BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

Re: *Petition for AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. for Structural Separation of BellSouth Telecommunications, Inc.*

Docket No. 01-00405

BRIEF OF VERIZON SOUTH, INC. IN OPPOSITION TO PETITION FOR STRUCUTRAL SEPARATION

Verizon South, Inc. (Verizon) files this brief in response to the Tennessee Regulatory Authority's (Authority) November 19, 2001 general call for comments or briefs from any interested party regarding structural separation. Verizon opposes structural separation on two basic grounds: 1) it is poor public policy that has been rejected by every state commission and legislature that has decided the issue, and 2) the Authority does not have jurisdiction to order the requested relief. Verizon unequivocally supports the Florida Public Service Commission's recent conclusion that structural separation is a draconian remedy that leads to greater costs, discourages innovation and investment, is an inefficient way to encourage competition, and "is a solution in search of a problem."[1] The Authority should deny the request and close this docket.

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[1] *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-01-2178-FOF-TP (Fla. P.S.C. Nov. 6, 2001). A copy of the order (Florida Order) is attached as Appendix A.

I STRUCTURAL SEPARATION REQUESTS HAVE BEEN REJECTED ACROSS THE COUNTRY.

The relief requested in Tennessee is hardly new or novel, and there is a strong track record across the nation that it is exceedingly poor public policy. The following matrix shows its rejection before state commissions and legislatures everywhere the process is complete.

STATE	ACTIVITY	DATE
Florida	• AT&T and others file petition with FPSC • Commission workshop on structural separation - Docket No. 010345-TP • FPSC ruled it did not have jurisdiction and closed the proceeding	3/21/01 7/30 & 31 10/16/01
Illinois	• Structural separation legislation introduced (SB928) • Hearings on legislation • Telecommunications rewrite legislation passed without structural separation requirement (HB2900)	2/22/01 3/19 & 3/22 5/30/01
Maryland	• Structural separation legislation introduced in House (HB957) • Hearing • Structural separation legislation withdrawn by sponsor	2/9/01 2/22/01 3/2/01
Pennsylvania	• Hearings held before Commission • Legislation (two bills) introduced to reject/prohibit structural separation • Final PUC Order rejecting full structural separation	2/26/01 3/19/01 4/20/01
Virginia	• AT&T and others filed Petition with Commission • Verizon filed motion to dismiss and answer to petition • Commission issued order rejecting structural separation. Docket No. PUC010096	4/9/01 4/27/01 6/26/01

As can be seen, structural separation has received no support where a final decision has been made.

II SPECIFIC COMMISSION ACTION

Every state commission that has completed its consideration of structural separation has rejected it as a legitimate regulatory tool. These decisions are discussed below.

A. Florida

On November 6, 2001, the Florida Public Service Commission (FPSC or Florida Commission) issued its "Order Granting BellSouth's Motion To Dismiss AT&T's AND FCCA's Petition For Structural Separation." The Order is significant given the evidentiary record on which it is based and the detailed analysis contained in the Order. The FPSC allowed for multiple briefing cycles, held extensive workshops and held several oral arguments in response to the structural separation request. The Order addresses the key policy issues surrounding structural separation regardless of the specific jurisdictional issues present in a particular state.

The Florida Order first disposes of AT&T's legal analysis supporting its contention that the FPSC has jurisdiction to grant a structural relief remedy. In Florida, as in Tennessee, AT&T relied upon an implied authority argument in the absence of a statute on point. The Florida Commission concluded that it was "unfathomable" that the Legislature intended to give it such a broad grant of authority and found the Petitions failed to state a cause of action.[2] The Florida Commission summarized their conclusion on the legal issue as follows:

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[2] Florida Order at 6.

"Namely, we have neither Federal or State authority to grant the relief requested, full structural separation."[3]

After disposing of the jurisdictional issue, the Florida Commission addressed the policy issues presented by the request. The FPSC first reviewed the numerous competitive dockets pending before the Commission concerning UNEs, OSS, dispute resolution, performance measures, anticompetitive behavior and a collaborative process to resolve systemic issues arising from interconnection agreements. This review led the FPSC to conclude these dockets were sufficient to resolve any alleged competitive issues and that the requested relief was a "solution in search of a problem."

