separation so that as a  
6 policy matter it backed off the structural separation decision  
7 and concluded that structural separation was not in the best  
8 interest of Pennsylvania consumers.

9 Now, the code of conduct that we've discussed a  
10 little bit this morning is still being defined in an ongoing  
11 rulemaking, but the important point to be made here is that  
12 functional separation does not mean what AT&T thinks it does.  
13 AT&T filed a motion in Pennsylvania to clarify that functional  
14 separation meant identical access to operation support systems  
15 for the CLECs and the ILECs own retail operation. The  
16 Commission rejected that notion as well and said that it did  
17 not require such identical access, so AT&T's efforts to turn a  
18 functional separation proceeding into another structural  
19 separation have failed in Pennsylvania.

20 Verizon expects to see more decisions rejecting  
21 structural separation as policymakers act on structural  
22 separation proposals in other states. All parties here,  
23 including AT&T and the CLECs, would have to agree there's no  
24 explicit legislative authority in the statutes to give you any  
25 authority to do structural separation. So, the question is

1 whether you want to go out on a very shaky limb and claim the  
2 unduly broad jurisdiction that AT&T and the other CLECs urge  
3 you to. If you do it, it will be a sharp departure from your  
4 longstanding reluctance to interfere in matters of corporate  
5 structure.

6 The Commission should not waste its time and  
7 resources in those of the parties which would participate in a  
8 structural separation proceeding, unless there was some reason  
9 for believing that structural separation would serve the public  
10 interest.

11 Tomorrow you'll hear why it will do no one any good  
12 to order structural separation of BellSouth. And after hearing  
13 that discussion, you'll have no hesitation at all about the  
14 wisdom of dismissing AT&T's petition for lack of jurisdiction  
15 as the Virginia Commission did.

16 Thank you.

17 COMMISSIONER DEASON: Any questions? Thank you.

18 MS. CASWELL: Thank you.

19 COMMISSIONER DEASON: Is AT&T the next presenter?

20 MS. LOGUE: Yes, sir. The next presenter will be

21 AT&T.

22 MR. LAMOUREUX: I'm just going to introduce our  
23 presenters. I may be one of the few lawyers that's actually  
24 not on those pleadings that Mr. Lackey discussed this morning.  
25 I don't need to do much of an introduction. Mr. Lackey did a

1 fine job introducing our distinguished presenters on the  
2 jurisdictional argument.

3 Mr. Meros and Mr. Hatchett will be presenting our  
4 legal arguments on the jurisdictional issue and, I think, after  
5 hearing them you will find that it's very clear that they're  
6 not here to confuse you or to weave some sort of argument, as  
7 Mr. Lackey proposed, but they're here to clarify the issue and  
8 help you understand that when you get down to it you'll  
9 understand simply and clearly that you do have jurisdiction.  
10 And with that, Mr. Meros will be going first.

11 MR. MEROS: Commissioners, my name is George Meros,  
12 with Gray, Harris & Robinson. I am pleased to be here before  
13 you today, and it is my honor to be here on behalf of AT&T, the  
14 petitioners in this cause.

15 I want to first say that if I were half the lawyer  
16 that Mr. Lackey thought I am, he would have hired me, and I'd  
17 be arguing on his side and so, unfortunately, that didn't  
18 happen. I still have the big mortgage, so I'm here doing the  
19 best I can.

20 It is also an equal privilege to share this  
21 presentation with Judge Hatchett. He will be doing the great  
22 bulk of it. My role will be really to provide you some  
23 observations and to try to put some things in context and ask  
24 you to consider a number of things carefully as you proceed in  
25 this docket. And I say as you proceed in this docket because,

1 frankly, I do not believe and, I think, the facts and the law  
2 show that jurisdiction is not a closed question and, I think,  
3 Mr. Lackey's last argument is the key to that.

4           Mr. Lackey conceded to you that something of the sort  
5 of functional separation or code of conduct is within this  
6 jurisdiction's powers. If it is, then the relief requested in  
7 our petition is as well, because there is nothing in the  
8 Florida statute that talks about a code of conduct. There is  
9 nothing in the Florida statute about functional separation. It  
10 is a matter that after full evidentiary proceedings and after  
11 careful evaluation it was decided that that is what was  
12 necessary to effectuate and to make competition real in local  
13 exchange services, and that is just the power and the authority  
14 that you have to make competition real by whatever means is  
15 necessary consistent with the state and federal statute, and  
16 our relief requests just that.

17           We do not have to bend the law. We do not have to  
18 twist it. We simply have to provide it to you. And, frankly,  
19 Mr. Lackey said that he had missed the Teleco case. Mr. Lackey  
20 missed a decade of Florida Supreme Court cases which we will  
21 provide to you. There are no less than four decisions from the  
22 Florida Supreme Court, which Judge Hatchett will explain to you  
23 in greater detail, that show your plain power and jurisdiction  
24 over this proceeding.

25           This is not whether or not by the end of tomorrow you

1 will order some certain relief. It is whether you have the  
2 authority and the power to enter into proceedings to determine  
3 what relief, if any, is necessary. And it will be our burden  
4 to prove it but, clearly, you have the right to impose that  
5 burden on us and to consider these proceedings.

6 I will divide my comments into four major themes  
7 which I believe, comes out of the pleadings and the papers  
8 filed by BellSouth. They're obviously not explicit in  
9 BellSouth's papers but, I think, they are clearly the essence  
10 of it.

11 The first argument that BellSouth makes is if you  
12 don't see it in writing you can't do it. The second is life  
13 will be a lot easier if you stop before you begin. The third  
14 is credibility doesn't matter. And the fourth is to heck with  
15 the consequences to this Commission, if this Commission were to  
16 deny jurisdiction.

17 Let me go first to if you don't see it in writing you  
18 can't do it. Consider carefully, I urge you, the essence of  
19 their argument. What BellSouth is telling this Commission is  
20 that even if the relief requested is necessary to root out or  
21 eliminate anticompetitive conduct. And even if it is  
22 absolutely necessary because, again, for purposes of  
23 jurisdiction you must assume all of these facts to be  
24 absolutely true and uncontested. And assume that the relief  
25 will greatly enhance competition, will encourage new entrants

1 into the market at less cost and greater services to consumers.  
2 You can't do it, because you don't see it in black and white.

3           Again, it was Mr. Lackey who admitted to you that you  
4 have the jurisdiction to entertain things such as functional  
5 separation, code of conduct, but you will find nowhere in the  
6 Florida statutes any reference to those words. It's because  
7 you are a body intended to effectuate the policy of the  
8 legislature when the legislature cannot contemplate and  
9 anticipate and determine every precise remedy.

10           The legislature has imposed on you the duty and the  
11 opportunity to use your expertise and your competence to do the  
12 right thing in the right circumstances. And really what  
13 BellSouth is saying without saying it disrespectfully is that  
14 you are functionary, that you are here to simply apply words on  
15 a piece of paper and not do more. If that were your role here,  
16 then you would be just as -- in just as dire straits as is  
17 competition in local exchange markets, because you would not  
18 have discretion, you would not have the ability to innovate and  
19 to think imaginatively as problems arise in this evolving  
20 marketplace and in the electric marketplace and in gas  
21 transmission and in every other of your jurisdiction, you  
22 wouldn't have those powers. You'd simply say, well, is it in  
23 black and white? And if it isn't, I can't do it. And I will  
24 suggest to you later that if there were a denial of  
25 jurisdiction here, you are unconsciously or through unintended

1 consequences would be putting yourself in that position later  
2 on.

3 I think, the fallacy of BellSouth's argument is best  
4 exemplified by very simple syllogism. And I would like to show  
5 that to you now, if I could, which is Exhibit A, and go over it  
6 briefly. And the premisses here are matters that are without  
7 dispute, and the first is the governing statute. That is a  
8 paraphrase of that statute to be sure but, nonetheless, it is  
9 entirely accurate and that is that competition of local  
10 exchange services is in the public interest and will encourage  
11 new technology, innovation, and investment in  
12 telecommunications, generally, and local exchange services,  
13 specifically, no question about that.

14 Second thing is just as incontestable, and that is  
15 what the Florida Supreme Court has said, specifically, with  
16 regard to Chapter 364. And I urge the Commission to understand  
17 now as we go through this that none of these decisions were  
18 cited to you by BellSouth in their papers, and those cases say  
19 that this Commission has broad authority to regulate in the  
20 public interest.

21 The third is an admitted fact, because you have a  
22 petition before you that lays out in great detail what is  
23 happening in the industry today. And as a matter of law, this  
24 Commission has a tough duty today and tomorrow and that is, on  
25 the one hand, to absolutely assume is true facts in the

1 petition but to, thereafter, consider ramifications of remedies  
2 that will occur after full fact-finding proceedings.

3 But as we sit here at this moment, we have to admit  
4 and have to accept as admitted the facts in the petition and in  
5 this third premise, and that is that structural separation  
6 would enhance or enhances competition in local exchange  
7 services. The conclusion from that is as simple as it is  
8 conclusive, and that is, structural separation is in the public  
9 interest and squarely within the power of the PSC.

