

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 010345-TP - 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.

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

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 4

DATE: Tuesday, October 16, 2001

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

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PARTICIPANTS:

KIMBERLY CASWELL, Verizon.
CLAUDIA DAVANT, AT&T.
JASON FUDGE and HAROLD McLEAN, Florida PSC.
JOSEPH HATCHETT, on behalf of AT&T.
JOSEPH MCGLOTHLIN, on behalf of FCCA.
NANCY WHITE, BellSouth.

STAFF RECOMMENDATION

ISSUE 1: Should BellSouth's Motions to Dismiss, or, in the alternative, Motions to Strike AT&T's Petition and FCCA's Request be granted?

RECOMMENDATION: No. The motion regarding AT&T's Petition has been rendered moot. Staffs recommendation on BellSouth's Motion regarding FCCA's Request is subsumed in its recommendation in Issue 2 and 4.

ISSUE 2: Should BellSouth's Motion to Dismiss, filed August 28, 2001, be granted?

RECOMMENDATION: No. The Motion should be denied with the understanding that the Commission's authority to order any relief will be made when the appropriate relief, if any, is determined. This analysis is also applicable to BellSouth's Motion to Dismiss FCCA's Request filed April 17, 2001.

Issue 3: Should BellSouth's Motion for More Definite Statement and Motion to Strike Clarified and Amended Petition, filed August 28, 2001, be granted?

RECOMMENDATION: No. The motions should be depreciated.

ISSUE 4: Should the Commission proceed to hear on AT&T's Amended Petition to consider structural separation of BellSouth, as well as other remedies?

RECOMMENDATION: Yes. The Commission should set this docket for hearing and continue its investigation of the matters raised in AT&T's Amended Petition and FCCA's Request.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No. Based on staff's recommendation in Issues 1, 2, 3, and 4, this docket should remain open.

1 CHAIRMAN JACOBS: We're now on Item 4.

2 MR. FUDGE: Commissioners, Item 4 is
3 staff's recommendation on BellSouth's various
4 motions to dismiss.

5 CHAIRMAN JACOBS: Very well. Ms. White.

6 MS. WHITE: Thank you. Thank you,
7 Mr. Chairman.

8 This vote is about whether the Commission
9 should go forward with a hearing that may or may
10 not determine whether structural separation, an
11 extraordinary remedy, may or may not be within
12 the Commission's jurisdiction to fix a problem
13 that may or may not exist. There's certainly a
14 knot of mays, maybes, coulds, and perhapses
15 surrounding this issue.

16 Let's go back for a minute to another
17 petition, a petition filed by competitive
18 carriers for Commission action to support local
19 competition in BellSouth's service territory.
20 This was filed in late 1998. It was Docket No.
21 981834. AT&T, MCI, Florida Competitive Carriers
22 Association, and the Competitive
23 Telecommunications Association, among others,
24 alleged that there were certain roadblocks to
25 local competition in Florida and that four, four

1 actions were required by this Commission to spur
2 local competition.

3 First they said that this Commission should
4 establish a generic UNE pricing docket. Then
5 they said this Commission should establish a
6 Competitive forum to address BellSouth's
7 operational issues. Third, the ALECs said the
8 Commission should establish third-party testing
9 of BellSouth's operational support systems. And
10 fourth, they said the Commission should
11 establish a rulemaking for expedited dispute
12 resolution. "Only with these specific actions,"
13 said the ALECs, "will Florida see progress in
14 the development of local competition."

15 You should note that structural separation
16 was not, I repeat, was not one of the actions
17 sought about these petitioners.

18 Now, in response to this petition, the
19 Commission opened several dockets. They opened
20 a docket, generic docket on the provisioning of
21 collocation. They opened a generic docket on
22 the pricing of unbundled network elements. They
23 opened a generic docket on compensation between
24 ILECs and ALECs for terminating local traffic.
25 The Commission opened a docket to investigate

1 the establishment of permanent performance
2 measures. This Commission established
3 third-party testing for BellSouth's operational
4 support systems. And these dockets were in
5 addition to dockets previously held on number
6 portability, resale, interconnection, and number
7 conservation issues.

8 The Commission has recently opened a docket
9 on allegations of anticompetitive behavior, and
10 the Commission has also established a
11 collaborative process in an attempt to resolve
12 various operational issues. And this doesn't
13 even mention some of the major arbitrations at
14 which issues common to several ALECs have been
15 resolved by the Commission.

16 Now that these various dockets are either
17 resolved or in the process of being resolved,
18 only now do the ALECs come along and say, "wait
19 a minute. The actions we requested in late 1998
20 and that you granted, the actions that have been
21 ongoing for the last two years, well, they're
22 just not good enough. We want structural
23 separation." Only when the actions that you
24 were asked to take are coming to fruition did
25 the FCCA and AT&T say, "we've thought of another

1 hurdle for Bellsouth."

2 Now, there will always be another hurdle, a
3 higher standard that these parties want. By
4 explicitly stating that the actions they asked
5 for are not good enough, the ALECs are
6 implicitly saying, "we don't like the answers
7 the Commission gave us." You're being asked to
8 prejudge that the actions that you have taken in
9 these dockets have not and will not accomplish
10 anything, and this you shouldn't do.

11 structural separation is an enormous step
12 into the unknown. All that AT&T and the FCCA
13 have advanced in favor of structural separation
14 are accusations of conduct. Now, if there's a
15 violation of conduct, this Commission has the
16 authority to address it without the necessity
17 for an extraordinary remedy such as structural
18 separation.

19 what will the byproducts of structural
20 separation be? Increased costs passed on to
21 customers in the form of higher prices; customer
22 confusion, more regulation, not less -- even the
23 staff recognizes this in their recommendation.
24 A greater burden on the resources of the
25 Commission, not less; increased complexity; and

1 a pretty good argument that there's no
2 authority, there will be no regulatory authority
3 over the wholesale side.

4 Now, this Commission is being asked to take
5 a general average statute, a statute that says
6 the Commission should encourage and promote
7 competition, you're being asked to take that
8 statute and distort it to fit the Draconian
9 action sought by the ALECs. If the Commission
10 starts down this path, logic goes out the
11 window. What's going to be next? Are you going
12 to be asked to use the statute to fund
13 financially ailing ALECs because that will
14 encourage and promote competition? Are you
15 going to be asked to close an ILEC's operations
16 completely because that might encourage and
17 promote competition?

18 Look at the timing of this request. This
19 Commission is in the middle of BellSouth's 271
20 proceeding, a proceeding that will, in part,
21 determine whether local competition exists in
22 Florida. In states that have long distance
23 authority, local competition has increased
24 dramatically. So the 271 proceeding is also a
25 proceeding that by other states' experience will

1 promote competition in Florida.

2 Consider who stands to gain by going
3 forward with a hearing on this issue. Not the
4 Commission; your burden will increase. Not the
5 customer; their confusion will increase. And
6 certainly not BellSouth. The parties who will
7 gain are the same ones trying to prevent
8 BellSouth from entering the long distance
9 market.

10 Don't be fooled by protestations that their
11 motive is to encourage local competition.
12 You've heard that before. You acted on it.
13 Now, only when your labors are bearing fruit do
14 you hear the ALECs shouting for more.

15 I urge you to reject a hearing on this
16 issue, and I urge you to close this docket.
17 Thank you.

18 CHAIRMAN JACOBS: Very well. Ms. Caswell.

19 MS. CASWELL: As Ms. White pointed out,
20 staff's recommendation says that you may or may
21 not have the authority to order structural
22 separation for BellSouth, but that you should go
23 ahead and hold a hearing anyway and decide at
24 the end. Verizon agrees with BellSouth that you
25 don't have jurisdiction to order structural

1 separation under any scenario.

2 But let's leave the legal arguments aside
3 for a moment and use some common sense. The
4 ILECs and the CLECs may not agree on the details
5 of how much structural separation would cost and
6 whether it would benefit anyone. There is no
7 dispute, however, that there will be significant
8 costs. That's self-evident. Dividing one
9 company into two will create inefficiency and
10 expense.

11 There has also been no real challenge to
12 the point that structural separation would chill
13 ILECs' investments in the state. Maryland, for
14 instance, rejected structural separation
15 legislation because it would discourage
16 investment in new technologies and it would
17 suppress job creation. Here in Florida, union
18 leadership has called structural separation a
19 radical and ill-conceived idea and a threat to
20 good union jobs.

21 Now, let's consider these concerns about
22 investment, jobs, and increased costs in light
23 of today's environment. Since September 11th,
24 investors have pulled out of the stock market in
25 droves. The country is headed into a recession.

1 The U.S. Congress is considering economic
2 stimulus packages. President Bush is working on
3 a plan to protect national security and
4 reinvigorate the economy. The plan will address
5 protecting critical telecommunications
6 infrastructure and boosting broadband
7 deployment.

8 Here in Florida, unemployment claims are
9 soaring. Governor Bush is doing all he can to
10 put the Florida economy back on track.

11 The FBI has put telecommunications
12 utilities on high alert, and state law
13 enforcement authorities have asked these
14 companies for their crisis management plans.

15 Now, here's where the common sense is
16 important. Given these conditions, do you want
17 to entertain a radical proposal that will have
18 unmistakably negative impacts on investment and
19 jobs? As policy-makers around the country
20 readjust their priorities to focus on network
21 security and reliability, do you want to even
22 consider the possibility of breaking up the
23 largest telecommunications company in Florida?
24 Do you want to consider a scheme that will
25 undermine BellSouth's ability to respond to a

1 disaster, whether it's natural or manmade?

2 If you need a firsthand account of what it
3 takes to respond to a major crisis, Verizon is
4 the expert. After the massive destruction of
5 its facilities in Manhattan on September 11th,
6 Verizon was told to get wall street back in
7 business in less than a week, and it did. This
8 unprecedented achievement would not have been
9 possible if Verizon's wholesale and retail
10 operations were in two separate companies.

11 structural separation was never a good
12 idea, but there could not be a worse time for
13 this Commission to embark on a proceeding to
14 consider such a drastic and expensive proposal.
15 Aside from the cost of structural separation
16 itself, just going to hearing will drain
17 Commission resources to a degree you have never
18 seen before. Again, if you need the details,
19 you can ask Verizon. The Pennsylvania
20 Commission and the company spent two and a half
21 years and untold resources on a structural
22 separation proceeding. The Commission
23 ultimately rejected structural separation
24 because it would be too costly, would increase
25 the need for regulatory oversight, and would not

1 be in consumers' best interests. So you should
2 be skeptical of any suggestion that there's no
3 harm in just studying structural separation.

4 Aside from the burden on resources, going
5 to hearing on AT&T's petition will be seen as a
6 sign that this Commission believes structural
7 separation has some merit. As long as the idea
8 is alive here, it will create uncertainty, not
9 just for BellSouth, but for other ILECs too.
10 Uncertainty increases risk, and risk is bad for
11 investment. What this industry needs most now,
12 what this state needs most now is stability, not
13 more upheaval.

14 Staff says there's no need to go to hearing
15 in the near term because several ongoing dockets
16 may address AT&T's concerns. It's certainly
17 true that there are many dockets to address
18 competitive issues. These include the UNE
19 dockets, OSS proceedings, BellSouth's 271
20 application, the alleged anticompetitive conduct
21 dockets, various complaint proceedings, and the
22 collaborative process sponsored by the Chairman.
23 It's a good bet that you've got more dockets
24 open to address competitive issues than any
25 other state in the country. The existence of

1 these dockets is not just a reason to wait to go
2 to hearing; it's a reason to close this docket.
3 If any CLEC has legitimate concerns about
4 anticompetitive conduct, they will be fully
5 fleshed out and addressed in one or more of
6 these proceedings.

7 It makes no sense to become mired in an
8 all-consuming debate about a structural
9 separation remedy before even knowing what
10 you're trying to fix. First, let's figure out
11 what the problems are, if any, and then assess
12 what remedy, if any, is appropriate. That's the
13 way you've always worked, and there's no reason
14 to change that now.