> Moreover, while some of those dockets are pending, AT&T and FCCA have petitioned this Commission for additional relief. This most recent Petition requests relief so draconian that of the states that have examined the issue, all have rejected it. [footnote omitted] To find that structural separation is necessary to promote competition, as the Petitioners urge, implies at best, that we question our confidence that the other dockets will promote competition; and at worst, that our earlier efforts have been in vain. Similarly, this most recent Petition either is cumulative, or will interfere with, our earlier efforts, many of which are ongoing. In any event, pursuing this course of action will further deplete our limited resources to the detriment of other pending dockets, some of which, as mentioned earlier, were initiated at the request of the Petitioners before us.[4]

The Commission next addressed the costs associated with structural separation and found it was an "inefficient way to encourage competition."[5] The Commission noted that additional regulation creates costs and inefficiencies and brings uncertainty to an industry in which stability is necessary to foster

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[3] *Id.*
[4] Florida Order at 7.
[5] *Id.*

competition.[6] The Commission stated it could not ignore the hundreds of interconnection agreements in effect and concluded their existence contradicted any notion that structural separation is a prerequisite to the establishment of competition in the telecommunications industry. The Commission generically rejected structural separation as a valid regulatory tool.[7]

> We cannot indulge hypertechnical interpretation of procedural protocol where the interests of Florida ratepayers are at stake. In this proceeding, like all others, we need to take a common sense approach, considering costs and benefits of suggestions which come before us. In the workshop, we were advised that a bifurcation of BellSouth would inevitably lead to greater costs – greater costs which would be ultimately borne by Florida's ratepayers. We learned of the necessity for certainty in this industry – certainty which would be upset by further investigation of such a draconian measure. We were advised that the fracture of BellSouth would discourage both innovation and investment – innovation and investment which would have otherwise inured to the benefit of the ALEC community, and to Florida's ratepayers. Indeed, investment and innovation are among the many reasons we are mandated to foster competition to begin with.[8]

Finally, the FPSC discussed the increased importance of national security since September 11, 2001 and the ability of American industry to respond to national events. The FPSC noted that Verizon reestablished service to Wall Street in less than a week and accepted that this could not have occurred if Verizon was separated into wholesale and retail operations.

> This is a risk to our economy and consumers that we are not willing to take. It would be a violation of simple common sense for this

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[6] Florida Order at 8.

[7] Structural separation would require massive change and introduce, in the words of FCC Chairman Powell, an "extraordinary period of disruption and uncertainty" in the development of local competition. *Michael K. Powell, Chairman, FCC, Hearing of the Telecommunications and Internet Subcommittee of the House Energy and Commerce Committee: Agenda and Plans for Reform of the FCC,* Mar. 29, 2001.

[8] *Id.*

Commission to erect a structural barrier to BellSouth's ability to react to national emergency in these troubled times.[9]

Verizon submits the FPSC order is the current landmark decision on structural separation and was entered after extensive proceedings and analysis. The Authority should carefully consider its findings and conclusions in rendering its decision.

B. Virginia

The Virginia State Corporation Commission (VSCC) dismissed a request for structural separation on June 26, 2001.[10] The request sought the separation of Verizon's Virginia operations into distinct wholesale and retail corporate subsidiaries as an alleged tool for increasing competition. The VSCC rejected the request ruling that the Commission did not have the broad inherent authority to order the requested structural separation.[11] The VSCC also concluded full structural separation would impair Verizon's property rights under its Virginia certificates and that the 1996 Act also did not support the requested relief. The Commission concluded any alleged problems could be addressed in existing cases and closed the docket.[12]

C. Pennsylvania

The history of structural separation in Pennsylvania is complex and lengthy with the case proceeding through multiple stages including massive appellate

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[9] Florida Order at 9.
[10] *Joint Petition of Cavalier Telephone L.L.C., Network Access Solutions, LLC, Covad Communications Company and AT&T Communications of Virginia, Inc. for Structural Separation of Verizon Virginia Inc. and Verizon South Inc.*, Case No. PUC010096 (V.S.C.C. June 26, 2001) (Virginia Order).
[11] Virginia Order at 4.
[12] Virginia Order at 5.

litigation.[13] The Pennsylvania Public Utility Commission (PPUC) ultimately rejected full structural separation on April 20, 2001.[14] The issue first arose during a huge docket (the "Global Docket") aimed at accelerating competition in Pennsylvania.[15] The initial Global Order tentatively concluded that structural separation was a valid regulatory tool but did not address any of the details required to implement structural separation, and the PPUC held another docket to further pursue the issue.