10 Moreover, the Florida Supreme Court and the legis--  
11 interpreting the legislative intent specifically with regard to  
12 telecommunications and, again, in a case in 1987, did not find  
13 its way into BellSouth's papers, says that it is incumbent upon  
14 the PSC to act in a matter likely to achieve the goals of  
15 Florida's telecommunications policy to the fullest extent  
16 possible, not baby steps, not a little bit; not, well,  
17 entertain it if it looks like maybe it'll be within our powers,  
18 but you investigate and implement to the fullest extent  
19 possible; no shyness in the legislative intent in regard to  
20 what this Commission can and cannot do.

21 Now, I want to go very clearly past BellSouth's  
22 argument that the language has to be explicit in the statute.  
23 And I've alluded to this briefly, but this is in Exhibit C, and  
24 this is a case from 1959. This is not a new concept in Florida  
25 jurisprudence as to what the PSC can and cannot do in the



1 absence of explicit words.

2           And what this case dealt with was an old trucking  
3 matter, but it was very much the same sort of thing. The PSC  
4 was trying to come up with a remedy to abusive practices, and  
5 came up with a remedy that, in their view, was consistent with  
6 the statutory scheme, consistent with their duties to fulfil  
7 the public interest, but was not found explicitly in the  
8 statute.

9           And the company said, well, you can't do that, it's  
10 not explicitly in the statute. And the Court first said what  
11 is the standard? It's clear that the PSC only has such powers  
12 as are expressly or impliedly conferred by statute, no question  
13 about that. But what does it go on to say? It says that it is  
14 the very difficulty of making a specific enumeration of all  
15 such powers as the legislature may intend to confer that  
16 renders it necessary to confer some powers in general terms.

17           And further, that the general terms -- general powers  
18 are intended to confer some powers, other than those  
19 specifically enumerated. What that means, of course, is that  
20 when you have general language, that language is meaningful,  
21 that language is not flabby. That language says that you have  
22 general powers, because we can't anticipate all of them, and  
23 those general powers are telling you to go above and beyond,  
24 depending upon the facts, depending upon what comes out, and do  
25 what is right, because the legislature has said you must make

1 competition work. And, I think, you can see that 364 has  
2 broader and more powerful language of directory language to  
3 enforce competition than any of your other statutory  
4 authorizations in any other area.

5           And I will not repeat or I will not start off and  
6 discuss cases that Judge Hatchett will discuss, but there are  
7 four or five different cases that say very much the same thing  
8 in this decade that, again, was missed by BellSouth. But I do  
9 want to point out that there are a number of examples in this  
10 past decade of relief provided by this Commission that was not  
11 found expressly in the language of the statutes and in these  
12 cases, very importantly, there were attempts by the Commission  
13 or efforts by the Commission to say that the language of a  
14 particular section did include this power and the Court said  
15 no, it's really not in that section, but the authorizing power  
16 under 364.01 and 02 was more than enough to confer power upon  
17 this Commission to do what was necessary under those  
18 circumstances.

19           And three of those, just like we heard about before,  
20 is the Teleco case divestiture. There is nothing in the  
21 statute that made reference to that and, in fact, the Court  
22 said this particular statutory language doesn't do that but,  
23 nonetheless, you have full authority to do that under 364.02  
24 and 03.

25           Another one was the Commission forcing the payment of

1 compensation from a subsidiary to a parent corporation without  
2 express statutory authority. And the third, the Beard case,  
3 which takes on substantial importance here, I'd suggest, was  
4 one where the PSC reclassified long-distance service to local  
5 at a time when there was no competition in local service, and  
6 the long-distance provider said wait a minute, you can't do  
7 that, I have a certificate. It doesn't say anything in the  
8 statute about you taking away my service area, and you are  
9 violating my constitutional rights, you're intruding in my  
10 business, and there's no express authority. The Court said  
11 there does not have to be any express authority.

12           The Commission has the right to work in the public  
13 interest in telecommunications. The legislature has given it  
14 the broadest possible power to do so. And so long as the  
15 facts, as ultimately developed, show this to be a reasonable  
16 and rational response to the legislative policies, you have the  
17 power to do so.

18           COMMISSIONER DEASON: Let me ask a question on the  
19 Beard case.

20           MR. MEROS: Sure.

21           COMMISSIONER DEASON: And you may need to correct me  
22 if I'm wrong. Was this a situation where there was a grant of  
23 an extended area of service to an area that previously was a  
24 toll route and it was converted to local service?

25           MR. MEROS: It was converted to local service.

1           COMMISSIONER DEASON: And it was under the authority  
2 of the Commission to consider requests for extended area of  
3 service and to grant those if certain conditions were met?

4           MR. MEROS: No, this was not a request for extended  
5 service. This was a reclassification from long distance to  
6 local that did not come within any of the specific statutory  
7 provisions. It was done at the -- I think, at the original  
8 initiation of the Commission itself. And that was before local  
9 competition, and the carrier said the only rights you have, the  
10 only powers you have, are you can decertify me, but you can't  
11 -- you have no express authority to change my service area.

12           And the Commission said -- the Commission cited a  
13 provision that they believed gave them that express authority,  
14 and the Court said no, that language does not give you the  
15 express authority, but under 02, the general powers to acquire  
16 -- the general powers of the PSC were more than sufficient.

17           COMMISSIONER DEASON: Okay. Well, let me ask you  
18 this question, then. Given that -- that that's the case and,  
19 Staff, you may need to research that and see if that was a  
20 grant of extended area of service under specific provisions of  
21 extended areas of service, which is in the statute. But if  
22 that's not the case, are you saying then this Commission has  
23 the authority now to grant extended area of service in our  
24 general provisions of --

25           MR. MEROS: This was a different statutory scheme.

1 This was before 1995. And what I'm saying is --

2 COMMISSIONER DEASON: Let me make my question very  
3 clear.

4 MR. MEROS: Sure.

5 COMMISSIONER DEASON: It's my belief that the  
6 Commission granted extended area of service -- under statutory  
7 provision, it gave us authority to consider extended area of  
8 service, and we did so. What you're saying is that no, under  
9 our general authority we took away a long-distance route and  
10 made it local. There may be a difference without a distinction  
11 or vice versa, I'm not sure, but if I buy into your argument  
12 that we have broad authority from the legislature, are you  
13 saying here today in the year 2001, if we think it's in the  
14 public interest, we can declassify long-distance route and make  
15 it local under general provisions to do what's in the public  
16 interest?

17 MR. MEROS: Not to the extent that it would be  
18 inconsistent, expressly inconsistent, with other provisions in  
19 the code now. And I don't know whether -- I cannot cite to you  
20 now whether --

21 COMMISSIONER DEASON: The legislature took away the  
22 ability of the Commission to grant extended area of service in  
23 1995 rewriting of Chapter 366 -- I'm sorry, 364. So given  
24 that, you're saying we would not have the authority now to do  
25 that?

1           MR. MEROS: Well, the argument would certainly be  
2 that if the legislature expressly took away power that you  
3 otherwise had, then that legislative intent shows that the  
4 legislature intended to take it away, and that that specific  
5 retraction is their intent. That, of course, has nothing to do  
6 with the statutory intent here, of course, because there's been  
7 no retraction of power in 364 with regard to making competition  
8 work.

9           Certainly, there would be a strong argument that if  
10 you had one day clear explicit authority and the legislature  
11 made it clear that we no longer think you should have that  
12 authority, then that would rule over the general powers, but  
13 there is nothing in 364 inconsistent with the ordering of the  
14 relief here.

15           In fact, the only language is consistent with the  
16 grant of general powers and the grant of power to do what is in  
17 the public interest. And there's been no argument, no  
18 assertion whatsoever, by BellSouth in their papers or in this  
19 argument that there's any legislative intent that says that at  
20 one time there was this power and it's now been taken away.

21           COMMISSIONER DEASON: Okay. The previous case, which  
22 you mentioned, which is a 1989 case, could you provide me more  
23 factual background? What was the monetary compensation? Who  
24 was it paid from, to whom, for what reason?

25           MR. MEROS: It was paid from the subsidiary to the

1 parent because of a perceived unfair -- because of perceived  
2 receipt of intangible benefits by the subsidiary that had not  
3 been compensated.

4 COMMISSIONER DEASON: Did we actually order a payment  
5 or did we input amount of revenue in setting the rates for the  
6 local provider of service?

7 MR. MEROS: If I read it correctly and, I believe, I  
8 did, it was actually the ordering of compensation.

9 COMMISSIONER DEASON: Staff, I need some  
10 clarification at some point. Not right now, unless you have it  
11 right now.

12 MS. SIMMONS: Commissioner Deason, I can't answer  
13 that particular question, but I wanted to comment on the other  
14 case you were describing. We suspect it is the Tampa Bay ECS  
15 case, but the legal Staff is going to check.

16 COMMISSIONER DEASON: Okay. And if at some point we  
17 can get some information on the Nichols case as well, that  
18 would be helpful. Pardon the interruptions.

19 MR. MEROS: No, certainly.

20 And the third case, the Beard case -- well, we  
21 already talked about the Beard case. In Teleco, I did want to  
22 answer the question earlier that in Teleco the company was, in  
23 fact, granted certification as an ALEC, but the statute that  
24 required it to divest or the statute that said it did not have  
25 authorization was in effect at the time of the proceedings.

1 And the Court said, well, we can't retroactively say -- or we  
2 can't say now that the case is moot, because at the time they  
3 possessed it they did not have certification, but at the time  
4 of the proceeding Teleco did, in fact, have certification as an  
5 ALEC.

