



Public Service Commission

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DATE: JANUARY 24, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF GENERAL COUNSEL (FUDGE) *OP AK*
DIVISION OF COMPETITIVE MARKETS AND ENFORCEMENT (SIMMONS) *SAS* *A*

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 BELL SOUTH TELECOMMUNICATIONS, INC. INTO TWO DISTINCT WHOLESALE AND RETAIL CORPORATE SUBSIDIARIES.

AGENDA: 02/05/02 - REGULAR AGENDA - MOTION FOR RECONSIDERATION - ORAL ARGUMENT NOT REQUESTED - PARTICIPATION BY PARTIES AT THE COMMISSIONERS' DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\010345.RCM

CASE BACKGROUND

On March 21, 2001, AT&T Communications of the Southern States, Inc., TCG South Florida and MediaOne Florida Telecommunications, Inc. (collectively, "AT&T"), filed a petition requesting that this Commission institute proceedings and enter an order requiring the structural separation of BellSouth Telecommunications, Inc. ("BellSouth") "into two distinct wholesale and retail corporate subsidiaries." On April 10, 2001, BellSouth filed its Motion to Dismiss, or in the Alternative, Motion to Strike AT&T's Petition seeking the Structural Separation of BellSouth. (First Motion to Dismiss) On May 2, 2001, AT&T filed a response opposing BellSouth's Motion to Dismiss.

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On April 10, 2001, the Florida Competitive Carriers Association (FCCA) filed a Request for Commission investigation concerning use of structural incentives to open local telecommunications markets in support of AT&T's petition to initiate proceeding. On April 17, 2001, BellSouth filed its Motion to Dismiss, or in the alternative, Motion to Strike FCCA's Request. On May 2, 2001, FCCA filed its Response in Opposition to BellSouth's Motion.

By Order No. PSC-01-1206-PCO-TP, issued May 30, 2001, the Commission found that a Commission workshop would provide the best forum to determine subsequent courses of action, which would include ruling on the Motions filed in this docket. A Commission Workshop (Workshop) was held on July 30 and 31, 2001, in Tallahassee.

On June 20, 2001, AT&T filed its Motion to Clarify and Amend Petition for Structural Separation. On July 2, 2001, BellSouth filed its Opposition to Motion to Clarify and Amend AT&T's Petition for Structural Separation. By Order No. PSC-01-1615-PCO-TP, issued August 8, 2001, AT&T's Motion to Amend its Petition was granted.

On August 28, 2001, BellSouth filed its Motion to Dismiss, Motion for More Definite Statement, and Motion to Strike Clarified and Amended Petition (Second Motion to Dismiss). On September 10, 2001, AT&T filed its Response to BellSouth's Second Motion to Dismiss. By Order No. PSC-01-2178-FOF-TP, issued November 6, 2001, the Commission granted BellSouth's Motion to Dismiss AT&T's and FCCA's petitions for structural separation. On November 21, 2001, AT&T filed its Motion for Reconsideration. BellSouth filed its Memorandum in Opposition to AT&T's Motion for Reconsideration on December 3, 2001.

The Commission has jurisdiction over this matter pursuant to Section 364.01(4)(g), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should AT&T's Motion for Reconsideration of Order No. PSC-01-2178-FOF-TP be granted?

RECOMMENDATION: No, AT&T has failed to identify any point of fact or law that the Commission overlooked or which the Commission failed to consider in rendering its Order. (FUDGE)

STAFF ANALYSIS: Rule 25-22.060(1)(a), Florida Administrative Code, governs Motions for Reconsideration and states, in pertinent part: "Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order." The standard of review for a Motion for Reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc., at 317.

AT&T's Motion for Reconsideration

In its Motion, AT&T argues that the Commission decided its case on the merits without the benefit of due process. AT&T points out that "[t]he Order acknowledged the impropriety of deciding a motion to dismiss on the merits, in the absence of evidentiary proceedings, but did so anyway." AT&T also argues that its due process rights were violated when the Commission looked beyond the four corners of the petition in rendering its decision.