15 You can investigate AT&T's claims in any
16 one of the open BellSouth dockets. Yet another
17 proceeding to address vague allegations would do
18 nothing but waste taxpayers dollars. You should
19 make the common-sense conclusion that the
20 Virginia Commission did: there's no reason for
21 a structural separation inquiry when there are
22 already several dockets open to address
23 competitive issues.

24 Even under staff's legal analysis, you
25 don't have jurisdiction to order structural

1 separation unless it's the only means to promote
2 competition and prevent anticompetitive
3 behavior. I don't think any of you need a
4 hearing to know that that can't be true. If you
5 suspect that it is, then you need to close all
6 those dockets that I just listed because they're
7 pointless. And you need to conclude that all of
8 those arbitrations, UNE cases, collocation
9 cases, OSS cases, and others you've decided over
10 the past six years have been a big waste of
11 time.

12 of course, we know that's not true.
13 Florida is one of the most active states for
14 competitive entry. It's among the top four
15 states in lines served by CLECs and for number
16 of competitive entrants. It's in the top three
17 for zip codes served by multiple CLECs. The
18 Commission should take pride in these statistics
19 rather than admitting defeat and launching a
20 structural separation inquiry.

21 If you want to encourage more competition,
22 there's no need to try experimental methods like
23 structural separation. Instead, try the
24 sure-fire approach; approve BellSouth's 271
25 application. States with long distance approval

1 for the RBOCs show the greatest competitive
2 advances. That's definitive proof that
3 structural separation cannot be the only way to
4 promote competition.

5 AT&T's structural separation petitions
6 around the country are widely acknowledged to be
7 a ploy to derail the RBOCs' 271 applications.
8 If you're taken in by the ploy, then you've also
9 got to be prepared for AT&T to abandon it in
10 midstream. It's no secret that AT&T is looking
11 for a merger partner and that it's pursuing the
12 ILECs. BellSouth has been mentioned as a
13 leading candidate. If talks with BellSouth or
14 any other ILEC get serious, you can be sure that
15 the last thing AT&T will want is structural
16 separation. So if you launch a structural
17 separation proceeding, there's a fair chance
18 that a year or so into it, AT&T will be here
19 asking you to close the docket.

20 You don't need any hearing to dismiss
21 AT&T's petition for lack of jurisdiction. If
22 the Legislature meant for you to have the
23 extreme authority to break up a company, it
24 would have said so, and it wouldn't have
25 fashioned the statute in such a way that if you

1 do break up the company, the wholesale entity
2 will escape your jurisdiction. Again, that just
3 doesn't pass the common sense test.

4 You've never even claimed jurisdiction to
5 review mergers, even though the statute requires
6 you to approve all transfers of control and
7 acquisitions, so how can you consider the
8 opposite scenario of taking a company apart
9 without any statutory hint that you may. The
10 two lines of thinking just can't be squared.

11 BellSouth's motion asks you to decide
12 whether you have the jurisdiction to act on
13 AT&T's petition to separate BellSouth. There's
14 no reason you can't answer that question now and
15 no reason you can't dismiss AT&T's petition for
16 lack of jurisdiction. If you would rather avoid
17 making the jurisdictional decision now, then you
18 should do the next best thing and close the
19 docket. You've got plenty of other dockets open
20 to determine whether BellSouth has engaged in
21 anticompetitive behavior. If it has, then you
22 can address that behavior and impose any
23 appropriate remedy in the context of those
24 dockets.

25 Thank you.

1 CHAIRMAN JACOBS: Thank you.

2 Mr. McGlothlin.

3 MR. MCGLOTHLIN: I'm Joe McGlothlin. I'm
4 here today for the FCCA.

5 The FCCA filed a supportive petition in
6 this docket, and as staff clarified in a revised
7 memorandum last week, its recommendation to deny
8 BellSouth's motion to dismiss the AT&T petition
9 also applies to BellSouth's petition to dismiss
10 the FCCA pleading. At the out --

11 COMMISSIONER JABER: Mr. McGlothlin, are
12 you speaking on behalf of AT&T as well?

13 MR. MCGLOTHLIN: I am not, only FCCA.

14 At the outset, I would like to commend the
15 staff for the hard work and good job on getting
16 its arms around the issues that the motions have
17 presented, and I concur and commend its
18 conclusion to you. With respect to the
19 arguments here today, I just want to respond
20 very briefly.

21 First of all, I believe counsel
22 mischaracterized the recommendation in a couple
23 of respects. Counsel said -- or summarized the
24 recommendation as saying the problem may or may
25 not exist. That's not the status of the

1 pleadings. The FCCA alleged in its petition
2 that a severe problem exists, and so did AT&T,
3 and that is the allegations before you now and
4 is the subject of the motion to dismiss.

5 The pleadings were characterized and the
6 recommendation was characterized as saying you
7 may or may not have authority, but I read the
8 staff recommendation very differently. I think
9 the staff recognized that the status of the
10 pleadings is this: you have available to you a
11 range of alternative remedies, and the
12 appropriate time to determine whether you have
13 authority is when you decide what action needs
14 to be taken. For that reason, the argument is
15 misplaced.

16 There was a reference to the FCCA petition
17 filed several years ago. The only pertinent
18 portion of that case that's applicable here is
19 the fact that in that case, as here, BellSouth
20 filed a motion to dismiss. And the Commission
21 denied the motion to dismiss and in denying it
22 said this. "Put simply, processes designed to
23 further open the local market to competition are
24 entirely consistent with the purposes and
25 procedures of the Act. If the Commission finds

1 that the requested relief is designed to achieve
2 that goal and does not undermine the procedures
3 prescribed by the Act, then the relief is well
4 within the legal authority of the Commission."

5 One final comment. Ms. Caswell said,
6 "Let's leave legal arguments aside." Well, that
7 is a motion to dismiss, and I'm here to tell you
8 you can't do that. And when you apply the
9 standards applicable to a motion to dismiss, you
10 will conclude that it should be denied.

11 Beyond that, I would simply say that many
12 of the matters that she tried to bring to you
13 today belong, if at all, in a proceeding on the
14 merits.

15 Thank you.

16 COMMISSIONER JABER: I need some
17 clarification. We're here because AT&T filed a
18 petition requesting structural separation.

19 MR. FUDGE: Among other things, in their
20 clarified petition.

21 COMMISSIONER JABER: FCCA filed a
22 subsequent petition requesting the same thing.

23 MR. MCGLOTHLIN: That's correct.

24 COMMISSIONER JABER: And AT&T is not here
25 to address this Commission today?

1 MR. FUDGE: I don't see them here.

2 COMMISSIONER JABER: I just needed some
3 clarification.

4 COMMISSIONER DEASON: Let me ask a
5 question. Mr. McGlothlin closed his argument by
6 indicating that we cannot ignore the legal
7 argument which is squarely in front of us
8 because we're here on motions to dismiss, and I
9 understand that. And it's staff's
10 recommendation, and correct me if I'm wrong,
11 that we should not grant the motions to dismiss,
12 and that's based upon your legal analysis; is
13 that correct?

14 MR. FUDGE: Yes, Commissioner.

15 COMMISSIONER DEASON: Now, we've also had a
16 great deal of discussion here, particularly by
17 counsel for Verizon and for BellSouth, going
18 into the merits of whether it's advisable to
19 continue with an investigation concerning
20 structural separation, and I don't think we can
21 ignore that either. And I guess the hurdle that
22 I'm at is how do we address the motions to
23 dismiss, or are we here today to address both
24 the motions to dismiss and what future action we
25 take in regard to structural separation. Are we

1 here to address both?

2 MR. FUDGE: You certainly can address both,
3 Commissioner. But the primary reason we're here
4 today is to determine the motion to dismiss,
5 only raises the question of whether you can
6 proceed on the petitions by FCCA and AT&T.

7 COMMISSIONER DEASON: well, let me say
8 this, and let me give you a broader picture
9 approach as to where I see where we are and
10 where we need to be, and you tell me how we can
11 get there, if we can. And, Commissioners, this
12 is really at this point more for discussion.
13 I'm not trying to make a motion, but I'm trying
14 to get the issue in focus to try to see where we
15 are right now and where we ultimately should be.

16 We have had very thoughtful and thorough
17 analysis and presentation on the jurisdiction
18 question. Staff's analysis is part of that.

19 I do not think it's necessary at this point
20 to make a determination as to whether this
21 Commission has the jurisdiction if it found that
22 it was necessary to order structural
23 separation. And the reason I say that is that I
24 think it is ill-advised at this point to go
25 forward with an investigation into structural

1 separation. I'm persuaded by the argument that
2 this Commission has historically taken
3 sufficient action to promote competition and has
4 a number of ongoing dockets, and they have been
5 listed for us this morning by the participants,
6 a number of dockets addressing various aspects
7 of competition within Florida and how we need to
8 go about fostering or promoting that
9 competition, and that it is not necessary at
10 this point to continue with an investigation
11 into structural separation.

12 However, I'm not comfortable making a
13 decision today saying that, yes, for sure we
14 have the jurisdiction or that, no, that we do
15 not. But I don't think it's necessary to
16 address that question. And I need to put in
17 context, how do we address the motions to
18 dismiss if we just have the feeling, the belief
19 that to continue an investigation into
20 structural separation is not the appropriate
21 action and we need to direct our attention to
22 the dockets we already have open addressing
23 competition within the state. That's kind of a
24 broad question, and whatever feedback staff can
25 have, and I would look forward to feedback from

1 fellow Commissioners as to where you all think
2 we are and where we need to be.

3 MR. FUDGE: Commissioners, if you decided
4 not to rule on the motion to dismiss today, you
5 would still have the outstanding petitions of
6 FCCA and AT&T, and if you still have those
7 petitions, you have to do something with them.
8 And there's two basic options. You can either
9 consolidate the docket into the other open
10 dockets, or you can just continue this
11 proceeding indefinitely until those other
12 dockets are resolved.

13 COMMISSIONER JABER: Let me --
14 Commissioner, you asked for some feedback. I
15 appreciate your concerns, and I have additional
16 concerns that I want to throw out here so that
17 we can continue to dialogue.

18 I think that the motion to dismiss does
19 have a strict legal standard. And you may
20 recall the discussions we had the first time
21 this came to us, and I was troubled by the fact
22 that the motions to dismiss give us a legal
23 standard that is almost inflexible.

24 But the bigger picture to me is the actual
25 remedy that was requested. And to me, to pursue

1 structural separation right now sends a message
2 that we failed or the Act has failed. And I
3 know I've got problems with the Act, but we
4 haven't finished doing everything we need to do
5 to comply with the Act, and this agency hasn't
6 finished doing some of the things that it can do
7 on its own to make sure that all of the markets
8 are open.

9 So it's almost premature to reach the level
10 of structural separation, but I'm sensitive to
11 the fact that we have a motion to dismiss. I
12 would like staff to comment on whether we could
13 discard the motion to dismiss by not reaching
14 the point of deciding the motion to dismiss,
15 because on our own we find it premature to
16 address the structural separation petition.
17 That's one concern.

18 The second concern is, I want certainty in
19 this industry. It is time for us to be able to
20 focus on the matters that are directly prominent
21 on our calendar. And I think all industry
22 stakeholders deserve certainty, and I am not
23 willing to entertain leaving this docket open.
24 It is good to know we may have an additional
25 tool that I would like to use, or at least be

1 able to use later on if it's absolutely
2 necessary. But to leave a docket open and bring
3 some of that uncertainty to the market I'm not
4 interested in doing. So maybe staff could
5 address those points as well.

6 MR. FUDGE: Commissioners, if you think
7 it's premature to rule on the motions to dismiss
8 today, then you could just defer it indefinitely
9 until the other dockets are resolved, which may
10 ultimately render the petition moot.