6           The next subsection of BellSouth's argument is that  
7 life would be easier if you stop before you begin. And what  
8 BellSouth does, very effectively, is try to mix facts with law  
9 and say this is very complex, this is very difficult and  
10 because of that it would be better not to proceed, because  
11 again Mr. Lackey said he doesn't know where the line is. He  
12 doesn't know where your jurisdiction starts and where it stops.

13           If Mr. Lackey doesn't know where that line is, it is  
14 precisely for this Commission to entertain proceedings to  
15 determine where that line is. And it is the clearest  
16 indication yet that there is no case law that says you can go  
17 this far but no further in this particular area at this  
18 particular time, it is not in the statute. To the contrary, it  
19 is only the broadest language requiring you to do whatever you  
20 can to enforce competition.

21           And I would suggest something that this Commission  
22 already knows, but it is never easier, it is never wiser not to  
23 fulfill the complete mandate that the legislature has provided  
24 to you, and the only way you can do that is to entertain the  
25 evidentiary proceedings to see where the facts go. If we do



1 not prove the facts, then we lose.

2 COMMISSIONER JABER: Let me interrupt you for a  
3 second.

4 MR. MEROS: Sure.

5 COMMISSIONER JABER: Do whatever we can to promote  
6 competition, I think, is what you said. What's the closest  
7 statute that I could look at in Florida statutes that would say  
8 exactly that?

9 MR. MEROS: 364.03 and all of the subparts, and Judge  
10 Hatchett will give you a number of the specific cites that  
11 talks about not only the importance of competition.

12 COMMISSIONER JABER: Okay. Now, have you all done --  
13 has anyone done -- this is a question that I would ask of  
14 anyone here. Has anyone done a legislative history for 364.03  
15 that might give me some guidance on what those parameters are?

16 MR. MEROS: We have done a legislative history with  
17 the exception of reviewing tapes. There's enumerable tapes  
18 that time simply has not permitted and, frankly, I can find  
19 nothing on either side of the issue that would shed light on  
20 this. And that, of course, is one of the problems with Florida  
21 legislative history, unless you can transcribe and read all of  
22 the tapes, it is hard to get solid things at times.

23 Going to the next section, I call that "Credibility  
24 Doesn't Matter." This Commission has every right to consider  
25 the credibility and, I believe, the responsibility to consider

1 the credibility of statements and assertions made in this  
2 proceeding. BellSouth's arguments on jurisdiction are not  
3 credible for a number of reasons: One, because of the very  
4 cases and the decade of cases that are not found in their  
5 papers and have not been discussed and have not been cited.

6           And one of -- I think, another reason that this  
7 Commission should look at that very carefully is what are the  
8 cases cited to this court from the Florida Supreme Court that  
9 suggests that there is no such power in Florida? There's one  
10 case that everyone would concede was right in 1974 and that is  
11 that agencies don't impose tort damages, and agencies do not  
12 get involved in personal injury suits or compensatory damages.  
13 That's obvious.

14           Now, to some extent, I think, the Telecommunications  
15 Act, in the new scheme, might modify that decision to some  
16 extent, and there are some powers that are in ways, I would  
17 believe, compensatory in this scheme but, nonetheless, that  
18 case is obvious.

19           What is the other case? The only other case that  
20 BellSouth cites to support the proposition there's no  
21 jurisdiction here, that is a case from 1928. And I would  
22 suggest to you that the regulatory world and the legislative  
23 scheme in the state of Florida has changed since the Great  
24 Depression and since World War II and since the advent of  
25 reliable automobile travel.

1           And that statement, in fact, in that case, is taken  
2 out of context, but Judge Hatchett will describe that. That is  
3 the reason on-- the reason why that case was cited is because  
4 it's the only one in the state of Florida that makes some  
5 suggestion that a Commission cannot effect the corporate  
6 conduct of a regulated company.

7           Now, what BellSouth doesn't cite to this court but  
8 should have, again, not only not missing Teleco and not missing  
9 a decade of precedent, but they didn't cite a case that was  
10 decided 31 years later by the first DCA that says the obvious  
11 and says what Florida law is, that corporations are creatures  
12 of statute and they are amenable to all reasonable regulations  
13 imposed by statute, both as to internal operation and to the  
14 rights of those who own them, their stockholders. That's the  
15 law of Florida, and that's certainly the law after the era of  
16 movies with sound.

17           This is not about the morse code in 1928. And I  
18 would suggest to you that Mr. Lackey is a fine lawyer himself.  
19 And if BellSouth cannot bring to this Commission a case after  
20 1928 that argues in support of their motion to dismiss, it is  
21 powerful proof that there is not substance to the motion to  
22 dismiss.

23           The other point I would ask the Commission to  
24 consider about credibility is that sometimes BellSouth argues  
25 that this Commission is omnipotent, but other times impotent,

1 and it really depends upon the situation and what it is in the  
2 best interest of BellSouth.

3 In a decision or in a case presently pending or  
4 earlier pending in the 11th Circuit Court of Appeals in which  
5 BellSouth was involved where a local government was trying to  
6 assert some regulatory control over BellSouth's facilities,  
7 BellSouth cites Chapter 364 and cites it in precisely the way  
8 we are citing it now, talking about it being the capstone of  
9 telecommunications law in Florida. It unequivocally provides  
10 that the PSC has exclusive jurisdiction to promote health,  
11 safety, and welfare and ensuring that basic local  
12 telecommunications service are available to all consumers and  
13 to promote competition by encouraging new entrants in  
14 telecommunications market.

15 What does it do, then? It cites Florida  
16 Interexchange Carriers vs. Beard, one of the very cases cited  
17 by us, a case again, not cited in BellSouth's brief. The 1928  
18 telegraph case was cited, not Beard, not Teleco, not Nichols,  
19 not all of the other cases in this past decade.

20 The last area that I would ask the Commission to  
21 consider is what I call BellSouth's view to heck with the  
22 consequences to this Commission. BellSouth would have this  
23 Commission, essentially, deny its own viability in this area by  
24 saying there's no need for you to consider the effect of your  
25 denial. You just don't have the power. I ask the Commission

1 to consider very carefully what would be the effect, what would  
2 be the illegal effect of an order denying jurisdiction?

3           You have, in this century, a full plate of areas of  
4 law that are going to require imagination, innovation, and  
5 courageous thinking in areas that are evolving and changing  
6 every day. If you enter an order denying jurisdiction here and  
7 saying it's not in the statute, we can't find it in statute,  
8 therefore, we have no power, then lawyers like myself will be  
9 up here every day telling you in the next case, in the electric  
10 field, you don't have the power, because you just said you  
11 didn't over here, despite all of the broad language and a  
12 decade of cases that say you have the right to entertain these  
13 proceedings.

14           And in the very case where it would be most critical  
15 for you to entertain your jurisdiction, in those gaps where the  
16 legislature cannot contemplate the right way to go, you would  
17 not have that power or you would have weakened your ability to  
18 assert that power. That's why Mr. Lackey doesn't know where  
19 the line is, because the line is where the wisdom and the good  
20 sense of this Commission follows and where it reaches based on  
21 the evidence and the discretion and the judgment of this  
22 Commission in looking at the law.

23           But if you say that line is at an arbitrary point,  
24 then your discretion and your power to effect policy and to  
25 effect the will of the people will be severely circumscribed.

1 This Commission is not a functionary. It is not here to simply  
2 read words on a piece of paper. It's here to make policy and  
3 to make the law consistent with the legislative mandate.

4 CHAIRMAN JACOBS: So, how do we come to defining a  
5 line? An alternative point, I think, Mr. Lackey said, was the  
6 reasonableness test.

7 MR. MEROS: Well, Judge Hatchett will cite to you a  
8 case from your own docket two years ago which -- and you said  
9 it better than anyone, and that is if the relief requested is  
10 consistent with the goals of the Telecommunication Act, to  
11 enforce and to develop and implement competition to local  
12 exchange services and it's a reasonable method of doing so,  
13 then it is well within our powers. It will be decided once you  
14 have full proceedings and you determine what the scope of the  
15 problem is, that there is a problem, and what is the right  
16 remedy -- what is the right relief to remedy that situation?

17 I'd like to leave you with one hypothetical that I'd  
18 ask you to consider carefully. I would like you to assume that  
19 at the end of this workshop the president of BellSouth came to  
20 you and said, "It isn't in our best interest to treat ALECs  
21 fairly, it just isn't. It's far better to take your fines, to  
22 pay them, and then to continue to delay. And we intend to  
23 continue to delay, continue to be discriminatory in access, not  
24 provide OSS systems fairly and appropriately, because that's  
25 what's best for our shareholders. And when we get caught,

1 we'll pay a fine, and we'll comply for a little while, and then  
2 we'll start doing it again, because that's what's best for us."

3           If the president said that to you, any of you, you'd  
4 say wait a minute, you have to comply with the law, and you  
5 have a certificate and we can take your certificate away and we  
6 can put you out of business, and there's no question you have  
7 that power. If you have the power to take BellSouth out of  
8 business, then you have the power to do something much more  
9 moderate and to create a forum of business for them that will  
10 give them the same incentives to comply with the law that  
11 everyone else has.

12           The power to destroy is far broader than the power to  
13 make competition work, and you have that full range of power.  
14 I ask the Commission not to give that up in this or any other  
15 field, because it will be that much more difficult to fulfill  
16 the people's mandate. That's all I have.