In the final phase of the case, Verizon presented evidence that the cost of structural separation in Pennsylvania was over $1 billion dollars. While the Commission did not accept Verizon's specific cost estimate of structural separation, the PPUC acknowledged that full structural separation would require substantial implementation costs and that the resulting regulatory oversight over the separated entities would not be reduced.[16] The PPUC rejected full structural separation on these two points and imposed a Code of Conduct to resolve any competitive concerns. The PPUC held that implementing nondiscrimination

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[13] While the Pennsylvania commission's authority to order structural separation was initially upheld by an intermediate appellate court, *Bell Atlantic – Pennsylvania, Inc. v. Pa. PUC*, 763 A.2d 440 (Pa. Cmwlth. 2000), the Commission ultimately chose not to exercise this authority before the Pennsylvania Supreme Court had an opportunity to rule on this issue.

[14] *Structural Separation of Bell Atlantic-Pennsylvania, Inc. Retail and Wholesale Operations*, M-00001353, Opinion and Order (P.P.U.C. April 11, 2001) (Pennsylvania Order).

[15] *Joint Petition of Nextlink Pennsylvania, Inc.; Senator Vincent J. Fumo; Senator Roger Madigan; Senator Mary Jo White; the city of Philadelphia; The Pennsylvania Cable & Telecommunications Association; RCN Telecommunications Services of Pennsylvania, Inc.; Hyperion Telecommunications, Inc.; ATX Telecommunications; CTSI, Inc.; MCI Worldcom; and AT&T Communications of Pennsylvania, Inc. for Adoption of Partial Settlement Resolving Pending Telecommunications Issues, Joint Petition of Bell Atlantic Pennsylvania, Inc., Conectiv Communications, Inc.; Network Access Solutions; and the Rural Telephone Company Coalition for Resolution of Global Telecommunications Proceedings*, Docket Nos. P-00991648 and P-00991649 (P.P.U.C. Sept. 30, 1999).
(Global Order)

[16] Pennsylvania Order at 21.

obligations through a code of conduct would provide for non-discriminatory access to the phone system for Verizon's retail arm and for Verizon's competitors while being more efficient and avoiding regulatory micromanagement.[17]

III SPECIFIC LEGISLATIVE ACTION

No state has enacted legislation requiring structural separation. Instead, every state legislature that has completed its consideration of the matter has rejected structural separation as a legitimate regulatory tool. To date, the legislative process has been completed in Illinois and Maryland. In Illinois, the matter was not included in a major rewrite of telecommunications regulatory statutes while in Maryland the sponsor of the bill withdrew it after the first legislative hearing.

IV THE AUTHORITY DOES NOT POSSESS JURISDICTION TO STRUCTURALLY SEPARATE BELLSOUTH

The only relief requested by Petitioners is the complete structural separation of Bell South into distinct wholesale and retail corporate subsidiaries.[18] In order to entertain this request, the Authority must have either express or implied authority to grant the relief. It has neither.

A. Implied authority has been rejected as a basis to support structural separation by all commissions.

AT&T and the other Petitioners have filed similar complaint petitions in Florida, Indiana, New Jersey, and Virginia. None of the filings contain a specific citation of authority to support the requested relief. Rather, as here, there are thin references to general statutes coupled with an implied jurisdiction argument

[17] Pennsylvania Order at 31.

that the agency has authority to act. To date, Florida and Virginia have completed their proceedings and have rejected the implied authority argument. The Virginia Corporation Commission rejected AT&T's inherent authority argument and noted that the specific legislative authority authorizing the kind of restructuring envisioned by Joint Petitioners for Virginia electric utilities supports the proposition that, absent such enabling legislation for telephone companies, the Commission would not be able to order structural separation in telecommunications.[19]

The Florida Public Service Commission recognized that while it possessed broad authority, it only has those powers expressly granted by statute or necessarily implied. After considering AT&T's implied authority argument the Commission concluded as follows:

> We find it unfathomable that the Legislature intended to grant us authority so broad that it would ultimately negate our express authority over the ILEC under Section 364.02(12), Florida Statutes. (citation omitted). Consequently, we find that the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation.[20]

The rulings of these two commissions rejecting AT&T's search for a statutory basis to support its claim when none exists is instructive regarding the validity of the Petition before the Authority. The Authority should likewise reject implied authority as a basis for the draconian remedy requested.