11 COMMISSIONER JABER: It seems like if we
12 address the underlying request for structural
13 separation, depending on how we address it, the
14 motions to dismiss take care of themselves. If
15 we find that there's no need right now to
16 entertain a petition for structural separation,
17 I would imagine that the motions to dismiss are
18 rendered moot.

19 COMMISSIONER DEASON: We find ourselves in
20 a rather unique situation, in that we have --
21 this Commission took the petitions very
22 seriously and, in fact, we scheduled two days of
23 workshops, so -- and part of that workshop was
24 devoted to the jurisdictional question, but part
25 of it was devoted to the merits, so it's

1 difficult to divorce the two.

2 I am of the opinion that it is ill-advised
3 at this point to continue with the investigation
4 into structural separation and to even have that
5 docket open. And we have gotten information
6 through the workshop process, and I believe that
7 if we -- I'm trying to find a vehicle where we
8 do not have to rule on the strict jurisdiction
9 question, because I think it's not necessary.
10 So if there is a way that we can avoid having to
11 rule on the jurisdiction and just simply close
12 the docket, how do we get there?

13 CHAIRMAN JACOBS: I have a question, and
14 it's not in opposition to what your concern was,
15 Commissioner. This is legal. What's the nature
16 of the remedy of structural separation?

17 MR. FUDGE: Can you expand on that? Do you
18 mean what would it entail?

19 CHAIRMAN JACOBS: Let me ask this. Isn't
20 structural separation an equitable remedy?

21 MS. SIMMONS: Commissioner, or Chairman
22 Jacobs, let me take a stab at this.

23 CHAIRMAN JACOBS: This is purely legal.

24 MS. SIMMONS: Okay.

25 CHAIRMAN JACOBS: I need an answer first.

1 MS. SIMMONS: Okay.

2 MR. MCLEAN: Well, I'm trying to remember
3 the difference between equitable and legal
4 remedies. This is -- the first thought that
5 comes to my mind is that we're dealing here with
6 a quasi-legislative agency, and strictly -- the
7 distinction between legal and equitable remedies
8 may not help us a whole lot. If I had to
9 choose, I would say it was much more analogous
10 to an equitable remedy. It is a thought that
11 this is the right thing to do, despite the fact
12 that it may not be specifically set forth in
13 statute. But I'm very uncomfortable with that
14 kind of analogy because, frankly, I think the
15 distinction between equity, chancery and law
16 doesn't help us a whole lot here.

17 CHAIRMAN JACOBS: Well, what I tried to do
18 was kind of get some idea about that myself, and
19 I went and looked it up. And according to the
20 treatise that I found, it, while not definitive,
21 is pretty consistent with the idea of equitable
22 relief.

23 MR. MCLEAN: Yes, sir, I agree. It's
24 closer to equity than it is to law, but it is
25 not the same, I would say.

1 CHAIRMAN JACOBS: Then my next question
2 then becomes, if that's what the nature of this
3 relief is, how do we -- in an administrative
4 forum, is that where we impose equity relief?

5 MR. MCLEAN: No, sir. The Commission
6 doesn't have equitable powers like a court does,
7 like a court of chancery does. And in that kind
8 of analysis, I would suggest to you that, no, it
9 doesn't have equitable powers. But I don't
10 think that's what the staff recommendation to
11 you envisions.

12 Equity takes you almost outside the law.
13 It's the conscience of the crown. It lessens
14 the severity of legal remedies. And I don't
15 think that kind of rationale applies well here.
16 That's not what staff is suggesting to you.

17 CHAIRMAN JACOBS: Well, absent -- in fact,
18 I would disagree. I think it absolutely applies
19 here. And what I -- the whole import of
20 implementing this type of a remedy is that you
21 come to a conclusion that there has been
22 egregious behavior, there has been
23 monopolization, antitrust, anticompetitive,
24 whatever. And the whole objective, at least in
25 the antitrust arena, the whole objective then

1 becomes what do you do to fix it, what do you do
2 to make the market conditions amenable to
3 competition again, and you then look at a range
4 of remedies to achieve that. And structural
5 separation has historically been implemented
6 when the structure of the marketplace was deemed
7 to be out of whack and you had to implement
8 fundamental market structure modifications in
9 order to adjust that.

10 But without going too far afield, I want to
11 get back to the central question that in my mind
12 is raised. If this looks like a duck, i.e., it
13 looks like equity relief, how do we implement
14 it? And in searching that through, my research
15 says that even when governmental agencies -- and
16 let me step back for a minute. I have a lot of
17 agreement with the analysis of implied
18 authority. I think that implied authority is
19 broad, particularly when you have a statute, an
20 organic statute that's broad.

21 However, the essence of the legal analysis
22 says once you come to the conclusion that you
23 have broad implied authority, then all manner of
24 remedies is at your disposal. And I've always
25 understood that equity relief is a different

1 door to the courthouse. And, in fact, we have
2 to go to the court, it's my understanding. Even
3 if we demonstrate that the basis of relief is
4 found, can we do that in an administrative order
5 or an administrative forum, or do we have to go
6 to a court and ask the court to implement the
7 equity remedy that we now have supported in our
8 analysis? That's really my question. Once we
9 do --

10 MR. MCLEAN: If you say that it's an
11 equitable remedy, then you have decided that the
12 Commission can't do it. In my opinion, this
13 Commission does not have equity jurisdiction.
14 But what you're dealing with here is very close
15 to equity jurisdiction. It's a good analog, I
16 think. But, again, I'm very nervous bringing
17 the distinctions between law and equity into
18 this forum. I don't think they have a place
19 here.

20 What the staff is saying to you is that the
21 Legislature has directed you to encourage
22 competition and has given you a number of tools
23 to achieve that end. If you find that this is
24 the only tool which is appropriate to the task,
25 then it's one you should impose. That's

1 essentially what the staff is saying to you.

2 COMMISSIONER JABER: And in that regard,
3 why can't we say it is premature right now to
4 entertain a petition like that, because it may
5 not be the only tool. I mean, why do we even
6 need to reach whether this is a matter of law or
7 equity or whether we have jurisdiction? It's
8 just premature.

9 MR. MCLEAN: Well, let me point this out to
10 you. You're here on a motion to dismiss, which
11 has some fairly technical requirements. And
12 I've looked to give Commissioner Deason the
13 comfort that we don't have to deal with it, but
14 I'm afraid you have a motion to dismiss before
15 you and that you need to deal with it. Now, you
16 could put it off for a while, but sooner or
17 later somebody is going to say, "well, you've
18 put it off long enough, so it's a decision in
19 and of itself."

20 COMMISSIONER JABER: I don't think I agree
21 with you, Harold. Why can't we dismiss the
22 underlying petition on our motion --

23 MR. MCLEAN: I think that you --

24 COMMISSIONER JABER: -- and find the motion
25 to dismiss moot as a result? Is that --

1 MR. MCLEAN: Because I think affected
2 parties have a right to a point of entry into
3 the administrative process to bring evidence
4 before you.

5 COMMISSIONER JABER: An affected party that
6 didn't bother to come today.

7 MR. MCLEAN: Well, we have two petitioners,
8 as I understand it. And I noticed that they
9 didn't show up too.

10 But let me back up just a little bit. You
11 may want to deal with the motion to dismiss and
12 then deal with the petition on your own motion.
13 But it is my opinion that you should do so by
14 proposed agency action, because people who want
15 to bring evidence before you have the right to
16 do that on their petition, unless you decide on
17 your own motion that you don't want to hear from
18 them. Then you're going to have to propose an
19 action, and then they can petition for formal
20 hearing on that proposed action.

21 CHAIRMAN JACOBS: There's a troubling
22 aspect of where we are right now, because we're
23 -- and I know your analysis is broad and it
24 makes a better point than I'll make now. But
25 the scope of this discussion is that our

1 jurisdiction rests on our ability to ascertain
2 whether or not this remedy applies. Yes, there
3 is a way to contest a cause of action which says
4 we don't have -- that relief can't be granted.
5 But we can't be sitting here talking about our
6 jurisdiction and then say, "well, let's talk
7 about whether or not structural separation
8 applies." We have the jurisdiction to take on
9 this manner of investigation of conduct or we
10 don't, and I don't want us to get trapped in
11 that box. We have the jurisdiction to undertake
12 this investigation.

13 COMMISSIONER DEASON: We may have the
14 jurisdiction, but there's also the question of
15 should we exercise that jurisdiction.

16 MS. WHITE: Exactly.

17 MR. MCLEAN: Precisely.

18 CHAIRMAN JACOBS: That's precisely the
19 point where we are right now.

20 MR. MCLEAN: That's exactly the point where
21 we are. Yes, sir, I agree.

22 CHAIRMAN JACOBS: And then my analogy
23 becomes do we -- if what we're seeking to
24 accomplish here is to impose things that look
25 like equity relief, then perhaps we shouldn't

1 exercise that jurisdiction in this matter. We
2 have other avenues to do that.

3 MR. MCLEAN: Maybe I could clear the deck
4 like this. If you deny -- if you grant the
5 motion to dismiss, then the case is over.
6 Nothing else happens, because you decide that
7 you don't have jurisdiction to do what the
8 petitioner wants you to do.

9 On the other hand, if you deny the motion
10 to dismiss, then the issue becomes, now that you
11 claim that you have jurisdiction, what you're
12 going to do with the petition. And among the
13 things that you could do is decide that you're
14 pursuing these matters in other dockets, and
15 that's where you want to handle it, and you
16 propose to either deny -- well, you propose to
17 deny the petition on its merits, or perhaps you
18 move this record to some other docket. You
19 essentially consolidate it with some other
20 docket.

21 But the seminal question is one of whether
22 you have jurisdiction. And you have a motion
23 before you, and my advice to you is that you
24 probably need to decide that motion sometime in
25 the foreseeable future. I don't think deferring

1 that motion for a long time is such a hot idea.

2 One thing that you could easily do is to
3 deny the motion to dismiss and propose not to go
4 forward in this docket because you believe the
5 policy suggests that you should proceed
6 elsewhere.

7 MS. WHITE: But you could also answer
8 Issue 4, which is should the Commission proceed
9 to hearing on the petition, say no to that, and
10 then the motions to dismiss are moot.

11 COMMISSIONER BAEZ: I have a question
12 while Ms. white raised Issue 4, and I have a
13 question of staff, because I think I heard
14 Commissioner Jaber suggest certainty. Certainly
15 the industry deserves certainty, but I'm having
16 trouble just finding certainty within this
17 Commission as to what dockets are open and what
18 they all mean and how they relate to each
19 other. We heard mention of the anticompetitive
20 dockets, of which I have very little knowledge
21 to this date what the purpose of them -- I guess
22 there's three of them -- will be. And is there
23 any relation to the hearing that you suggest in
24 Issue 4 with these other dockets that are
25 already open?

1 MS. SIMMONS: Commissioner Baez, I'll try
2 to address that.

3 To me -- I am not directly involved with
4 the anticompetitive dockets, but to me, those
5 dockets are more in the way of regulatory
6 detection and enforcement in terms of -- it's
7 more of our status quo approach, almost a
8 bottoms-up kind of approach, let's detect
9 problems and figure out remedies. That's how I
10 understand those dockets.

11 The structural separations docket, on the
12 other hand, to me is more redesigning the
13 system. And I use that term very loosely, our
14 system of regulation. BellSouth, the way they
15 have themselves organized, it would almost be a
16 change in the whole regulatory modus operandi
17 that would be under consideration. And to me,
18 it's more of a tops-down pervasive kind of
19 approach to the alleged anticompetitive issues.

20 COMMISSIONER BAEZ: So then if I hear you
21 correctly, would structural separation -- and
22 I'm trying to get away from the jurisdictional
23 argument, which I have problems with as well.
24 But besides that, structural separation as a
25 remedy is not something that could be considered

1 under these generic or these more general
2 anticompetitive dockets?