17           COMMISSIONER JABER: Mr. Meros -- is it Meros?

18           MR. MEROS: Meros.

19           COMMISSIONER JABER: Meros. Mr. Lackey made the  
20 argument that a true separation will result in a wholesale  
21 company that doesn't fit the definition of a telecommunications  
22 company so, I guess, I would ask you if you agree with that.  
23 And the second question would be reconcile that with what you  
24 just said, which is the Commission now has so much power that  
25 it could actually take away BellSouth's certificate. Well, if

1 Mr. Lackey is correct, a true separation would result in a  
2 company that we wouldn't even have jurisdiction over, so can  
3 you reconcile those statements for me?

4 MR. MEROS: Well, I believe, I can. And, frankly,  
5 the argument is one that isn't even in their paper so, I think,  
6 it may be a bright idea for one morning.

7 COMMISSIONER JABER: Some of the best ideas come  
8 early in the morning, so I don't know that --

9 MR. MEROS: Let me suggest to you, first of all, that  
10 what comes out of this will be determined by the Commission,  
11 and the scope and the breadth of the relief and what the  
12 companies will look like will be determined by you. And so,  
13 you can do it in any number of ways, and I'm not an expert in  
14 that. That may or may not create his situation. I do not  
15 believe it would, but you have and you will continue to have  
16 the same oversight authority that you do now, even if  
17 Mr. Lackey is correct in the outer most example by virtue of  
18 the federal Act. You will continue to exercise authority and  
19 responsibility under the federal Act, even if the wholesale  
20 company fit within that narrow exception.

21 So, nothing will change in substance over what you're  
22 doing now, and certainly nothing is inconsistent between the  
23 federal Act and the state act to permit you to do that. If,  
24 for some reason, that relief is something you did not wish to  
25 do, you could structure it in a way that would not fit within



1 the narrow exception to that statute. And frankly, if you look  
2 at the definition of what is a facility, a facility is not  
3 necessarily the same as a local telecommunications company.

4 So, it's very hard to determine whether or not, even  
5 under his example, there would be some lesser regulation by the  
6 PSC. But again, even assuming that it was, you would continue  
7 to have the same oversight authority pursuant to your role  
8 under the federal statute. But I really suggest that is for  
9 the proceedings and to determine what is the right remedy and  
10 what is the structure of the right remedy at that time.

11 I mean, the most important part now is to say you  
12 certainly have the right to entertain those questions and to  
13 come up with good results. And what BellSouth is saying to you  
14 is, well, you don't even have the power to think about it.  
15 Well, what happens when there's the next situation kind of like  
16 this? Well, would it fit within this exemption or would it  
17 not? Well, we can't think about it, because we found we didn't  
18 have jurisdiction. We simply want this Commission to carefully  
19 consider those precise issues and to come up with a result that  
20 is both consistent with the Florida and federal Act and is  
21 consistent with common sense.

22 COMMISSIONER JABER: Speaking of common sense, how  
23 much should I think about what Congress did not do? Congress,  
24 in opening up the telecommunications market, found it  
25 appropriate to design the 271 process, for example.

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1 MR. MEROS: Right.

2 COMMISSIONER JABER: They did not separate all of the  
3 incumbent local exchange companies into wholesale and retail,  
4 so common sense might tell me that if Congress wanted to  
5 separate ILECs in such a fashion they could have done that.

6 MR. MEROS: I would flip common sense there and say  
7 that Congress always at least should and, I think, most often  
8 does, and when it does not speak, it tells the states that the  
9 states are free speak to the extent not clearly inconsistent  
10 with the federal Act. It is states are the vessel of  
11 experimentation for the federal government and for federal  
12 legislation, and the Act made it very clear that it was not  
13 intended to preclude the states from fulfilling their mandate  
14 and to filling in the gaps in federal legislation.

15 So, I would suggest that the federal government not  
16 speaking and Congress not speaking in something that isn't so  
17 very local, as local exchange services, says nothing other than  
18 we think the states should always be the appropriate entity and  
19 the one most knowledgable to experiment and to innovate.

20 COMMISSIONER JABER: And where is that in the Act?

21 MR. MEROS: That's just basic federalism. And also,  
22 Judge Hatchett will go into the specifics of the provisions in  
23 the Act that continue to confer authority on the Commission to  
24 do its job.

25 COMMISSIONER DEASON: Let me ask a question. Would

1 you classify -- the relief that is being sought here is that  
2 the separation, the structural separation, that's a remedy that  
3 you're seeking, correct?

4 MR. MEROS: Yes.

5 COMMISSIONER DEASON: Okay. Now, Mr. Lackey  
6 mentioned in the statute that there are certain remedies that  
7 the Commission has -- enforcement provisions that the  
8 Commission has, we can fine the company or we can, ultimately,  
9 if we could, even revoke their certificate.

10 MR. MEROS: Mm-hmm.

11 COMMISSIONER DEASON: Can you define for me a  
12 difference between a remedy and an enforcement?

13 MR. MEROS: Absolutely. An enforcement is a  
14 punishment. And an enforcement is a specific -- is both a  
15 punishment and, to some extent, a remedy. But it is -- in the  
16 context of 364, the fine provision is just that, it is the  
17 intended punishment. But the statute goes on in great detail  
18 to talk about the general authorities under the injunctive  
19 relief provisions of 364.05 or I've forgotten the citation, but  
20 it is one of the most broad injunctive relief provisions that  
21 you will find in Florida law; that is, in addition to that,  
22 there is also the provision in the cross-subsidization statute,  
23 and I'm so proud of myself that I pronounced that correctly,  
24 that talks about the continuing ability of the Commission to  
25 investigate, to root out, and eliminate anticompetitive

1 conduct.

2           And then, the statute says that anytime there is a  
3 violation or interference with telecommunication services or  
4 companies, that it constitutes irreparable harm for which there  
5 is a right to relief in addition and above other rights and  
6 remedies. That statute is as broad as you can get and, I  
7 think, is express legislative intent that the fine section is  
8 only a portion of it. And that gets us right back to the  
9 problem, Commissioner; and that is, it is more economical, it  
10 is more sensible, it is the best thing for BellSouth to be  
11 fined and fined and fined and still do beautifully by paying  
12 those fines, until the incentives are there beyond the fines to  
13 act in a way consistent with the full legislative intent, as  
14 the case says, to the fullest extent possible, then they will  
15 not fully comply with the law.

16           It will be the death to the ALEC community by a  
17 thousand cuts. And it's the thousand cuts of a delay here, a  
18 discrimination there, and a little bit more delay there, and  
19 then they will remedy that for a moment, pay the fine, and in  
20 the meantime, the industry goes in the tank. That's why this  
21 is a serious request and a serious remedy for a serious problem  
22 far beyond fines.

23           COMMISSIONER DEASON: Let me ask you another  
24 question, maybe a little bit broader. And I don't mean to  
25 oversimplify, and if I do, please correct me. But what I hear,

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1 your message is that the Commission has broad authority, we  
2 should not limit our jurisdiction, and if we think that we need  
3 to do something that's in the public interest, we should do it,  
4 and if we go too far, well, then, a court will correct us.  
5 That's the message I'm getting, so tell me where I'm wrong in  
6 that.

7 MR. MEROS: I believe, you're incorrect in that,  
8 first of all, the authority is not just doing generally what's  
9 in the public interest. The authority provisions in the  
10 statute also talk about the very matters that we are talking  
11 about now.

12 I disagree with the statement that there's not  
13 express authority to do this. I think, there is all but  
14 express authority, because it talks about the need to eliminate  
15 anticompetitive behavior, to encourage new entrants, to do all  
16 of those things, so it is far more than just the PSC has the  
17 right to enter policy or to create rules in the public  
18 interest.

19 Secondly, what the cases have said is that in  
20 telecommunications more than any other area of which this  
21 Commission has jurisdiction, there is a clear affirmative  
22 mandate to make competition work. And if, in fact, we as a  
23 court, later find that the relief granted is consistent with  
24 the facts, is rationally related to the problem, and is not  
25 otherwise, clearly inconsistent with the law, then we will

1 affirm that.

2           And so, what this Commission will, thereafter, is  
3 entertain the facts; determine one, whether there's a problem.  
4 And it goes away if you say there's no problem. If there's a  
5 problem, what's the right remedy? And we say, and let's  
6 assume, that it's structural separation. The Court would say,  
7 in my view, that there was evidence to support that the problem  
8 existed, there was evidence to support -- and this goes back to  
9 the syllogism -- there's evidence to support that structural  
10 separation will enhance competition, and because of that, it's  
11 a rational response to a real problem based on the facts.

12           And based on that, we will affirm because, as you  
13 know, the Court gives the PSC the broadest possible discretion  
14 to do its job, if there are facts supporting it. And all we're  
15 saying is give us the opportunity, give us the forum to present  
16 those facts, win or lose.

17           COMMISSIONER DEASON: Thank you.

18           COMMISSIONER JABER: Mr. Meros, there's something you  
19 just said. We have to -- I think, what you just said is as  
20 long as we can make a finding that there is some  
21 anticompetitive behavior and that our actions, regardless of  
22 what the remedy is, will result in basic services being  
23 available to all Floridians at fair and reasonable prices and  
24 that the remedy we pick will encourage new entrants, we can  
25 justify a full separation of BellSouth.

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1           MR. MEROS: Those are a number of the standards. In  
2 the statute there's many more.