A. The Authority does not possess implied authority to order structural separation.

[18] Petition at 1 and 16.
[19] Virginia Order at 3.
[20] Florida Order at 6.

In the absence of an express grant of authority, the only other source of jurisdiction is by necessary implication from the statutes. *PSC v. Southern Railway Co.*, 554 S.W.2d 612, 613 (Tenn. 1977). In either instance, the grant of power to the Commission is to be strictly construed. *Pharr v. Chattanooga and St. Louis Railway*, 186 Tenn. 154, 208 S.W.2d 1013 (1948). The Tennessee courts have held that "[t]he powers of the [TRA] must be found in the statutes. If they are not there, they are non-existent." *Deaderick Paging v. Tennessee Public Serv. Comm'n*, 867 S.W.2d 729, 731 (Tenn. Ct. App. 1993). Implied authority to order structural separation is not present because the statutes cited by Petitioners concern the general supervisory authority of the Authority over utilities and nothing more. Indeed, as discussed below, the specific statutes cited by Petitioners do not even support their position. These general statutes cannot support a structural separation remedy when there is no further guidance from the General Assembly in the specific succeeding sections of the Chapter. *Franklin Light & Power Co. v. Southern Cities Power Co.*, 164 Tenn. 171, 189, 47 S.W.2d 86 (1931).

Petitioners cite sections 65-5-208(c), 65-4-115 and 65-4-122(c) for the proposition that the Authority has jurisdiction to address cross-subsidization, predatory pricing, price squeezes, discriminatory practices and unreasonable preferences. These statutes provide no support for structural separation. This is particularly true because the General Assembly is familiar with the issue and has imposed specific structural separation requirements where appropriate.[21] Likewise, Petitioners citation of section 65-4-124 (unbundling) and section 65-4-123 (unreasonable disadvantage) are not applicable because the statutory sections assume on their face an integrated telecommunications service provider that offers both retail and wholesale services.

The Petitioners have failed to cite any relevant statute, and implied authority is not present. As in Florida and Virginia, it is "unfathomable" that the General Assembly intended to give the Authority such a broad grant of authority without expressly including such jurisdiction in a specific statute.

B. There is no express Tennessee statute that grants authority to order structural separation.

The petition does not contain a citation to any Tennessee statute that expressly authorizes the Authority to order structural separation. This omission demands that the Petition be dismissed because the Tennessee General Assembly is familiar with the structural separation issue and has enacted specific legislation to address structural separation where appropriate. Section 7-52-601 allows municipalities to provide certain cable services if certain conditions are met. If a municipal electric system elects to provide such services, Section 7-52-603(a)(1)(A) requires that it do so via a separate division that maintains its own accounting and record-keeping system to prevent cross subsidization. The fact that the General Assembly did not include a similar requirement in any of the statutes governing the Authority shows that jurisdiction is not present. Indeed,

[21] *See* T.C.A. §7-52-603(a)(1)(A) discussed at section IV C below.

the Tennessee Telecommunications Act of 1995 assumes a single telecommunications service provider that offers both retail and wholesale services as evidenced by section 65-4-124 which requires all providers to offer resale, packaging of basic local exchange service or unbundled features with services of other providers, and nondiscrimination requirements.[22] The Authority should reach the same conclusion as the Virginia Corporation Commission and dismiss the Petition.

V STRUCTURAL SEPARATION IS BARRED BY FEDERAL LAW

Independent of Tennessee law, the Telecommunications Act of 1996 (1996 Act) prohibits the requested relief.

A. Section 253 preempts any requirement that prevents an entity from providing retail services.

The Petition clearly requests the establishment of separate wholesale and retail entities, and the wholesale entity would be prevented from engaging in retail operations. Section 253(a) of the 1996 Act prohibits this result. Section 253(a) expressly preempts all state and local barriers to entry: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service."[23] 47 U.S.C. § 253(a) (emphasis added).

[22] Section 65-4-101(c) includes an ILEC in the definition of a telecommunications service provider.
[23] Section 253(a) ensures that no entity "is inhibited from entering a telecommunications market because of any state law, regulation or legal requirement. Memorandum Opinion and Order, *Public Utility Commission of Texas*, 13 FCC Rcd 3460, 3462, ¶ 3 (1997).