3 MS. SIMMONS: I guess it's possible, if you
4 wanted to do that, to consolidate this docket
5 with, for instance, the anticompetitive docket
6 that was set up to deal with Bellsouth issues.
7 That could be done. I wouldn't necessarily
8 recommend that, because I think the approaches
9 in the two dockets are quite different, but it's
10 something you could consider. As I say, I
11 wouldn't necessarily recommend it.

12 COMMISSIONER BAEZ: And here's some of the
13 concerns I'm having. (a), I don't believe our
14 jurisdictional analysis in -- I guess it's Issue
15 1 in this recommendation. I'm not comfortable
16 with the federal analysis. I'm not comfortable
17 with how all this plays out in terms of the Act,
18 whether we have authority under the Act, the
19 federal Act, or not. So I'm not comfortable
20 with saying we have or haven't jurisdiction on
21 those grounds. I don't believe that issue has
22 been fleshed out, at least not for my purposes
23 anyway.

24 Secondly -- and I think it may have been
25 Commissioner Deason or Commissioner Jaber. And

1 I go back to something I said, I guess it was a
2 couple of weeks ago. I'm trying to wade through
3 this mass of open dockets that all seem to bleed
4 into each other and trying to make some sense
5 out of all of them. But certainly there appear
6 -- some dockets have the implication that if you
7 decide to move forward with one of them, you're
8 in fact -- you know, you're canning whatever
9 progress or whatever results you would possibly
10 make with pursuing the rest of them. And I have
11 a problem with that, because -- I'll say it
12 again. We've been at this for over two years on
13 some of them, and to change -- you know, to
14 switch onto another track midstream just doesn't
15 make sense to me.

16 And I would like to understand how
17 proceeding with this docket and accepting your
18 recommendation doesn't constitute changing for
19 forsaking all the progress or whatever decisions
20 we've made up to now in other dockets, be it
21 OSS, be it the pending 271 docket, even the
22 anticompetitive dockets, which at this point I
23 don't think we've made much progress on, but
24 there they are. So I want to know how this --
25 you know, adding one other docket and one other

1 investigation and one other consideration of
2 remedies doesn't mean to me that I have to
3 ignore whatever work we've already done and
4 whatever resources we've already expended on the
5 other dockets.

6 MS. SIMMONS: I guess I would comment that
7 I think there is a question in terms of how many
8 paths you want to go down simultaneously. Let
9 me make clear that I understand your concerns.

10 COMMISSIONER BAEZ: I'm running out of
11 fingers.

12 COMMISSIONER JABER: Ten days of the week.

13 MS. SIMMONS: I think that's --

14 COMMISSIONER BAEZ: And toes, ten days of
15 the week, yes.

16 MS. SIMMONS: -- a very legitimate
17 question. You know, based on the legal analysis
18 before you, the legal, I think, recommendation
19 is to -- basically that we should proceed as far
20 as the legal analysis. I do think -- if you
21 take that just as a given for sake of
22 discussion, I do think there remains a question
23 of timing, timing and also venue, you know,
24 where do you want to deal with this and when.

25 COMMISSIONER DEASON: Well, let me say

1 this. And maybe this is a poor analogy, and if
2 it is, staff, correct me. But, Commissioner, I
3 see that -- I don't see that this structural
4 separation potential remedy is necessary. I
5 don't think that it can be combined in with some
6 of our other dockets. I think it is a totally
7 different remedy. And the analogy I would use
8 is that, you know, we've got an automobile, and
9 perhaps it's not running exactly as it should.
10 Do we fix it, or do we scrap it and build a new
11 one? And I don't think you do both of those at
12 the same time. And I think that structural
13 separation is more akin to scrapping what you're
14 doing now and building a new one.

15 COMMISSIONER BAEZ: No, I agree with you.
16 It's an extreme -- it's perhaps the most extreme
17 of remedies. But the trouble that I'm having
18 understanding parallel paths is that, again, as
19 an example, an anticompetitive -- first of all,
20 this docket -- and I'm not clear if the hearing
21 again that you're suggesting in Issue 4
22 constitutes having a hearing on finding --
23 having a finding of anticompetitive behavior,
24 because that to me -- and I could be wrong, but
25 that to me becomes some kind of threshold issue

1 as to whether you should even get into a
2 discussion of remedies. You know, you have to
3 have a basis for it. And I think to some
4 extent, we're backing into it.

5 Is what we're saying here, yeah, we've got
6 jurisdiction to do it, and we can do it if we
7 want to, and let's go find out if we should do
8 it? Isn't that what we're doing to some extent
9 on the other dockets? Understanding,
10 Commissioner Deason, what you're saying is one
11 probably has nothing to do with the other. But,
12 you know, to say that I have jurisdiction or not
13 to do it, well, that serves me -- great, but it
14 doesn't solve it.

15 COMMISSIONER DEASON: Well, I'm not
16 comfortable saying we do have jurisdiction. I'm
17 not comfortable saying that we do not.

18 COMMISSIONER BAEZ: And I said that up
19 front. Absolutely.

20 COMMISSIONER DEASON: You know, at some
21 point -- and I don't know what the future holds.
22 At some point, we may feel compelled that we
23 need to exercise our jurisdiction in a way which
24 would result in structural separation. We're
25 not there yet.

1 CHAIRMAN JACOBS: Commissioner, that's a
2 very troubling argument, and I hope I was -- I
3 was trying to say we don't do. We don't say
4 that we do an investigation in order to impose
5 structural separation. We do an investigation
6 to root out and discover anticompetitive
7 conduct, and then we have an arsenal of tools
8 before us to deal with that. We can't get -- in
9 my mind, we would do ourselves a disservice to
10 say, "Let's embark upon this path to get to
11 structural separation." It's a nonstarter. We
12 are dealing with a market issue and conduct in
13 that marketplace.

14 And I keep saying this, that to say that
15 this magical thing is it is, first of all,
16 limiting ourselves. I agree with what
17 Commissioner Jaber said earlier. There are a
18 hole host of tools to deal with whatever you
19 discover in an investigation.

20 I think, if I may, Commissioners, that the
21 issues are covered in other dockets. We're
22 doing the investigation essentially that would
23 -- that is necessary to derive whatever records
24 you would need to derive to reach whatever
25 conclusions you need to reach regarding conduct

1 in the marketplace in other dockets. The
2 purpose of this petition was to seek a specific
3 relief. And it challenges me in many respects
4 because it's just on that specified course to
5 arrive at some specified result.

6 That is not what we're here for. We're not
7 here to derive a specified result for the
8 parties. We're here to determine what's
9 happening in the marketplace, whether or not
10 it's conducive to competition, and what we may
11 have to do to facilitate competition.

12 COMMISSIONER PALECKI: Commissioner -- I'm
13 sorry.

14 CHAIRMAN JACOBS: And then I still go back
15 to my other argument, which was, I admit, one of
16 those nice little lawyers' discussions, but I
17 think it's a relevant discussion here. You
18 know, I don't want to get into the history and
19 all that of the law, but it's pretty clear that
20 when you order structural separation, what you
21 have essentially done is enjoined a parent
22 company from exercising further control over a
23 subsidiary. That's injunctive relief. That's
24 equity relief. And I'm of the opinion that we
25 as an administrative body, if we wanted that, we

1 would have to go to the court or to the Attorney
2 General to ask for them to go to court to get
3 that relief.

4 COMMISSIONER PALECKI: Commissioners,
5 there's something that I would like to
6 accomplish either in this docket or in one of
7 the many other dockets that we have open right
8 now.

9 I see that we do have a problem in this
10 industry. I see that we've had constant
11 litigation between the ALECs and the ILECs since
12 the 1996 Act was passed. In 90 percent of these
13 cases, it seems that the ALECs believe that
14 they're being treated unfairly because they are
15 being treated in a manner that's different from
16 the retail side of the ILEC. They feel that
17 they are being discriminated against. They feel
18 that they are not at parity. And there's no end
19 in sight. From the information I've received,
20 there's no let-up in this litigation in the
21 states where 271 approval has been granted.

22 I don't want to dictate to the ILECs how
23 this should be done. I don't want to use the
24 word "separation" at all, let alone structural
25 or functional. But I would like to ask the

1 ILECs to evaluate their processes and let the
2 ILECs tell us how they could be reorganized so
3 that their retail side would use the same
4 processes as the ALECs, and I would like staff
5 to make this a matter of discovery. I don't
6 feel that I need to do that in this docket, but
7 I think it's something that I would like to hear
8 from the ILEC community as to what they think
9 the best manner that this could be accomplished
10 in.

11 And I would like to ask the ILEC community
12 to please keep an open mind. Don't just give us
13 a knee-jerk reaction against this. Look at the
14 amount of your litigation expense since 1996,
15 and let's try to do something to give the ALEC
16 community the perception that they're in this
17 together with the retail side of the ILECs, that
18 you're all going through the same processes,
19 that you're all lined up at the same ticket
20 window, and let's try to eliminate some of this
21 litigation.

22 I don't think it needs to be done in this
23 docket. I think there are many other vehicles
24 that we have available to us. But this is an
25 area that I think the Commission should explore.

1 COMMISSIONER JABER: I have a question for
2 Harold. It seems to me that the motion to
3 dismiss, the standard, if I understand it
4 correctly, Legal, the moving party in this case,
5 FCCA and AT&T, have to demonstrate that -- no,
6 the moving party was BellSouth. BellSouth has
7 to demonstrate that the allegations in the FCCA
8 and AT&T petitions -- we have to assume that
9 those are facially correct and that they've
10 shown that there's a cause of action for which
11 relief can be had here. That's the standard.

12 MR. MCLEAN: That's correct, Commissioner.

13 COMMISSIONER JABER: I think we may be able
14 to accomplish what the Commissioners are
15 suggesting by finding that the relief requested
16 is premature. I'm really trying to avoid
17 reaching the issue of jurisdiction. But at the
18 same time, I hear what you're saying with
19 respect to the motion to dismiss. I understand
20 we have to rule on the motion to dismiss. And
21 why can't we say that we can't grant the relief
22 requested because it's premature, we are not
23 done with processing the very important dockets
24 that we have open?

25 MS. CASWELL: Commissioner Jaber, can I

1 just make a --

2 COMMISSIONER JABER: Hang on. I --

3 MS. CASWELL: Okay.

4 COMMISSIONER JABER: -- need our staff to
5 answer this question for me.

6 MR. MCLEAN: The notion that the -- I'm a
7 little confused. Are you suggesting that the
8 docket not go forward because the remedy
9 suggested is premature? I think that you can do
10 that, but does that mean that you close the
11 docket?

12 COMMISSIONER JABER: I would like to close
13 this docket because --

14 MR. MCLEAN: I have a concern, and that is,
15 a party has filed a petition before you seeking
16 relief. You can't just blow that petition off
17 on the merits because you think it's premature.
18 I think that you can propose to do that because
19 it's premature, but I still think that you have
20 to afford a party a clear and effective point of
21 entry into the administrative process. And to
22 my mind, that means an opportunity to present
23 evidence to you to persuade you what you ought
24 to do if they have stated a claim upon which
25 relief could be based. so it --

1 COMMISSIONER JABER: I thought the motion
2 to dismiss standard actually doesn't take you
3 into the merits, that you're supposed to kind of
4 take a prima facie look, and if there's a cause
5 of action for which relief may be had, fine. If
6 there isn't, you're supposed to grant the motion
7 to dismiss.

8 MR. MCLEAN: I agree.

9 CHAIRMAN JACOBS: I thought that's what the
10 whole doctrine of ripeness was about, that you
11 blow people off because it's not time yet.

12 MR. MCLEAN: Well, are you prepared to
13 decide to deny the petition on its merits here
14 and now as a final appealable order?

15 CHAIRMAN JACOBS: I thought I heard
16 Commissioner Jaber say it's not ripe yet.

17 COMMISSIONER JABER: Yes. I think you're
18 turning it around on us, Harold. You said we've
19 got to decide the motion to dismiss.