3           COMMISSIONER JABER: Okay, but we -- the agency needs  
4 to make a finding that those facts exist. What's the metho--  
5 the end justifies the means. We have got to get to the result  
6 that the remedy is appropriate because there was  
7 anticompetitive behavior, there is justification in the sense  
8 that this would provide another vehicle for new entrants to  
9 enter into the market and that the action that we take will  
10 result in basic services being provided to all Florideans at  
11 fair and reasonable prices. We should make those kinds of  
12 findings before we order a full separation of BellSouth.

13           MR. MEROS: Those would be the sorts of findings that  
14 you would enter into when -- at the time or before you entered  
15 a remedy.

16           Now, I do not want to suggest that you would have to  
17 make all of those findings. You could make one or more of  
18 those findings or other findings based on the statute, which  
19 could justify this relief, depending upon the circumstances.

20           COMMISSIONER JABER: All right. And the second thing  
21 you said was that BellSouth needs to have an incentive to do  
22 better. Help me understand your statement. How would a strict  
23 separation of the company provide BellSouth with an incentive  
24 to do better?

25           MR. MEROS: Okay. Well, right now -- and I'm

1 certainly not the expert and you will be hearing some of that,  
2 but let me tell you in my simple terms. It is the fox in the  
3 henhouse right now. The fox is controlling access and  
4 controlling the situation. And all the fox has to do to eat a  
5 little chicken is just slow the process down a little bit and  
6 pay a fine, have everything out there that looks like it's open  
7 and fair and just process orders a little bit more slowly, and  
8 that causes the problems with the industry that you see.

9           Now, in a situation where you have the company that  
10 has to offer the same services to BellSouth as well as the  
11 others, that company is incentivized to offer full services to  
12 all, because they will make money to all of them equally, and  
13 they will have to -- and they will be just like any other  
14 business, forced to do what is in the best interest of that  
15 company.

16           Now, it's in the best interest of the company to pay  
17 the fines and to have this Commission simply be a policing  
18 body. And that's another problem with this. BellSouth would  
19 have -- suggest that this Commission will be engaging in more  
20 regulation rather than less by doing this.

21           It's exactly the opposite. This Commission is  
22 besieged with these problems and complaints, because it's been  
23 trying and appropriately, because you have to try it first by  
24 little policing actions. There's a problem here, there's a  
25 problem there, you've got to slap the wrist there, you've got



1 to slap the wrist there, you've got to slap it here, and you  
2 will be faced with that yesterday, today, and tomorrow for a  
3 long time if that's the way you deal with it. And you are  
4 constantly involved in that wrists, and they are involved in  
5 that, again, because that's what makes the shareholders the  
6 most money, and that's rational conduct. That's exactly what  
7 they should be doing.

8           COMMISSIONER JABER: I guess, where I'm not clear,  
9 assume we agree with you, how would the situation be different  
10 if we stopped and ordered a separation of the company. Won't  
11 there be a delay associated with allowing new employees to be  
12 hired, new computer equipment to be reprogrammed?

13           MR. MEROS: The logistics of that are clearly beyond  
14 me. Will there be a short-term logistical transition? No  
15 question about it, but I would suggest what the Commission has  
16 to do is look at the logistical problem versus what competition  
17 will do in the marketplace; and also, with the greatest respect  
18 look back at the legislature and the legislation that says that  
19 competition must flourish, competition must be made effective  
20 and anticompetitive conduct must be rooted out and eliminated.

21           COMMISSIONER JABER: Does AT&T have a speaker today  
22 or tomorrow that will address --

23           MR. MEROS: Yes. Yes, ma'am. And I apologize, I've  
24 taken far too much of my time. Looks like I have another  
25 question.

1           COMMISSIONER PALECKI: Just one more question. If  
2 this Commission disagreed with your argument regarding  
3 structural separation and determined that we did not have  
4 jurisdiction to go there but we decided that perhaps some  
5 lesser measure, such as functional separation would be in the  
6 public interest, I guess, the question I have is on a motion to  
7 dismiss are we bound by the relief that was requested in the  
8 petition and would we be required to grant the motion to  
9 dismiss?

10           MR. MEROS: No, for a number of reasons. One,  
11 because the most immediate of which is that we have an amended  
12 petition filed to which BellSouth objects that clarifies that  
13 we seek any and all relief, no matter what it is; whether it's  
14 more severe or less severe than structural separation, so we  
15 right now have pending a request to be permitted to file an  
16 amended petition.

17           Secondly, any tribunal has the authority to enter the  
18 relief requested or something less or something more. And, in  
19 fact, under the Florida constitution, the tribunals and courts  
20 of this state are cautioned not to dismiss cases because of  
21 specific relief requested, that the Court or tribunal should  
22 look at whether there is any relief appropriate or within the  
23 powers of the tribunal and grant that relief, if the facts show  
24 it.

25           So, there's a real simple answer in that clearly we

1 have the right to amend the petition. That's really not a  
2 serious argument. To the contrary, we have asked for  
3 structural separation or whatever is ultimately found. And I  
4 would urge the Commission, again, if the Commission were to  
5 find we don't have the power to grant structural separation  
6 and, therefore, we grant the motion to dismiss there, then the  
7 Commission would have to be able to have a clear legal reason,  
8 not factual, a clear legal reason why there's a delineation in  
9 what the legislature said between structural separation and  
10 functional separation, despite the fact that neither term is in  
11 the statute.

12           And if the Commission were to grant it without that  
13 clear delineation that, I believe, would be an error -- a clear  
14 error of law and would put this Commission in the position in  
15 other areas of regulation of having these motions to dismiss  
16 every time and as a matter of law restricting yourself from  
17 creating remedies that might be necessary and might be  
18 appropriate after full fact-finding proceedings are had, so I  
19 think that for any number of reasons that would be wrong, both  
20 as a matter of fact and as a matter of law.

21           CHAIRMAN JACOBS: There's an interesting argument  
22 here, because arguably our entree into this area has been  
23 piecemeal, heretofore, we looked at interconnection dockets and  
24 some generic dockets, but there has been very limited kind of  
25 broad police powers looked at how marketplace is operating and

1 whether or not competition is effective.

2 MR. MEROS: Right.

3 CHAIRMAN JACOBS: And here, the argument that you  
4 raise is clear, this has not been preempting, so we can make  
5 this foray. And then, when we look at it, if we find conduct  
6 that is not conducive to competition, then our powers to  
7 address that are fairly broad. Is that a fair statement?

8 MR. MEROS: Yes.

9 CHAIRMAN JACOBS: But you have to acknowledge as well  
10 there's a balancing that has to occur, correct?

11 MR. MEROS: That a balancing needs to occur?

12 CHAIRMAN JACOBS: Right. A balancing needs to occur.  
13 And, I think, that was kind of the lead-in to Commissioner  
14 Jaber's question is because the arguments are raised of the  
15 extraordinary costs that would be imposed by a remedy, such as  
16 structural separation and overhead that would imply. And,  
17 heretofore, economic arguments have always said that all those  
18 costs flow to the retail ratepayer. We have to make that  
19 balancing and, I guess, I'm just asking you acknowledge that  
20 that balancing has to occur.

21 MR. MEROS: I do not dispute for a second that this  
22 Commission has to balance the cost and benefits of whatever  
23 regulation it imposes, both the cost to consumers as well as  
24 the benefits to society as a whole.

25 CHAIRMAN JACOBS: Okay.

1           MR. MEROS: However, I urge the Commission to think  
2 about cost in any number of ways; and that is, there's a very  
3 big difference between costs of implementing competition, in  
4 getting competition in the marketplace which, frankly, is not a  
5 discretionary act. That is a statutory imperative. That  
6 decision has been made by the people of Florida, competition  
7 must occur in telecommunications. And there's a difference  
8 between logistical cost and implementation cost versus the  
9 benefits of competition once that's in place.

10           And, frankly, it is the height of arrogance for  
11 BellSouth to talk about cost to consumers to make competition  
12 wheel in the marketplace. There will, unquestionably, be some  
13 interim cost to BellSouth, some of which may be borne by  
14 consumers to get what the legislature told you must occur and  
15 that is competition, but the benefits of competition thereafter  
16 will both, theoretically, because the people have said that's  
17 what we ought to have, but in actuality far exceed those  
18 implementation costs once we get there.

19           CHAIRMAN JACOBS: If we -- consistent with your  
20 argument, if we determine that there is some manner of  
21 anticompetitive conduct, some of those costs, I would assume,  
22 could reasonably be borne to reverse that conduct affecting the  
23 marketplace. Is that a reasonable conclusion?

24           MR. MEROS: Yes, I believe so, and there will be --  
25 we have people that can more fairly and intelligently discuss

1 some of the costs and benefits. But I also suggest that there  
2 are very substantial costs to consumers and to the public at  
3 large in the type of policing actions this Commission has had  
4 to engage in. Everytime people like myself is up here and this  
5 Commission has to entertain policing actions, that is a  
6 substantial cost that's ultimately borne by consumers.

7 CHAIRMAN JACOBS: Commissioners, we've eaten very  
8 well into the next presenter's time.

9 MR. MEROS: And I apologize to Judge Hatchett. I've  
10 spoken way too long, but it's not the first time that I've done  
11 that. Thank you.

12 MR. MEROS: Thank you.

13 MR. HATCHETT: Good morning, Commissioners. Joseph  
14 Hatchett, Ackerman Senterfitt, for AT&T. My presentation here  
15 this morning is going to concern the Florida statutes and the  
16 Florida opinions that touch upon this Commission's  
17 jurisdiction. Unfortunately, to do that I will have to read  
18 portions of statutes and portions of cases far greater than  
19 ordinary, but it is important that we consider each word in  
20 these statutes, because they're all very important.