AT&T further alleges that in spite of the Commission's statements to the contrary, no existing dockets provide a clear point of entry to protect AT&T's interests. AT&T also quotes Commission staff's concern voiced at the Agenda Conference that consolidating the Petition with other pending dockets would be

inappropriate because they involve entirely different approaches. Finally, AT&T adopts and specifically incorporates the dissenting opinion of Commissioner Palecki set forth in Order No. PSC-01-2178-FOF-TP.

BellSouth's Response

BellSouth argues that the Commission properly determined that it does not have the authority to order structural separation. BellSouth states that AT&T has failed to identify the "established rules" or law that the Commission violated, failed to consider, or overlooked. Moreover, BellSouth contends that the Commission did not look beyond the four corners of AT&T's Petition when it decided it lacked the authority to grant full structural separation.

BellSouth also addresses the Commission's decision on AT&T's request for lesser included remedies. BellSouth argues that the Commission did not render its decision based on the motion to dismiss or because AT&T's request for lesser included remedies failed to state a cause of action. Rather, BellSouth contends that the Commission decided to deny AT&T's Petition for lesser remedies because the "requests for relief would be cumulative and may interfere with several pending dockets."

BellSouth states that as a matter of judicial economy, the Commission denied AT&T's Petition for "lesser remedies" without prejudice and with leave to refile explaining the specific relief requested, what the requested relief will accomplish, and why this relief cannot be accomplished in pending dockets. BellSouth argues that the Commission's actions are akin to consolidation as contemplated in Rule 28-106.108, Florida Administrative Code.

Regarding AT&T's due process rights, BellSouth notes that AT&T's rights are protected because the Petition for "lesser remedies" was denied without prejudice; and AT&T has other points of entry to protect its interests.

Staff Analysis

Staff notes that the Commission's Order is comprised of two decisions: the first determined that the Commission lacked the authority to order full structural separation; the second determined that AT&T's request for "lesser remedies" may be cumulative, so the request was denied without prejudice.

Regarding the Commission's decision that it lacked the authority to order full structural separation, it was clearly based on AT&T's Petition in light of the Commission's legal authority. Because the Commission lacked the authority to grant the relief requested, the Petition was denied. AT&T has identified no mistake of fact or law in that decision; instead, it has simply reargued its case and disagreed with the Commission's conclusion.

Regarding the Commission's decision on "lesser remedies," the Commission did consider the applicable legal standard for a motion to dismiss but recognized that agency decisions are not made in a vacuum. The Commission went on to discuss the policy reasons why proceeding with AT&T's Petition was unnecessary at this time and that it may in fact be duplicative of other dockets. On this point, AT&T has also failed to identify a mistake of fact or law, only a disagreement with the approach and conclusion.

AT&T contends that no other docket provides a clear point of entry to protect its interests and even if other dockets exist, those dockets involve an entirely different approach than AT&T's Petition. While staff agrees that the other open dockets and the Petition take different approaches, their aim is the same: the promotion of a competitive telecommunications marketplace. AT&T's Petition seeks to remedy alleged harm suffered from anticompetitive behavior. If the other open dockets find and ultimately remedy the alleged anticompetitive behavior, then AT&T's interests are protected. While the specific remedies requested by AT&T, structural separation and "lesser remedies," may or may not be imposed in the other dockets, the results will be the same - a competitive telecommunications marketplace. Moreover, staff notes that the Petitions were denied without prejudice, with leave to refile and explain what exactly the petitioners are requesting; what they believe the requested remedy will accomplish; and precisely why this cannot be accomplished in already pending dockets.

Therefore, staff believes that AT&T has failed to identify a point of fact or law that the Commission overlooked or that it failed to consider in rendering its Order. As such, staff recommends that the Motion for Reconsideration be denied.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, since no further action is required, this docket should be closed. (**FUDGE, SIMMONS**)

STAFF ANALYSIS: Yes, since no further action is required, this docket should be closed.