20 MR. MCLEAN: I think that you do.

21 COMMISSIONER JABER: All right. In
22 deciding the motion to dismiss, if we grant the
23 motion to dismiss, that disposes of the petition
24 for structural separation.

25 MR. MCLEAN: I think it's a little -- the

1 petition is broader than that. And I misspoke
2 earlier, because I said if you granted the
3 motion to dismiss, you would shut down the
4 docket. It is also true that the amended
5 petition does deal with lesser remedies. It
6 suggests that there's a whole realm or continuum
7 of remedies that you might consider.

8 So it's in a peculiar posture, to put it
9 mildly. You have -- the initial petition was
10 construed by the defendant or by Bell to say
11 that it addressed only that specific remedy and
12 no other, and they filed a motion to dismiss on
13 that basis. The petition was then amended to be
14 a much broader petition, and the motion I think
15 is renewed I think to the extent to address all
16 those other things.

17 COMMISSIONER JABER: My frustration is that
18 it's like -- what is the saying? The cart
19 before the horse? We are talking about the
20 remedy before we finish the docket where we're
21 looking at the violations. So that's why I keep
22 saying it seems premature.

23 But, you know, the parties should be
24 commended. It is good to know we've got
25 additional tools in our basket that we are not

1 shy about exercising. I just don't want to
2 decide the remedy before I look at the bigger
3 picture. So how do we get there?

4 MR. MCLEAN: Well, I have a suggestion that
5 might work. I don't know what the parties would
6 think of it. But it is simply to propose to
7 dismiss -- strike that. Propose to deny the
8 petition on its merits and hold the motion to
9 dismiss to be moot in the same process.

10 But I believe that you have to do that as a
11 proposal, because otherwise you will deny
12 parties, namely, AT&T and the other ALECs, an
13 opportunity, a point of entry into the
14 administrative process.

15 CHAIRMAN JACOBS: Commissioners,
16 Ms. DeLoach is here, but before she speaks, we
17 need to take about a ten-minute break to take
18 care of some matters real quick, and then we'll
19 come back in about ten minutes and we'll have
20 Ms. DeLoach speak.

21 Thank you.

22 (Short recess.)

23 CHAIRMAN JACOBS: Mr. McGlothlin.

24 MR. MCGLOTHLIN: Yes, Mr. Chairman. First
25 of all, I wish to sponsor the appearance of

1 Claudia Davant-DeLoach, the attorney for AT&T,
2 who in addition to being the petitioner also
3 participates in the FCCA. And secondly, if I
4 may, I would like to respond very quickly to
5 some of the comments I've heard.

6 I want to make the point very clear that in
7 its separate petition, the FCCA asked the
8 Commission to initiate an investigation of
9 structural incentives. So from the beginning,
10 with respect to the FCCA pleading, a range of
11 alternative remedies has been before you, and
12 that has been true with respect to AT&T since
13 its amended petition.

14 And specifically in the FCCA petition we
15 asked this. FCCA recommends that the Florida
16 Commission immediately convene a proceeding to
17 address the possible forms and very real
18 benefits of a structural incentive approach.

19 Now, the other point I want to make is
20 this. In her argument Ms. Caswell told that you
21 in the Pennsylvania case the Commission did not
22 order structural separation. Well, that is
23 because even though that remedy was available to
24 the Commission, the Commission and parties
25 reached a result short of that. It involved

1 some incentives and some changes, but fell short
2 of the most straightforward form of structural
3 separation. That outcome is one of the possible
4 outcomes available to the Commission in this
5 case.

6 Secondly, I've heard the Commissioners say
7 that the Commission should consider perhaps
8 denying the motion to dismiss, but ruling that
9 the remedy we seek is premature. Well, my point
10 is that the appropriate point in time for the
11 Commission to reach that decision is after
12 you've allowed the parties to give you evidence
13 on that point.

14 Now, FCCA recognizes that structural
15 separation or some variation on that theme in
16 the form of structural incentives is an extreme
17 type of remedy. But we've also alleged that the
18 situation is so severe that extreme remedies are
19 called for. And so we would make the point too
20 that we're entitled, should you find that you
21 have authority to hear this, we're entitled to
22 make our case before you decide we're premature.

23 Now I would ask that you allow me to
24 present Ms. DeLoach to address you.

25 MS. DAVANT: Mr. Chairman and

1 Commissioners, I apologize for being late today.
2 I had a personal emergency occur this morning,
3 and I have counsel who is on a train stuck
4 between there and Washington, and I have outside
5 counsel who's apparently missing in action. So
6 I do apologize for us not being represented
7 earlier than this very moment.

8 Obviously, I missed the earlier discussion,
9 but, Commissioner Jaber, I did hear the last
10 question that you asked, which is why are we
11 putting the cart before the horse. And I think
12 that's exactly why we brought this petition to
13 the Commission's attention. We've tried all
14 kinds of horses, and we've tried all kinds of
15 carts. I think the remedy that is suggested by
16 this petition is far different than any other
17 process that you're considering right now could
18 address.

19 I think you can fix a lot of problem with a
20 third-party test. I think you can through OSS
21 and other measures look at a lot of reasons why
22 competition is having problems in this state.
23 But you cannot get rid of the inherent conflict
24 that we have between an incumbent and a
25 competitive carrier whereby the incumbent still

1 controls the monopoly or the majority percentage
2 of volume in the state. I think it was born out
3 of frustration and absolutely the desire to
4 participate in one of the biggest markets in the
5 country that we brought this petition to your
6 attention.

7 I was not prepared to argue the
8 jurisdictional issue, but I can tell you that if
9 you rule on the motion to dismiss without even
10 giving us the opportunity to prove the evidence
11 that we've already alleged in the petition, I
12 would argue that you're not meeting that
13 burden. Even your staff recommendation says
14 that if facially, on its face, everything we
15 allege in this petition is correct, then you're
16 under the obligation to at least hear the
17 evidence of what we've brought before you. If
18 you dismiss this case before we even have the
19 opportunity to bring that to you, then I would
20 suggest that the Commission has lost an
21 opportunity to hear evidence that wouldn't
22 necessarily be admitted in any other process
23 you've got underway at the moment.

24 I guess I would leave it at that and urge
25 this Commission to adopt staff's recommendation

1 and move forward in a time frame that you think
2 is appropriate under the circumstances and give
3 the CLEC community an opportunity to come to you
4 and demonstrate what we've already put forth in
5 this petition.

6 MS. CASWELL: Mr. Chairman, may I respond
7 to that?

8 CHAIRMAN JACOBS: Ms. Caswell, briefly.

9 MS. CASWELL: First of all, legally you're
10 under no obligation to hear any evidence on any
11 of the allegations that are brought forward in
12 the petition. There are other forums that will
13 give them an effective point of entry into
14 administrative proceedings. We've mentioned all
15 of those forums, all of those dockets. I
16 vehemently disagree that any of the evidence
17 that might be heard here would not necessarily
18 be admitted there.

19 we've heard about the same alleged problems
20 at the workshops that we've had in the other
21 dockets, OSS problems, discrimination, lack of
22 parity, that sort of thing. We didn't hear any
23 specifics, and we certainly heard nothing to the
24 extent that would justify structural separation.
25 And don't you think they would have come forward

1 with something like that in the workshops if it
2 existed? It doesn't.

3 So you don't have an obligation to hear
4 every petition that comes before you. Parties
5 can file petitions over and over and over again
6 on the same thing, and you don't have to go to
7 hearing on those. You can decide that there are
8 other effective places that those allegations
9 can be heard, and that's the case here.

10 MS. WHITE: Nancy White for BellSouth
11 Telecommunications.

12 I would wholeheartedly agree with
13 Ms. Caswell. I think that Mr. McGlothlin's
14 statement that FCCA was not really looking for
15 structural separation, but something called
16 structural incentives, is just playing word
17 games. It's the same thing.

18 Everything that they've complained about
19 and that staff lists on page 16 of the rec are
20 things that are being dealt with in other
21 dockets. ALECs using BellSouth's OSS must wait
22 much longer than BellSouth's retail arm, heck,
23 that's what third-party testing is looking at.
24 BellSouth has not devoted sufficient technical
25 and related resources necessary to develop OSS

1 and provide parity to ALECs. Again, third-party
2 testing.

3 It just seems to me that we're reinventing
4 the wheel over and over and over again and that
5 it's time for it to stop. Thank you.

6 MR. MCGLOTHLIN: The distinction is that in
7 those other dockets, the parties have not asked,
8 nor is the Commission looking for the type of
9 remedy that will get at the root cause of the
10 problems. And by looking at structural
11 incentives, the Commission has the opportunity
12 to do that in a separate investigation.

13 MS. DAVANT: And with all due respect to
14 other counsel at this table, and with all due
15 respect to this Commission, my understanding of
16 the question before the Commission is whether
17 you're going to move to dismiss the petition.
18 The burden that's being discussed is not whether
19 you should order such a separation at this
20 point. I think, obviously, that decision comes
21 after you have a full hearing on the issue. The
22 issue before you is a motion to dismiss and
23 whether this petition meets the burden of
24 dismissal, which I would argue strenuously that
25 it does not.

1 Now, I don't think any of us are prepared
2 to argue the actual case before you today. I
3 didn't understand that's why we were here. My
4 understanding is we're arguing whether or not
5 this Commission is going to move to dismiss a
6 petition that on its face alleges facts that I
7 think you should consider.

8 MS. WHITE: And with all due respect to
9 AT&T, I would show the Commission Issue 4, which
10 is should the Commission proceed to hearing on
11 AT&T and FCCA's petitions to consider structural
12 separation of BellSouth, as well as other
13 remedies. That's an issue.

14 COMMISSIONER JABER: We need to back up.
15 We need to back all the way up.

16 CHAIRMAN JACOBS: Very well. Any other
17 questions?

18 COMMISSIONER BAEZ: Yes, Mr. Chairman. I
19 have a question for Mr. McLean. Does either
20 denial or -- would denial of the motion to
21 dismiss imply -- it would be an answer in the
22 positive as to jurisdiction necessarily? I know
23 that if we dismiss -- I know that if we grant
24 the motion to dismiss, it's necessarily on the
25 grounds that the movants have made; correct?

1 MR. MCLEAN: If you deny the motion to
2 dismiss, then I believe you've decided as a
3 matter of law that a claim has been stated
4 which, if proven up, deserves the relief, and
5 you have the jurisdiction to provide the
6 remedy.

7 COMMISSIONER BAEZ: So we are -- well,
8 yeah, I think we've had some discussion. At
9 least a couple of us have said that there is a
10 fair amount of concern as to whether the
11 jurisdictional question should be answered now
12 at all. And I guess I'm trying to understand
13 what the implication of either -- the
14 implication is clear if you grant the motion.
15 But if you deny the motion, is the same -- is it
16 the same implication as to jurisdiction? And
17 you're saying yes.

18 MR. MCLEAN: If I understand the question,
19 yes. You have decided that there has been a
20 claim stated upon which you have the authority
21 to base relief. I think that's what would be
22 necessarily held if you deny the motion to
23 dismiss. That's the issue that's truly before
24 you today, is whether there has been a claim
25 stated upon which you have the authority to base

1 relief.

2 COMMISSIONER JABER: Okay. Let me ask the
3 same question a different way. If we grant the
4 motion to dismiss, will that prohibit the
5 parties or the Commission at a later date from
6 entertaining a remedy like structural
7 separation?

8 MR. MCLEAN: If I were arguing that you
9 don't have authority, I would most assuredly
10 argue that you had decided before that you
11 didn't. So --

12 COMMISSIONER JABER: That's not what I
13 asked.

14 MR. MCLEAN: I understand, but you're going
15 to hear the argument. Does it control? I don't
16 know. Somebody will have to make that decision.
17 Certainly it's very close to controlling. If
18 you decide today -- this petition is cast to
19 suggest that you have the authority to go all
20 the way to structural separation. If you decide
21 that you don't have the jurisdiction to do that
22 today, you'll certainly be faced with that
23 argument should you try to do it later. And I
24 think a very --

25 COMMISSIONER JABER: And what would staff's

1 recommendation be in that regard?