21 We're here this morning on a motion to dismiss; that  
22 is, to dismiss AT&T's petition. So, the issue before this body  
23 is whether the petition states a claim upon which relief may be  
24 granted, and there are several important things that we must  
25 keep in mind. The very first is that because this is on a

1 motion to dismiss we must take all material allegations in the  
2 petition as true. There are no facts before this Commission  
3 now. There's no dispute. The allegations of the petition are  
4 to be taken as true. Likewise, all of the material allegations  
5 in the petition are to be construed against BellSouth.

6           And thirdly, the burden is on BellSouth to show that  
7 this Commission does not have jurisdiction. Those are the  
8 teachings, not only from your own order in competitive carriers  
9 for commission action April 21, 1999, but also from the case of  
10 Matthews vs. Matthews, 122 So.2d, 5571, Florida 2nd DCA.

11           What's in the BellSouth petition? The BellSouth  
12 petition simply says that AT&T's petition states that BellSouth  
13 is engaged in anticompetitive behavior, that its inherent  
14 structural makeup constitutes a conflict of interest in its  
15 role as both a supplier of wholesale telephone services and as  
16 a retail competitor with the other ALECs in the same market.

17           And so, its inherent structural concept, we believe,  
18 specifically, AT&T asks this Commission to structurally  
19 separate BellSouth, because it's dual role has allowed it to  
20 have an unfair advantage over other local carriers. We've been  
21 very specific in that petition. We've said that there are  
22 about four things that have occurred in anticompetitive way.

23           BellSouth has failed to provide operational support  
24 systems on parity. They've also failed to provide  
25 nondiscriminatory access to the unbundled network elements,

1 failed to provide line splitting fairly and in a  
2 nondiscriminatory manner, and has engaged in other  
3 anticompetitive retail behavior.

4           We believe that it is necessary that that company,  
5 BellSouth, be structurally separated, because as long as  
6 they're not separately separated -- structurally separated, the  
7 consumers of Florida will not receive those benefits that were  
8 contemplated when the legislature passed the Act in 1975, 364  
9 -- or amended it in 364 or when Congress passed the  
10 Telecommunications Act in 1965.

11           So, what has not been talked about here for a great  
12 deal this morning are consumers. You asked a question just a  
13 moment ago, and Mr. Meros mentioned that the consumers bear  
14 much of this cost. It was the consumers that the legislature  
15 had in power when they dictated competition in  
16 telecommunications.

17           And let me state quickly that I agree with Mr. Meros,  
18 that simply because AT&T asked in its original paper that the  
19 relief be structural separation that, obviously, I had believed  
20 the law of Florida would say to you and, of course, we did not  
21 anticipate the question, but if given ample opportunity, say a  
22 five-day period, we would be happy to submit to you information  
23 that would indicate that under Florida law the mere fact that a  
24 petition seeks one remedy does not take remedies, especially  
25 those that are less drastic. But I also remind you there is an



1 amendment pending before this Commission that would allow a  
2 relief, other than structural separation, has been prayed for.

3 One analogous situation in Florida, for example, is  
4 where if the plaintiff files a case in the wrong court, the law  
5 in Florida is very clear that that court, if it does not have  
6 jurisdiction, transfers the petition or the case to a court  
7 that does have proper jurisdiction. That's not exactly  
8 analogous, but certainly no motion to dismiss is ever  
9 entertained or granted when that situation arises.

10 And so, the mere fact that the original paper here  
11 asks for structural separation, we do not believe would in any  
12 way cause this Commission to have the power or reach the  
13 conclusion that it must dismiss the AT&T petition.

14 COMMISSIONER JABER: Judge Hatchett --

15 MR. HATCHETT: Yes.

16 COMMISSIONER JABER: -- may I interrupt you and ask  
17 you a question on that point? BellSouth is a nine-state  
18 company, nine-state regional company. If Florida orders  
19 structural separation, should I be -- should I include also the  
20 effect on the other eight states' customers?

21 MR. HATCHETT: I don't know.

22 COMMISSIONER JABER: And in terms of deciding the  
23 appropriate format -- well, something you said that just made  
24 me ask that question. I'd never thought about that before.

25 MR. HATCHETT: I understand, but I'm not an expert in

1 the telephone, telecommunications business. There are experts  
2 here who will testify as to cost and all of the ramifications,  
3 if the Commission is going to consider that remedy.

4 COMMISSIONER JABER: I'm not talking about cost. As  
5 a matter of law in determining the appropriate forum, is an  
6 individual state Commission the appropriate forum to decide on  
7 the structure of a company that operates in a multistate  
8 region? Something to think about. I'd never thought about it  
9 until you started talking about forum.

10 MR. HATCHETT: Well, I'm sorry, I misunderstood your  
11 question. There's no question that Florida, under the  
12 statutory scheme of Florida and under the intent of the  
13 legislature of Florida, has the right and the duty under those  
14 statutes to do what the consumers of Florida should expect and  
15 what the legislature intended at the time they enacted the  
16 legislation.

17 I don't believe that this Commission could ever  
18 justify not acting or dismissing this petition on the basis  
19 that, well, it may have a bad effect in Georgia or in South  
20 Carolina or in Alabama. And it is my duty here today,  
21 hopefully, to convince you that under the laws of the state of  
22 Florida you have no choice but to accept jurisdiction in this  
23 proceeding.

24 CHAIRMAN JACOBS: And as I understand it, in other  
25 instances, I believe, it's U S West, they've entered into

1 compacts, all the states in the U S West region have a series  
2 of compacts where they meet jointly, they're going to discuss  
3 issues having to do with the company systems or network that  
4 extend around the region. I don't -- but I'll leave to it your  
5 legal argument as to what our authority and duty would be.

6 MR. HATCHETT: Well, I'm sure that if those states  
7 have compacts, that's with legislative authority and the  
8 legislative approval. So, I would believe that maybe Florida,  
9 Georgia, and Alabama could, if it saw fit through the  
10 legislatures of the three states, come up with a compact and  
11 give to all of their Commissions directions as to how they  
12 wanted their Commissions to operate, what powers they wanted to  
13 withhold from them, what powers they wanted to extend to them.  
14 But we don't have the compact in this state. We have what, I  
15 believe, are very clear mandates by statutes of the state of  
16 Florida and by opinions from the Florida Supreme Court.

17 Florida statutes grants this Commission broad  
18 regulatory powers. I think that BellSouth agrees that the  
19 Commission has powers granted by statute and that it may  
20 exercise such power as derived from fair implication.  
21 Additionally, what has not been mentioned here today, this  
22 Commission has the authority to interpret the statutes that it  
23 is charged with enforcing.

24 Also, as federal law, Florida law indicates, this  
25 Commission's interpretation of those statutes will be given

1 great deference, and only if your interpretation is clearly  
2 erroneous, and those are the exact words of the Florida Supreme  
3 Court, clearly erroneous, will your interpretation not be  
4 approved by the Florida courts. In that case, it's the Florida  
5 Interexchange Carriers Association vs. Clark 678 So.2d 1267,  
6 Florida Supreme Court 1996.

7 Chapter 364 vests broad exclusive jurisdiction in the  
8 Commission to enhance competition and provide remedies.

9 Mr. Meros pointed that out at about the end of his argument  
10 when he flashed on the board the portion from the BellSouth  
11 brief when they were arguing before the 11th Circuit Court of  
12 Appeals. He said to that court, there's exclusive jurisdiction  
13 over the telecommunications market in the Florida Commission,  
14 the Public Service Commission; therefore, district court down  
15 in Orlando, you have no jurisdiction. That was BellSouth's  
16 position.

17 I had emphasized that you have exclusive jurisdiction  
18 in this area. If you don't do it, who will? BellSouth  
19 suggests that the courts would be better. That's a different  
20 position that they recently took. Where else is there? And I  
21 will go further into that argument.

22 In amending Chapter 364, the Florida legislature  
23 anticipated competition in the local telecommunications market,  
24 and the amendments were for that purpose. They, obviously,  
25 contemplated the Telecommunications Act of 1965.

1           So, let's review the legislation as it stands here in  
2 Florida today. 364.01(4)(a) provides jurisdiction to protect  
3 the public health safety and welfare by ensuring that basic  
4 local telecommunications services are available to all  
5 residents in the state at reasonable and affordable prices.  
6 That's 364.01(4)(a).

7           Then comes (4)(b). You are to encourage competition  
8 through flexible, flexible regulatory treatment among providers  
9 of telecommunications services in order to ensure the  
10 availability of the widest possible range of consumer choice in  
11 the provision of all telecommunication services. That's what  
12 the legislature expected of this Commission.

13           How did the legislature expect these local exchange  
14 companies to operate? Well, in Section 364.051 of the Florida  
15 statute it said local exchange carriers shall not engage in any  
16 anticompetitive act or practice nor unreasonably discriminate  
17 among similarly-situated consumers.

18           And then, in Section 364.014(g), all providers of  
19 telecommunications services must be treated fairly by  
20 preventing anticompetitive behavior and eliminating unnecessary  
21 regulatory restraint, ensure that all providers of  
22 telecommunications services are treated fairly by preventing  
23 anticompetitive behavior and eliminating unnecessary regulatory  
24 restraint. That's what was expected.

