

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 010345-TP  
ORDER NO. PSC-02-0200-FOF-TP  
ISSUED: February 15, 2002

The following Commissioners participated in the disposition of  
this matter:

LILA A. JABER, Chairman  
J. TERRY DEASON  
BRAULIO L. BAEZ  
MICHAEL A. PALECKI

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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.

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.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

By Order No. PSC-01-1206-PCO-TP, issued May 30, 2001, we 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, we 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. We have jurisdiction over this matter pursuant to Section 364.01(4)(g), Florida Statutes.

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 we failed to consider in rendering our 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 we 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 we looked beyond the four corners of the petition in rendering our decision.

AT&T further alleges that in spite of our statements to the contrary, no existing dockets provide a clear point of entry to protect AT&T's interests. AT&T also quotes our 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 we 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 we violated, failed to consider, or overlooked. Moreover, BellSouth contends that we did not look beyond the four corners of AT&T's Petition when we decided we lacked the authority to grant full structural separation.

BellSouth also addresses our decision on AT&T's request for lesser included remedies. BellSouth argues that we did not render our 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 we 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, we 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 our 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.

#### DECISION

We note that our Order is comprised of two decisions: the first determined that we 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 our decision that we lacked the authority to order full structural separation, it was clearly based on AT&T's Petition in light of our legal authority. Because we 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 our conclusion.

Regarding our decision on "lesser remedies," we did consider the applicable legal standard for a motion to dismiss but recognized that agency decisions are not made in a vacuum. We 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 we agree 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

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imposed in the other dockets, the results will be the same — a competitive telecommunications marketplace. Moreover, we note 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, we find that AT&T has failed to identify a point of fact or law that we overlooked or that we failed to consider in rendering our Order. As such, the Motion for Reconsideration is hereby denied.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Reconsideration filed by AT&T Communications of the Southern States, Inc., TCG South Florida and MediaOne Florida Telecommunications, Inc., is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 15th day of February, 2002.

BLANCA S. BAYÓ, Director  
Division of the Commission Clerk  
and Administrative Services

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records and Hearing  
Services

( S E A L )

JKF

DISSENT

Commissioner Michael A. Palecki dissents without opinion.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.