2 MR. MCLEAN: My personal recommendation
3 would be that indeed you have already decided
4 that issue adversely. So my view of it is that
5 it would foreclose a later consideration.

6 One thing that I believe Verizon brought up
7 was perhaps you can decide that you have -- that
8 affected parties have an effective point of
9 entry into the administrative process in these
10 other dockets. I have mixed feelings about
11 that. It's certainly one thing that you could
12 do today. It is probably the legal equivalent
13 of deciding that the petition and the remedy
14 suggested is premature. You can say perhaps
15 that the motion to dismiss is moot. With
16 respect to the petition on its merits, you
17 believe that the parties have an effective point
18 of entry in the other dockets. I think that's
19 the legal statement that the petition is
20 premature at this time.

21 COMMISSIONER JABER: Now I want to switch
22 focus a little bit and talk to Ms. Davant about
23 the difficulty I find myself in just as one
24 Commissioner. I hear everything the ALECs are
25 saying. And we've worked -- at the sake of

1 tooting our staff's horn and this Commission's
2 horn, we have worked diligently in addressing
3 these issues, and you know it and I know it.
4 And it's not over. We're not done. We are by
5 no means done. And the ultimate, ultimate
6 remedy for all of these violations is the threat
7 to BellSouth that they will not get 271. That
8 is the ultimate, in my opinion, drastic remedy.
9 Now, whether we get there or not, I don't know.
10 I don't want to prejudge anything.

11 But the situation I find myself in is
12 appreciative of the fact that you all have found
13 an additional tool that perhaps we could take
14 advantage of. The awkwardness is, to go there
15 today, regardless of all these procedural, legal
16 vehicles, I can't get past the recognition that
17 to go there today would be a sign that we have
18 failed already, and we're not even done.

19 So you help me get there. I don't want to
20 say we don't have jurisdiction to entertain the
21 relief of structural separation, but I also
22 don't want to say yet that we have it. It's
23 almost like a hip pocket kind of relief that I
24 would like to save, but I don't want to get
25 there today. So if you were in my position and

1 you knew exactly what I was trying to
2 accomplish, how would you get me there? would
3 you consider withdrawing your petition? It
4 seems to me strategically that's your best
5 option.

6 MS. DAVANT: Commissioner, I do understand
7 your concerns. I would disagree with you on one
8 point, and that is that structural separation is
9 a different remedy than any other that you will
10 consider in the 271 process.

11 I would also question whether or not 271 is
12 as big a hammer as everyone would have us
13 believe. I would agree with --

14 COMMISSIONER JABER: I can buy that,
15 Ms. Davant, but you're in an awkward position
16 too, because you take the risk of this
17 Commission finding today that we don't have
18 jurisdiction for structural separation.

19 So let me go back to my question, my last
20 question of you. As a matter of strategy, would
21 you consider withdrawing your petition for
22 structural separation?

23 MS. DAVANT: Well, I would consider just
24 about anything that this Commission puts forward
25 in that light. But I would also suggest, you

1 know, you can deny the motion to dismiss with
2 the understanding, as your staff's
3 recommendation clearly indicates, that there's
4 no hurry to get to a hearing yet because of all
5 the other processes. So if you deny the motion
6 to dismiss, but ultimately hold that there's no
7 reason, there's no impending crisis that would
8 require an immediate hearing on this issue,
9 maybe you determine that, well, we'll get
10 through the 271 process and ultimately determine
11 whether or not we need to move forward on the
12 hearing. You can deny a motion to dismiss and
13 yet not move forward on the hearing anytime
14 soon. I would suggest that strategically, that
15 gives you the hip pocket alternative you're
16 asking for.

17 COMMISSIONER DEASON: Ms. white, how do we
18 get out of this morass?

19 MS. WHITE: I would say that you vote no on
20 Issue 4, you --

21 COMMISSIONER DEASON: Is that denying
22 somebody due process if we vote no on Issue 4?

23 MS. WHITE: No, I don't believe it is,
24 because you will issue an order that says we
25 believe this matter should not be set for

1 hearing and that investigation should not go
2 forward because of several reasons, one, we
3 think it's premature because we have all these
4 other dockets going on; the parties have a point
5 of entry into all those other proceedings; and
6 three, if they don't like that, you're putting
7 this out as an order, and it can be appealed.
8 If you vote no on Issue 4, then the motions to
9 dismiss are moot, and you don't have to reach
10 the issue of jurisdiction.

11 COMMISSIONER DEASON: So if we -- under
12 your scenario, if we vote no on Issue 4 for the
13 reasons you just expressed, then the question of
14 the motions to dismiss become moot, and there
15 would be no vote taken on that?

16 MS. WHITE: That's correct. That would be
17 my position.

18 COMMISSIONER DEASON: Mr. McLean, you
19 disagree with that?

20 MR. MCLEAN: No, I agree with most of it.
21 I think it has potential weakness, and that is
22 whether a court, if asked to review that order,
23 would agree with you that those other dockets
24 afforded an effective point of entry. And given
25 the merits of what you're considering there, I

1 think we could make a very persuasive argument
2 that indeed it does, because, to kind of
3 summarize what several of you have said, you've
4 got -- Commissioner Baez is running out of
5 fingers, and I am too. There's quite a few
6 dockets that address the very same alleged
7 issues by the ILECs. So I think we could make
8 you a persuasive case that those other dockets
9 do afford an effective point of entry for this
10 consideration.

11 But I also have to say that a petitioner
12 ought to be able to come forward on their
13 vehicle and get their case heard too. So there
14 would be two sides to that argument.

15 Strategically, again, Commissioner Jaber,
16 perhaps AT&T would wait until they saw at least
17 what the directions of the other dockets were.
18 But the only problem I see with what Ms. White
19 just said is that a court is going to have to
20 agree with you, if asked to agree, that that
21 effective point of entry arose in the other
22 dockets.

23 MR. MCGLOTHLIN: May I respond?

24 CHAIRMAN JACOBS: We're getting into
25 another round-robin there.

1 well, let me ask this. Commissioners, do
2 we want to have more -- do you want more
3 questions, or do you want to ask more questions
4 of the parties?

5 COMMISSIONER JABER: I want to know if
6 Ms. Davant wants to take a five- or ten-minute
7 break and talk to the parties about -- I want to
8 know if we need a break so that you can think
9 about what the Commissioners' discussion has
10 been.

11 MS. DAVANT: May I request a ten-minute
12 break, Commissioner?

13 COMMISSIONER JABER: I would be in support
14 of giving the parties a ten-minute break.

15 COMMISSIONER DEASON: We'll temporarily
16 pass this out and come back to it in about 15
17 minutes.

18 * * *

19 CHAIRMAN JACOBS: We'll go back to item 4
20 now.

21 MS. DAVANT: Commissioner, we have
22 strategized with our team as well as some of the
23 other petitioners. And as luck would have it,
24 the judge arrived and wanted to have a few
25 words, if he might.

1 MR. HATCHETT: Thank you. Joseph
2 Hatchett, Akerman Senterfitt, for AT&T. Along
3 with me are counsel also associated in this case
4 in this proceeding.

5 It's my understanding that at the time of
6 the recess, the question was whether AT&T would
7 choose to withdraw its petition. We would urge
8 the Commission, since nothing is before the
9 Commission at this time except jurisdiction,
10 that the Commission would follow the staff
11 recommendation and deny the motion to dismiss,
12 in that way not really setting any great
13 precedent, and then perhaps to continue any
14 further consideration until some appropriate
15 time. That is, while you go forward with some
16 of these other proceedings, if at any time it
17 appears appropriate for you to consider a remedy
18 such as that that has been suggested by AT&T,
19 that at that time you would go forward with the
20 petition, but at this time to simply rule on the
21 motion to dismiss that is pending this morning.
22 And, of course, we urge that you deny that
23 motion and continue all further proceedings in
24 this matter.

25 CHAIRMAN JACOBS: Questions, Commissioners?

1 COMMISSIONER DEASON: Is there a response
2 from BellSouth?

3 MS. WHITE: Just a short one. I mean, this
4 is -- we've talked about this for at least two
5 hours now. I believe I can speak for Verizon
6 when I say that our position remains the same.
7 It was my understanding when we first started
8 this discussion from questions from the
9 Commissioners that the Commission did not really
10 want to -- thought it was premature to reach the
11 issue of jurisdiction at this point. And if you
12 follow Judge Hatchett's suggestion, then you are
13 making that decision.

14 So again, I would urge that the way to
15 decide this is on your own motion decide that
16 it's premature to go forward, that there are
17 other points of entry, and that -- decide it in
18 that way, and the motions to dismiss would be
19 moot.

20 Thank you.

21 MR. HATCHETT: May I --

22 COMMISSIONER DEASON: Let me make one
23 observation at this point. I'm sorry.

24 CHAIRMAN JACOBS: Brief response.

25 MR. HATCHETT: May I respond? As I

1 understand the comment that has just been made,
2 it said why not hold that the proceedings are
3 premature. If you do that, then I think you are
4 setting a precedent, because that will be
5 interpreted as meaning that you do not have the
6 jurisdiction to go forward on the remedy that we
7 have suggested.

8 If you simply deny the motion and postpone
9 all further proceedings, it is not forever in
10 stone that you will ever reach the remedy that
11 we have suggested. It simply means that the
12 other side has not sufficiently convinced you
13 that our allegations were untrue. And that is
14 all the Commission would be ruling on at this
15 point, the strength of the allegations in the
16 complaint or in the petition that AT&T filed.

17 That's all the Commission would be holding,
18 that those allegations are sufficient, because
19 on the motion to dismiss, all of the allegation
20 are taken -- or in our petition, all of the
21 allegations are taken as true, and you're simply
22 ruling on the four corners of the petition that
23 AT&T filed. But we believe that it would be
24 interpreted as this Commission holding that it
25 will never have jurisdiction to even entertain

1 the remedy that AT&T has suggested.

2 MS. CASWELL: Could I just respond briefly
3 to that?

4 CHAIRMAN JACOBS: Briefly.

5 MS. CASWELL: If you take the approach that
6 BellSouth and Verizon have suggested, then you
7 won't even need to rule on the motion to
8 dismiss. It will become moot once you decide
9 that you don't want to go to hearing on the
10 petition. So there's no way -- there's not even
11 the merest implication that you've decided you
12 don't have jurisdiction to order structural
13 separation. And if at the end of all those
14 other proceedings you feel it's the appropriate
15 remedy, then we can discuss it again.

16 COMMISSIONER DEASON: Let me ask Mr. McLean
17 a quick question. If we were to grant the
18 motion to dismiss on the grounds that we lack
19 adequate jurisdiction, is that an appealable
20 decision?

21 MR. MCLEAN: Yes, sir, I believe it is, but
22 let me add something. A motion to dismiss on
23 the basis of subject matter jurisdiction lies at
24 any time, so it could also be renewed later. I
25 don't think necessarily responsive, but it is a

1 thought that crosses my mind. If you decide to
2 deny the motion, if the motion is renewed at
3 some later point in time after --

4 COMMISSIONER DEASON: But I'm saying grant
5 the motion to dismiss on the grounds that we
6 lack adequate jurisdiction.

7 MR. MCLEAN: I believe that's an appealable
8 order, yes, sir.

9 COMMISSIONER DEASON: But then a court of
10 competent jurisdiction could define our
11 jurisdiction for us.

12 MR. MCLEAN: Yes, sir, if they chose to do
13 so.

14 COMMISSIONER DEASON: Or the Legislature
15 could give some guidance in this area as well.

16 MR. MCLEAN: They've been known to do that,
17 yes, sir.

18 COMMISSIONER BAEZ: So it's an appealable
19 -- it's appealable either way; right?

20 MR. MCLEAN: If you issue a final order
21 today that says we grant the motion to dismiss,
22 that's an appealable order. In my opinion, that
23 can be taken to the court.