25           May you act upon AT&T's petition? That's what we're

1 here to answer today. Section 364 of the Florida statutes  
2 provides that -- grants to the Commission the authority to  
3 conduct a limited or expedited proceeding to consider and set  
4 an act upon any matter, any matter, within its jurisdiction,  
5 any matter. Can it seriously be argued that this matter does  
6 not fall within your jurisdiction? I do believe no one would  
7 suggest that it does not fall within your jurisdiction, and  
8 that's how broad the legislature said you could go in  
9 committing and taking on one of these proceedings; a short one,  
10 an extended one, but any matter that falls within your  
11 jurisdiction. So, there's no question that the legislative  
12 provisions are broad enough to allow for this type of  
13 proceeding.

14           What has the Florida Supreme Court of Florida said  
15 about your jurisdiction? We talked a lot this morning about  
16 the Teleco case already, because we believe that that case  
17 pretty well puts this issue to rest. In that case, as you have  
18 heard, the Florida Supreme Court affirmed this Commission's  
19 jurisdiction to order an ALEC to divest their assets. There,  
20 the court held that the PSC -- and I quote now -- has the  
21 implied authority, the implied authority, under Section 364.01  
22 (3)(a) to order the transfer of title.

23           As Mr. Meros has pointed out, surely then, if you  
24 have the implied authority to actually take away title and to  
25 pass title and we have here asking for such a far less drastic

1 remedy than actually taking away the title, you must have the  
2 implied authority, then, to order structural separation.

3 In other recent cases, the Supreme Court of Florida  
4 has determined that the Commission has, and I quote, broad  
5 powers with regard to the telecommunications industry; that's  
6 GTE vs. Garcia, 778 So.2d 923, Florida 2001. We have also at  
7 length discussed the Beard case; broad authority, the Court  
8 said, to regulate telephone companies derived from its  
9 exclusive jurisdiction over telecommunication services.

10 And as Mr. Meros pointed out, that was the case where  
11 long-distance service was reclassified to local service in the  
12 Clearwater-St. Petersburg area. And as I read the case, one of  
13 the Commissioners asked it was not under any express authority.

14 If the Commission would like more information on  
15 that, we would be happy to submit a paper on exactly the  
16 authority in that case, but my memory is much of that as  
17 Mr. Meros, that there was no specific authority there, that the  
18 Commission spoke in terms of the community's needs and bundled  
19 together the fact that in that community there was constant  
20 travel between Clearwater, St. Petersburg, Dunedin, Tarpon  
21 Springs, and that there was constant movement within that area  
22 and, therefore, the needs of the community were enough to  
23 justify switching and reclassifying those services from long  
24 distance to local.

25 Well, we now know what the legislature has said, what

1 the Florida Supreme Court has said, but now let's look at what  
2 this Commission has said about its own jurisdiction. You  
3 stated, "This Commission is given express authority under state  
4 law to implement the Act through appropriate procedure under  
5 Section 120.8013(d) Florida statutes." You said that in  
6 petition for competitive carriers for Commission action dated  
7 April 21, 1999, but then with two of you who are still members  
8 of the Commission, this is the language that you said in your  
9 most recent pronouncement:

10 "Put simply, processes designed to further open the  
11 local market to competition are entirely consistent with the  
12 purposes and procedures of the Act. If the Commission finds  
13 that the requested relief proceedings is designed to achieve  
14 that goal and do not undermine the procedures prescribed by the  
15 Act, then the relief is well within the legal authority of the  
16 Commission." Those are the words of the Commission.

17 What about the Federal Communications Act? The  
18 Federal Communications Act recognizes this Commission's  
19 authority to regulate local telephone competition. State  
20 Public Service Commissions are to facilitate and enforce the  
21 goals of local exchange competition. 47 USC 251(d)(3),  
22 252(b)(1), 253(b), and 271(d)(2)(b).

23 And now about the federal courts. And I make this  
24 argument and I realize that I'm arguing an analogous situation,  
25 but I think it is interesting in looking at your authority and



1 your power to see what happens when the Federal Communications  
2 Commission has the same kinds of issues such as these and go  
3 into the federal courts and how do those courts react to  
4 whether the FCC has jurisdiction in these cases?

5           And on the board before you, you have four different  
6 cases. I will go through them fairly quickly. GTE Midwest  
7 Inc., 6th Circuit 2000; "Although the Telecommunications Act of  
8 1996 specifies separate subsidiary requirements for certain  
9 Bell company activities, the Act does not otherwise limit the  
10 Commission's authority to adopt separate affiliate  
11 requirements. If Congress has sought to preclude the  
12 Commission's ability to impose separate subsidiary  
13 requirements, it could have done so explicitly." That's the  
14 end of that quotation. They were upholding the FCC's order  
15 imposing separate affiliate requirements on all local telephone  
16 companies providing commercial or mobile radio services.

17           One of you earlier this morning asked of Mr. Lackey  
18 something about Section 272 and how it played into this.  
19 That's the answer, GTE Midwest case is the answer to the  
20 question regarding Section 272.

21           There's also the Illinois Bell Telephone Company  
22 holding that the FCC rule forbidding regional operating  
23 telephone companies to sell or lease telecommunication  
24 equipment to their customers or to sell certain specified  
25 services other than through a separate subsidiary was proper.

1           Computer and Communication Industries vs. FCC, 693  
2 F.2d 198, that's the D.C. Circuit, it was upholding a separate  
3 subsidiary requirement regarding offerings of combined data  
4 processing.

5           And the last case, GTE Service Corporation vs.  
6 Federal Communications Commission, the D.C. Circuit again,  
7 1973, holding that order of structural separation was within  
8 the FCC's general and abling authority to promote efficient and  
9 economical telephone service. So, when we look at what has  
10 happened to the federal courts and what has happened to the  
11 federal Commission, no one needed any express authority there  
12 to take the kind of action that you are asked to take here, and  
13 all of those cases were upheld in the federal court. The  
14 Commission's actions were all upheld.

15           We've talked about a lot of cases from other states.  
16 The only court -- the only court to address jurisdiction to  
17 order the type of structural relief that AT&T is seeking was in  
18 Pennsylvania. And so, the one court, we've talked about a lot  
19 of Commission rulings and what Commissions have done, the only  
20 court that has looked at this has upheld the jurisdiction of  
21 the Commission to take the action it has taken.

22           The arguments that were made in the Pennsylvania case  
23 are the same arguments that BellSouth is making here today.  
24 They were all addressed in that case, they were all rejected.  
25 I made the analogy with the FCC, and I called to your attention

1 the Pennsylvania case because the jurisdiction of this  
2 Commission is far broader than the jurisdiction of the  
3 Pennsylvania provision, because you have in your statute that  
4 you shall wipe out and prohibit anticompetitive conduct. You  
5 have the charge of doing the public welfare, the broad kinds of  
6 language that is not found in many, many of these other  
7 statutes.

8           And so, it's so clear when you read the Florida  
9 statute that the legislature certainly did not intend to  
10 pigeonhole every possible thing that you were to consider in  
11 taking care of the telecommunications industry as it relates to  
12 consumers of Florida. There would have been no need for the  
13 legislature to use such broad language as that that I have just  
14 spoken of, the general welfare, the public welfare, the safety,  
15 the anticompetitive conduct, if they intended to have  
16 everything expressed in the statute.

17           I think, we have heard this morning about the  
18 Pennsylvania functional separation. I note that that's a  
19 change of position, I believe, from the papers that were filed  
20 by BellSouth where, I think, they represented that the Virginia  
21 Commission did not order structural separation. Well, of  
22 course, they did not order structural separation. They ordered  
23 functional separation or BellSouth agreed to functional  
24 separation, but the big thing about the Pennsylvania case is  
25 not that point. The big point about the Pennsylvania case is

1 that the Court held that the Pennsylvania Commission had  
2 jurisdiction, and that's what we struggle here with today,  
3 whether the Commission has jurisdiction.

4 We also heard today about the Virginia State  
5 Corporation and that opinion. I hope you have read that  
6 opinion. If you have read it, I'm sure you are about as ready  
7 to discard it as most other people who have read it. It says  
8 very little -- in fact, it says nothing.

9 It sets forth no facts whatsoever, it gives no  
10 analysis whatsoever. And, at one point, after going through  
11 about five to get down to one point, they say we may take care  
12 of this during our 271 proceedings, so I say to you that the  
13 Virginia case has very little bearing, and I hope you will give  
14 it very little weight when you consider whether there's  
15 jurisdiction here today, because that case simply has no  
16 analysis; and how anyone can figure out exactly what was in the  
17 minds of the Commission when they wrote that order or that  
18 opinion, I don't know how you can possibly figure out what they  
19 were thinking about.

20 So then, I think, it is safe to say that I have cited  
21 to you statutes from Chapter 364 that indicate that you have  
22 jurisdiction, opinions from the Florida Supreme Court indicate  
23 that you have jurisdiction, federal courts in an analogous  
24 situation indicates that you have jurisdiction, and your  
25 Commission's own orders indicate that you have jurisdiction

1 over this proceeding.

2           Finally, as the matter of policy, the Commission  
3 should hold separate proceedings on structural relief and not  
4 follow the Virginia idea of trying to have this type of matter  
5 considered during a 271 proceeding. The Commission's mandate  
6 is to promote competition in the local telephone market. That  
7 mandate is far broader than the narrow checklist that is  
8 provided in a Section 271 proceeding. And your Commission has  
9 already stated in one of your opinions that you would not  
10 consider these type of remedies in a 271 proceeding.