24 COMMISSIONER BAEZ: And if you deny the
25 motion to dismiss, same posture?

1 MR. MCLEAN: Probably so. It is also true
2 that that motion can be renewed if denied. So
3 if you're contemplating continuing this action,
4 it is safe to say that if AT wished to do so
5 down the line somewhere, they could renew the
6 motion to dismiss.

7 COMMISSIONER BAEZ: I have a question for
8 Judge Hatchett and Ms. Davant. What -- and
9 maybe I'm hammering a square peg here. What
10 evidence would you produce, what different
11 evidence would this Commission hear in a hearing
12 as you request in your petition that we would
13 not hear as a result of the investigations that
14 the staff established?

15 MR. HATCHETT: I hate to admit it, but I
16 simply don't know the answer to that question.

17 COMMISSIONER BAEZ: I'm going to ask staff
18 later, but I just thought I would let you take a
19 crack at it.

20 MR. HATCHETT: I really don't know the
21 answer to that question.

22 MS. DAVANT: Commissioner, if I might
23 respond, I think obviously that's why we
24 requested the hearing, was to allow you to
25 listen to witnesses who on a day-to-day basis

1 may have different evidence to present. I know
2 counsel down the table disagrees with that. But
3 I think the key issue before this Commission is,
4 even if we don't bring new evidence to the
5 table, the petition, the reason for the petition
6 was the remedy. The remedy that you have before
7 you now may or may not prohibit or prevent the
8 activities and the evidence that have been
9 presented in these other cases.

10 COMMISSIONER BAEZ: And is a discussion of
11 the remedies that we may or may not have
12 available to us not an appropriate subject for
13 consideration in the context of these dockets
14 that already exist?

15 MS. DAVANT: Not this particular remedy,
16 Commissioner, as your general counsel mentioned
17 to you earlier.

18 COMMISSIONER BAEZ: Did he mention that
19 earlier?

20 MS. DAVANT: I didn't mean to speak for
21 Mr. McLean.

22 MR. MCLEAN: I'm not sure what the question
23 is.

24 COMMISSIONER BAEZ: well, Harold, what I
25 want to know is if this remedy that we're -- you

1 know, has been requested or suggested that we're
2 considering the appropriateness of, is that not
3 subject to proper -- it's subject to an original
4 decision or a preliminary decision that we have
5 on jurisdiction, but assuming that, would it not
6 be a proper remedy to consider under an
7 investigation docket that we've already got
8 open?

9 MR. MCLEAN: Yes, sir, I think so. I think
10 that's consistent with the staff recommendation
11 before you, which is, upon a showing of a number
12 of facts, alleged but not proven before you, but
13 alleged, that you have jurisdiction to proceed
14 with structural separation.

15 COMMISSIONER BAEZ: If that's the case, if
16 that's the case, then why are -- you know, why
17 Issue 4? If you've already got a docket that's
18 open -- I mean, I think we've already answered
19 that question. And secondly, if you're correct
20 and whatever remedies we have, again subject to
21 some kind of statement or some kind of
22 determination of jurisdiction at the appropriate
23 time, I don't think you can separate the two,
24 would that not be appropriate in a docket that
25 we've already got open? why are we considering

1 -- why do we have twin tracks here? And I know
2 that Ms. Simmons tried to explain it to me,
3 because one is top-down and the other one is
4 top-up, and I can only assume -- bottom-up.
5 Excuse me. I don't know if I'm up or down
6 anymore. And that may be true about the
7 approach. But I guess the bottom line is, if
8 you're looking for a remedy and you're looking
9 for something that might be available to you and
10 you want to consider it, the opportunity is
11 there, isn't it, at the appropriate time?

12 You know, again, I don't want to reach this
13 jurisdiction today. I don't think it has been
14 played out.

15 MS. SIMMONS: Commissioner Baez, we believe
16 you could do that.

17 MR. MCGLOTHLIN: Commissioner Baez, you've
18 anticipated the comment I was going to add, and
19 that is -- let me back up for a moment. The
20 FCCA's petition alleges that the situation is
21 urgent, and the FCCA represents -- just to make
22 it very clear, the FCCA represents a very broad
23 cross-section of the ALEC community, so the
24 problem being addressed is not limited to AT&T's
25 petition.

1 COMMISSIONER BAEZ: I understand.

2 MR. MCGLOTHLIN: And reference has been
3 made by opposing counsel to points of entry, and
4 I was very concerned listening to the argument
5 that we might find ourselves directed to another
6 docket, but with no ability to bring to you the
7 type of evidence and the type of remedies that
8 are here.

9 But that is something within the
10 Commission's control, and if the Commission
11 would allow the parties to develop not only the
12 evidence, but the remedies that are being sought
13 in here, then I think as long as we have the
14 opportunity in either this forum or the other to
15 make that case with the same end objective, that
16 would allay some of the concerns I've had about
17 finding my clients in a position of being told
18 to wait, because we've alleged very sincerely
19 that we think time is of the essence with
20 respect to consideration of these issues.

21 COMMISSIONER BAEZ: Well, while I have some
22 comfort by what you said, I'm not sure that I
23 have complete comfort, because as I've said all
24 along, I think that everybody here has
25 recognized the existence of other dockets, and

1 certainly the end purpose of those dockets is to
2 facilitate competition.

3 Now, what you're still suggesting is that
4 we've got to take up something before we come to
5 some conclusion on OSS, on 271. I mean, all of
6 these things are going to have some -- they're
7 going to create some critical mass, I suspect,
8 and we're going to see some results that would
9 then lead us to say, "Well, maybe this isn't
10 working, and maybe we need to be looking at more
11 drastic measures."

12 And I think that's where this remedy of
13 structural separation comes in. I'm not ready
14 to discount it as an alternative, but it's an
15 alternative that comes with certain -- that
16 comes under certain circumstances. And I'm not
17 sure that we do justice to the processes that
18 we've already got in place or underway to
19 consider now this other track absent some lack
20 of results from the ones that are already
21 underway.

22 And that's a concern that I have, and I've
23 stated it before. It's not -- we've got to have
24 some level of faith that the dockets that we've
25 got, that the processes that we've got are going

1 to be handled and resolved in a manner that's
2 fairer and that shows results to everyone. And
3 until we can make a determination that that is
4 not precisely the case, to engage in yet another
5 -- you know, go down yet another road is, in
6 effect, to discard all this work that we've been
7 doing and continue to do.

8 And I know that that sounds somehow unfair
9 if, as you say, the conditions are urgent. But
10 I don't think they're any less urgent than they
11 were yesterday when we had those other
12 processes. I don't think anyone up here, or
13 certainly anyone that was up here during those
14 votes said, "well, this is something that we're
15 going to do to address those problems, but we
16 can take our time about it, because, you know,
17 time is not of the essence." I don't think that
18 implication has ever come through. I don't
19 think that implication or that statement has
20 ever been made.

21 So I agree with you, the situation is
22 urgent. I urge you to let us see some kind of
23 result. Let us see a little bit of a result so
24 that we can say, you know, it's not going to
25 work. That day hasn't been reached.

1 COMMISSIONER PALECKI: Let me ask Ms. white
2 a question. Ms. white, you're aware of my
3 concerns and of the information and analysis
4 that I would like to receive from the ILECs. Do
5 the other dockets afford us an opportunity to
6 get that information that I mentioned earlier?

7 MS. WHITE: I think, yes, some more than
8 others probably. The collaborative I think is
9 probably the one that would go furthest towards
10 what you're looking at. That's not a -- I don't
11 know whether that has a docket number or not. I
12 guess it doesn't, but it's the collaborative
13 that Chairman Jacobs put together that's meeting
14 I think two or three times a month on various
15 issues. It has a huge topic list of issues.
16 But I think that is probably, of all the
17 dockets, the one that's coming the closest to
18 what you're looking at.

19 COMMISSIONER PALECKI: well, I very much
20 appreciate a collaborative process over a formal
21 docket, but my concern is that this is something
22 that I would like to ask the company for in a
23 more formal discovery situation. You know, as I
24 stated earlier, I would like the ILECs to tell
25 us how they can use their own processes, the

1 same processes that the ALECs go through, and
2 make some sort of reorganization so that their
3 retail side can use the same processes, because
4 I have a real problem in my -- I have a very
5 strong instinctive belief that 90% of these
6 dockets that we're hearing arise because the
7 ALEC community feels they're being treated
8 unfairly because they go through completely
9 different processes -- excuse me, I meant ALEC
10 community -- than the ILEC retail side. And I
11 would like to see that information provided to
12 us by the ILECs themselves.

13 I don't want to dictate what the ILECs do,
14 but I want to explore what are the possibilities
15 out there so we can make this more fair and so
16 we can make the perception that it's a more fair
17 process so that the ALEC community doesn't
18 constantly feel that they're being treated
19 differently and unfairly.

20 COMMISSIONER JABER: Commissioner Palecki,
21 certainly it is within your prerogative to ask
22 for whatever you want to ask for, so I don't
23 want to -- don't misunderstand my comments to
24 not be appreciative of that fact. But just to
25 offer a different viewpoint, some of what you're

1 requesting is exactly what the OSS test results
2 will show and some of these other dockets.
3 That's the first observation.

4 The second observation, every time we ask
5 BellSouth to do something in addition to what
6 we're already doing creates delay. And I'm not
7 sure that that's legitimate delay, but
8 nevertheless, it takes their focus from where it
9 needs to be to something else, and it takes
10 their resources away from the OSS testing to
11 something else.

12 And that's not to say that what you're
13 asking for is not necessary, but it's just
14 another viewpoint, something else to think
15 about. And every additional requirement that we
16 put on any telecom industry stakeholder creates
17 a cost for the consumer. And that's something,
18 to the degree we can avoid, I'm very interested
19 in avoiding.

20 COMMISSIONER BAEZ: Ms. White, did you just
21 say that the collaborative process was a
22 docketed matter?

23 MS. WHITE: No, it's not. I'm sorry. I
24 wasn't sure whether it was or not.

25 COMMISSIONER BAEZ: Okay. I misunderstood.

1 MS. WHITE: And it's not.

2 MR. MCLEAN: Mr. Chairman, I'll take just
3 a second to correct something I told
4 Commissioners Deason and Baez. I led you to
5 believe, I think, that if the motion to dismiss
6 was granted, that's an appealable order, and
7 that's true. I also, I believe, that if the
8 motions to dismiss were denied, that would be an
9 appealable order. And indeed it is, but courts
10 don't like to hear that kind of appeal. It's an
11 interlocutory appeal and would very likely be
12 rejected. I just want to --

13 COMMISSIONER BAEZ: I just want to get some
14 appreciation for the matter of, you know, acting
15 on the -- it still proves the point. I mean,
16 acting or not acting -- let me back up. Acting
17 on the motion to dismiss today makes a statement
18 on jurisdiction. I'm convinced of that. And
19 whether it's appealable or not -- I think you
20 said in both instances, whichever way it goes,
21 it's appealable. That just means that someone
22 else is going to decide whether we have
23 jurisdiction or not.

24 MR. MCLEAN: Probably so.

25 COMMISSIONER BAEZ: At least with the level

1 of comfort that I have in deciding this today.

2 MR. MCLEAN: The only reason I brought that
3 up was because in interlocutory kind of appeals,
4 courts like to say, "You administrative folks
5 finish your business, and then we'll hear from
6 you."

7 COMMISSIONER JABER: I want to take the
8 simplest approach, which is not reach the
9 question of jurisdiction, but say some parties
10 have exercised their discretion to petition this
11 agency for a hearing, and we want to exercise
12 our discretion to deny that request. That -- to
13 take that approach would be to move to deny
14 staff on Issue 4?