11           You did that, one called inconsideration of  
12 BellSouth's entry into interLATA services April 25, 2001. Your  
13 language was, and I quote, "A public interest determination is  
14 not an item delineated under subsection C of Section 271 for  
15 state Commissions to address."

16           So, unlike the suggestion that BellSouth has made, I  
17 urge you not to try and consider these anticompetitive effects  
18 and what remedy should be granted to AT&T and other local  
19 exchange carriers by proceeding under 271.

20           You're the Commission. You're the body with the  
21 expertise in the telecommunication industry, not the federal  
22 courts, not the state courts, you have exclusive jurisdiction,  
23 you have the expertise. They are your statutes that you must  
24 interpret. Your interpretation will be given broad and great  
25 deference.

1           Now, let's turn to BellSouth's arguments, and I won't  
2 dwell on these very long. Their first argument is, well, you  
3 can't give monetary damages. And for that proposition they  
4 cite the case Southern Bell Telephone and Telegraph vs. Mobile  
5 America Corporation, 271 So.2d 199, Florida 1974. Well, there  
6 is no prayer here for any monetary damages. And you will  
7 recall the reason that case turned that way was because this  
8 body is about future actions. Monetary damages are after  
9 something has been done, there's nothing anyone can do about  
10 it, it's over, and you give the complainant money, because  
11 nothing else can take place of it.

12           Here, we're talking about actions that will further  
13 consumer interest in the telecommunications interest. There's  
14 nothing in this case about any monetary damages and,  
15 consequently, that case should not be considered.

16           The next argument is a case called Radio Telephone  
17 Communications vs. Southeastern Telephone Company, 170 So.2d  
18 577, that's a 1965 case from the Supreme Court. And BellSouth  
19 cites that case for the proposition that in order for a statute  
20 to give implied authority, the implied authority must have been  
21 within the contemplation of the legislature when it passed the  
22 statute.

23           Well, there's an easy answer to that. The Florida  
24 legislature did in 1995 expressly contemplate the encouragement  
25 of local exchange competition by its amendment to Chapter 364

1 in 1995. They expressly anticipated it and placed the  
2 amendments in the statute.

3 One other argument is the Commission may not do  
4 anything that adversely affects the alleged rights of a  
5 telephone company that a telephone company enjoys under its  
6 corporate charter. That's also, of course, without merit. The  
7 Florida Supreme -- in State vs. Western Union Telegraph  
8 Company, one of the cases they cited, the Florida Supreme Court  
9 simply held that no, -- there, the Florida Supreme Court merely  
10 held that requiring a telegraph company to place a telegraph  
11 station at a certain location was not supported by evidence,  
12 nothing to do with authority, not by the evidence that was  
13 submitted in the case.

14 You have already seen the next case, Florida  
15 Telephone Corporation vs. the State. That was the case that  
16 held "Being creatures of statute, corporations are amenable to  
17 all reasonable regulations, both as through their internal  
18 operation and as to the rights of those who own them, their  
19 stockholders."

20 Let's turn now to whether conducting proceedings  
21 regarding structural relief is consistent with the Federal  
22 Telecommunications Act of 1996. The plain language of the Act  
23 indicates that it is. Let me read you another group of  
24 statutes, and I apologize for reading them to you, but the  
25 wording of these statutes are so very important on this issue.

1           47 USC 251(d)(3) provides that the FCC shall not  
2 preclude the enforcement of any regulation, order or policy of  
3 a state Commission that, A, establishes access and  
4 interconnection obligations of local exchange carriers; B, is  
5 consistent with the requirements of this section; and C, does  
6 not substantially prevent implementation of the requirements of  
7 this section and the purposes of this part.

8           Section 253 further states that this broad grant of  
9 authority to the state may be preempted. We had some  
10 discussion earlier about preemption. I continue the quote now.  
11 ..."may be preempted by the FCC only if the FCC, after notice  
12 and opportunity for public comment, determines that a state  
13 Commission's action violates Section 253."

14           Three things that are important in that statute.  
15 Number one, let's assume that you violate the statute. First,  
16 you would be given notice. Next, you would be given a hearing.  
17 Only after those two things would your action be declared to be  
18 preempted by the FCC, so here we'd be working in -- well, in  
19 lockstep almost with the federal Commission, because the goals  
20 of the Act are the same goals as Chapter 364 of the Florida  
21 statutes.

22           Finally, Section 261(c) provides, and I quote,  
23 "Nothing in this part precludes a state from imposing  
24 requirements on a telecommunications carrier for interstate  
25 services that are necessary to further competition in the



1 provision of telephone exchange service or exchange access as  
2 long as the state's requirements are not inconsistent with this  
3 part of the FCC's regulations to implement this part."

4 COMMISSIONER JABER: Judge Hatchett --

5 MR. HATCHETT: Yes.

6 COMMISSIONER JABER: -- as it relates to the  
7 Pennsylvania state Commission decision, did the FCC take  
8 action, issue notice, comment on the Pennsylvania order?

9 MR. HATCHETT: It did not. As I recall, it did not.

10 COMMISSIONER JABER: Okay.

11 JUDGE HATCHETT: There has been some talk about  
12 whether structural separation would be competitively neutral.  
13 The state agency mandate -- and I'm reading from a case now.  
14 "The state agency mandate is that Bell provide retail services  
15 through a structurally separate affiliate, albeit operating  
16 independently. It cannot be said that Bell, as a business  
17 organization, is being precluded on the whole from providing  
18 retail services." That's Bell Atlantic. That's part of the  
19 Pennsylvania case. There is nothing, then, that would be  
20 competitively -- put BellSouth at a disadvantage by a  
21 structural separation, because it cannot be said as a whole  
22 that the businesses being precluded from providing retail  
23 services.

24 CHAIRMAN JACOBS: You saw Mr. Lackey's argument  
25 accepting that we could have the authority to do the action,

1 but his argument is if we did that we are effectively  
2 deregulating the wholesale business. First of all, do you  
3 agree? And is that a reasonable result that we want to pursue?

4 MR. HATCHETT: I have to admit I have not thought  
5 through that. That was not in the papers that were sent to us.

6 CHAIRMAN JACOBS: You can give it to us later.

7 MR. HATCHETT: I would like to have about five days  
8 to respond to that argument.

9 CHAIRMAN JACOBS: Okay. You can give it to us later.

10 MR. HATCHETT: One of the experts maybe doing  
11 testimony tomorrow will have the opportunity to answer that  
12 question.

13 CHAIRMAN JACOBS: Very well.

14 MR. HATCHETT: I am not that familiar with the  
15 telecommunications business.

16 CHAIRMAN JACOBS: Very well.

17 MR. HATCHETT: Then, in summary, the relief sought  
18 here is not a burden on any type of interstate commerce. It is  
19 consistent with the Act; and, of course, 364 and the Act are  
20 consistent. There's no request, in this case, for money  
21 damages. And in 1995, the legislature did contemplate the  
22 encouragement of local exchange competition. The only court  
23 that has been faced with the arguments that BellSouth made  
24 rejected every single argument.

25 This Commission's jurisdiction is afforded through

FLORIDA PUBLIC SERVICE COMMISSION

1 Chapter 364, especially that language that speaks of any  
2 matter. Other statutes that speak of exclusive jurisdiction,  
3 those portions of statutes that speak of public welfare and  
4 anticompetitive conduct, the Florida Supreme Court has held  
5 that this Commission has implied authority, broad regulatory  
6 power. And this Commission itself has said that if the process  
7 is designed to further open competition in the local market,  
8 then we have jurisdiction.

9           The motion to dismiss, I close by saying all of the  
10 allegations in that motion are considered to be true, must be  
11 taken as true. All of the allegations must be construed  
12 against BellSouth, and it is BellSouth's burden to show that  
13 there is no jurisdiction in this case and support its motion to  
14 dismiss.

15           Thank you.

16           CHAIRMAN JACOBS: Thank you. Thank you very much.  
17 We're at a time where we can go ahead and break for lunch, but  
18 before we do that, we probably need to take care of some  
19 housekeeping matters for the afternoon.

20           MS. LOGUE: Mr. Chairman, what we would like to do or  
21 offer to you is that since the next presenter on the issue of  
22 jurisdiction is FCCA, and because FCCA is the first presenter  
23 for this afternoon, that we would then start with them and do  
24 both of their presentations simultaneously directly after  
25 lunch.

1           Also, as a matter of other housekeeping matters, I do  
2 need -- would need to see FCCA's representatives as well as  
3 representatives of the companies remaining for this afternoon,  
4 and if there are any presenters or corporate representatives  
5 for tomorrow's presentations that are here, I would need to see  
6 you before we break for lunch.

7           CHAIRMAN JACOBS: Thank you. Very well. We will  
8 break, and we will return at 1:15. Thank you.

9           (Lunch recess.)

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1 STATE OF FLORIDA     )  
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I, KORETTA E. STANFORD, RPR, Official Commission Reporter, do hereby certify that a Workshop was heard at the time and place herein stated in Docket Number 010345-TP.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED this Monday, August 13, 2001.

*Koretta E. Stanford*  
 KORETTA E. STANFORD, RPR  
 FPSC Official Commissioner Reporter  
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