15 MR. MCLEAN: I believe so, yes, ma'am.

16 COMMISSIONER JABER: Commissioners, it
17 seems to me that would be the simplest approach.

18 COMMISSIONER BAEZ: And -- Commissioner
19 Jaber, I'm sorry. I didn't mean to interrupt,
20 but I think Mr. McLean did suggest some form or
21 some kind of statement that has to get made.
22 And if I'm reading the comments correctly,
23 there's some belief at least -- and I may only
24 be speaking for myself -- that there are dockets
25 available, that there are avenues or points of

1 entry into the administrative process that are
2 already up and running to entertain these kinds
3 or issues. And if we identify them, then we
4 will have in fact -- not just identified them,
5 but certainly provided a clear point of entry by
6 our words.

7 I just wanted to say I don't think the -- I
8 just wanted to say for the record, I don't know
9 that the collaborative process necessarily works
10 here. I'm not persuaded that that's where we
11 should park issues. But I am persuaded that as
12 long as the staff has gone ahead and opened, you
13 know, investigations on anticompetitive issues,
14 that's where certainly this type of proof and
15 this type of evidence that FCCA and AT&T are
16 proposing to provide, that I would consider
17 that's where it more properly lies.

18 So, Commissioner, Jaber, I guess with at
19 least some of the clarification that Mr. McLean
20 had offered us, let's be clear on why we don't
21 think we need to approve this issue.

22 COMMISSIONER JABER: And I don't have
23 certainly any problem making sure we're clear on
24 why we're voting.

25 COMMISSIONER BAEZ: Please, some certainty.

1 COMMISSIONER JABER: But I think -- my
2 hesitancy is I'm not sure I agree with you that
3 those dockets necessarily encompass the issue.
4 That's my hesitancy.

5 But since we're on those dockets, let me
6 just tell you all that I realize that -- I'm the
7 prehearing officer on those three dockets,
8 Sally, and I want a briefing on those three
9 dockets ASAP. I want to know why those dockets
10 were opened, what they were designed to
11 encompass. And I want -- to the degree you all
12 have issues, I want to see those issues. And
13 that's when I'm ready to entertain what remedies
14 might be appropriate. That's my hesitancy,
15 Commissioner. I don't even know what those
16 dockets were designed to do.

17 COMMISSIONER BAEZ: And again, a lot of
18 what I've said -- this is a very delicate
19 situation, because a lot of the opinion that
20 I've formed is based on some assurances that
21 that's a proper venue or a proper forum for
22 those issues. I don't want to -- you know, if
23 they need to go back and consider it, maybe we
24 need to give this some time, but that would be
25 the basis of my -- the opinion that I'm

1 formulating here is that there is some avenue
2 available.

3 COMMISSIONER DEASON: Well, let me muddy
4 this water a little bit more. When we started
5 this whole discussion, I raised the idea of how
6 do we avoid the question of ruling on our
7 jurisdiction and basically not engage in an
8 investigation of structural separation at this
9 time because I felt it was premature. I felt
10 that was the easiest, most direct way to handle
11 this. And after an hour and a half of
12 discussion, I think I'm convinced that usually
13 what I consider the easy is probably not the
14 easy way.

15 Commissioners, I'm almost at the point
16 where I'm convinced that we should just grant
17 the motions to dismiss and be done with it. If
18 I'm forced to make a decision on jurisdiction,
19 that's where I come down. We do not have the
20 jurisdiction. And once we make that decision,
21 that can be taken to a court, and the court can
22 define our jurisdiction for us. And if that's
23 not sufficient, then the Legislature can define
24 our jurisdiction for us.

25 So to move this along, I make a motion we

1 grant the motions to dismiss.

2 COMMISSIONER JABER: So that's Issue 2 --

3 COMMISSIONER DEASON: Well, we have
4 motions to dismiss for lack of jurisdiction. I
5 think they apply to both the AT&T petition as
6 well as the FCCA. And I think that if we grant
7 the motions to dismiss for lack of jurisdiction,
8 it would apply equally. It would apply to both
9 at the same time. And if I'm mistaken on that,
10 staff, please correct me.

11 MR. FUDGE: You are correct, Commissioner.
12 That would only apply to Issue 2. Issue 1 is
13 whether the first motion to dismiss would be
14 rendered moot, and staff recommends that it
15 would be rendered moot.

16 COMMISSIONER DEASON: So it would be moot
17 for Issue 1, and we would be granting the motion
18 for Issue 2; is that correct?

19 MR. FUDGE: We approve Issue 1 and --

20 SPEAKER G: which becomes moot?

21 MR. FUDGE: In Issue 2, you would deny
22 staff.

23 COMMISSIONER DEASON: That's my motion,
24 then.

25 COMMISSIONER JABER: Second.

1 CHAIRMAN JACOBS: We have a motion to
2 approve staff --

3 COMMISSIONER DEASON: No, no. Deny.

4 CHAIRMAN JACOBS: I'm sorry. If I
5 understand, we're approving Issue 1.

6 COMMISSIONER DEASON: Okay. You're
7 correct.

8 MR. FUDGE: You're approving Issue 1, and
9 when you're granting the motion to dismiss on
10 Issue 2, that would only apply to the remedy of
11 structural separation. There are other live
12 issues that AT&T has alleged in its petition.

13 COMMISSIONER JABER: And that motion to
14 dismiss is to dismiss FCCA and AT&T's request in
15 its entirety; correct.

16 MR. FUDGE: That is correct, Commissioner,
17 but their allegations only go to that we do not
18 have the authority for full structural
19 separation.

20 COMMISSIONER JABER: We're not dismissing
21 the allegations. We would be dismissing the
22 entire petition. And I think the motion is to
23 deny staff's recommendation and to approve -- or
24 to grant BellSouth's motion to dismiss in its
25 entirety. Is that correct, Commissioner

1 Deason?

2 COMMISSIONER DEASON: That's my desire if
3 we can accomplish that.

4 MR. HATCHETT: May I be heard?

5 CHAIRMAN JACOBS: We have a motion. Very
6 briefly. Go ahead.

7 MR. HATCHETT: If it's improper, I --

8 CHAIRMAN JACOBS: I think probably we want
9 to go ahead and resolve the motion.

10 Are we clear now?

11 COMMISSIONER JABER: Harold, are you all
12 clear, because don't let us -- because what
13 we're trying to accomplish is granting
14 BellSouth's motion in its entirety and close
15 this docket. That's what we're trying to
16 accomplish.

17 MR. MCLEAN: Does BellSouth's motion in its
18 entirety address all of AT&T's petition? I have
19 not read it with that focus. My concern is that
20 you will -- the original motion to dismiss was
21 somewhat aimed at the rifle approach that
22 structural separation was the only remedy
23 suggested. Now, in the two amended versions,
24 the amended petition and the amended motion to
25 dismiss, I believe that the motion to dismiss

1 directs itself to the petition in its entirety,
2 but I have not read it with --

3 COMMISSIONER DEASON: Why can't we dismiss
4 it for lack of jurisdiction and lack of clarity
5 as to exactly what they're requesting and, give
6 them the ability to refile, leaving out all
7 reference to structural separation, and they can
8 refile it with a more definite statement as to
9 exactly what they're requesting.

10 CHAIRMAN JACOBS: Here's the thing. The
11 amended petition added the idea that we would
12 pursue our investigation, focus on structural
13 separation, but at the end, whatever conclusion
14 we arrived at, we would then attach the
15 appropriate remedy to that.

16 MR. MCLEAN: Yes, sir.

17 CHAIRMAN JACOBS: Regardless of whether it
18 be structural separation.

19 MR. MCLEAN: Yes, sir.

20 CHAIRMAN JACOBS: The response to that was
21 that it really was still maintaining a petition
22 for a specific remedy, and the other added was
23 nothing, in essence, it was puffery.

24 MR. MCLEAN: I believe that's correct,
25 Mr. Chairman.

1 CHAIRMAN JACOBS: And in my mind then, the
2 very important question, Commissioner, is, if we
3 accept the amended portion of that petition
4 which says do your investigation and attach
5 whatever remedy goes along with that, in my
6 mind, that's the more rational approach, either
7 that or we strike the whole thing and refile it,
8 whatever, however you want to do it, but --.

9 COMMISSIONER DEASON: well, I would grant --
10 I would move that we grant the motions to
11 dismiss in their entirety, dismiss the petitions
12 and allow the parties to refile, expressing what
13 they want us to accomplish and why what they're
14 requesting cannot be done in existing dockets
15 which are already open.

16 MR. MCLEAN: Mr. Commissioner, we can draw
17 that order and defend it.

18 CHAIRMAN JACOBS: There's a motion.

19 COMMISSIONER JABER: Second.

20 CHAIRMAN JACOBS: And a second. Let's
21 resolve it. All in favor.

22 COMMISSIONER DEASON: Aye.

23 COMMISSIONER BAEZ: Aye.

24 COMMISSIONER JABER: Aye.

25 CHAIRMAN JACOBS: I'm going to vote in

1 favor; however, it will granting in part and
2 denying in part.

3 COMMISSIONER PALECKI: I would dissent and
4 vote --

5 CHAIRMAN JACOBS: I will record then the
6 yea vote.

7 COMMISSIONER PALECKI: I would dissent and
8 vote for the staff recommendation.

9 CHAIRMAN JACOBS: Let me express -- I've
10 stated my theory on this earlier. I believe
11 that we have a petition for a specific remedy,
12 which in my mind is equitable remedy, which in
13 my mind -- we probably could get there, but it
14 was a stretch, and without specific authority, I
15 wouldn't.

16 I clearly think we have jurisdiction to
17 entertain the subject matter, and I think we
18 have jurisdiction to look at this investigation
19 and to do so in an existing docket.

20 Having said that, are there any other
21 issues in this docket that we need to address?

22 MR. FUDGE: There's also Issue 3, but I
23 think that has been rendered moot by the
24 previous motion on Issue 2. Issue 3 was the
25 motion for a more definite statement and motion

1 to strike clarified and amended petition be
2 granted. And with your motion on Issue 2, I
3 think Issue 3 has been rendered moot.

4 CHAIRMAN JACOBS: Okay. So that takes care
5 of 1, 3, and 4.

6 MR. FUDGE: Four I guess is rendered moot
7 too because of the motion on Issue 2.

8 COMMISSIONER DEASON: Very well.

9 MR. FUDGE: And 5 --

10 COMMISSIONER DEASON: Close the docket;
11 correct?

12 MR. FUDGE: Yes, sir.

13 CHAIRMAN JACOBS: Okay. All in favor?

14 COMMISSIONER BAEZ: Aye.

15 COMMISSIONER JABER: Aye.

16 COMMISSIONER DEASON: Aye.

17 CHAIRMAN JACOBS: Opposed? Show it
18 passes.

19 MR. MCGLOTHLIN: May I ask for a brief
20 clarification? Do I understand correctly that
21 with this ruling, the parties have the option or
22 opportunity either to refile or to raise related
23 issues in existing dockets?

24 COMMISSIONER DEASON: That was part of the
25 motion, yes.

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MR. MCGLOTHLIN: All right.

COMMISSIONER DEASON: But with the understanding that structural separation would not be a remedy that we would consider, because we've made the determination we don't have the jurisdiction to consider that. That's my understanding.

MR. MCGLOTHLIN: And by structural separation you mean the complete physical separation, as I understand it.

COMMISSIONER DEASON: That's correct.

MR. MCGLOTHLIN: Thank you.

CHAIRMAN JACOBS: Anything else? Any other clarification? Thank you, parties.

(Conclusion of consideration of Item 4.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)
COUNTY OF LEON)

I, MARY ALLEN NEEL, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 95 are a true and correct transcription of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, or relative or employee of such attorney or counsel, or financially interested in the action.

DATED THIS 17th day of October, 2001.



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