Petitioners' structural separation proposal is contrary to the plain wording of section 253 since the wholesale entity cannot provide retail services.[24]

Moreover, contrary to the allegation contained in the Petition, the competitively neutral language contained in section 253(b) cannot justify structural separation. First, application of requirements that only apply to certain carriers is not "competitively neutral." Second, section 253(b) states a permissible competitively neutral requirement cannot harm universal service, the quality of telecommunications services or the availability of services. Structural separation would violate all of these items as explained in Section I - III above and is contrary to Section 253 of the 1996 Act.

B. Structural Separation is contrary to the requirements of the 1996 Act

The requirements of section 251 of the 1996 Act are clear that ILECs are required to act in both a wholesale and a retail capacity.

Petitioners' key complaint is that Bell South operates as both a wholesale provider and retail competitor. According to the Petition, this creates contradictory roles that must be eliminated with structural separation.[25] The argument is in error because a unified carrier is required by the 1996 Act through section 251 that requires an ILEC to provide local service and also act as a wholesale provider to competitors. In particular, in section 251(c)(4), Congress required incumbent LECs "to offer for resale at wholesale rates any

[24] Such an "absolute prohibition on . . . entry is precisely the type of action Congress intended to proscribe under section 253(a)Memorandum Opinion and Order, *Classic Tel., Inc*, 11 FCC Rcd 13082, 13096, ¶ 27 (1996).
[25] Petition at 2.

telecommunications service that the carrier provides *at retail* to subscribers who are not telecommunications carriers." That statutory provision necessarily requires an incumbent LEC to remain in both the wholesale and retail markets. Structural separation divides the ILEC in two and separates its wholesale offerings from its retail services which is inconsistent with the 1996 Act.[26]

Congress' intent that incumbent LECs provide wholesale and retail services on an integrated basis is equally demonstrated by the fact that Congress imposed structural separation where it deemed appropriate in the 1996 Act. For example, section 272 required most in-region, interLATA services and manufacturing activities to be provided by certain carriers through a structurally separate entity until certain conditions are met. Section 274 sets out specific structural separation requirements for electronic publishing. Congress' decision not to adopt a similar requirement for the provision of local services is clear evidence that Congress rejected structural separation.

The D.C. Circuit's recent decision in *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) also refutes Petitioners' position. This decision reviewed a FCC merger condition requiring SBC/Ameritech to provide Advanced Services through a separate subsidiary based on the finding that the separate subsidiary would not be subject to the ILEC obligations contained in section 251(c) of the Act.[27] The FCC found that

[26] The FCC also concurs in this result. As FCC Chairman Powell stated, Congress "specifically opted not to take th[e] route" of structural separation, choosing instead the "interconnection" scheme set out in section 251. *Powell: FCC Not Scoping Out Issue-Oriented Merger Conditions*, Washington Telecom Newswire, Apr. 5, 2001.

[27] *Applications of Ameritech Corp. and SBC Communications Inc.*, 14 F.C.C.R. 14,7112 (Oct. 6, 1999) (SBC Merger Order).

the separate Advanced Services entity was not a successor or assign of the ILEC under section 251(h) and thus was not subject to the requirements of section 251(c). The Court disagreed with this conclusion and vacated that section of the SBC Merger Order. The Court concluded that the FCC's order would improperly allow an ILEC to avoid the resale obligations under the Act by merely creating a wholly owned separate subsidiary.

In challenging the separate subsidiary requirement in the above appeal, CompTel, which is also a petitioner here, contended that the FCC's order "sanction[ed] avoidance" of section 251(c)(4), and thereby "undermined the basic statutory scheme established by Congress."[28] The D.C. Circuit agreed, reasoning that "the Act's structure" – not just the resale requirement of section 251(c)(4), but also the fact that Congress provided for structural separation when it was appropriate – "renders implausible" the FCC's decision.[29] That same federal statutory "structure" renders petitioners' structural separation even more "implausible" here.

VI CONCLUSION

Verizon has conclusively demonstrated that structural separation is poor public policy, is impermissible under federal and state law and has been ubiquitously rejected by state commissions and legislators. It will raise consumer's rates, slow competition and decrease service quality. The Authority should recognize the request for what it is – a delaying tactic by the Petitioners to derail 271 relief in Tennessee. It has been Verizon's experience that the timing

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[28] Joint Br. of Appellant and Supporting Intervenor, *Association of Communications Enters. v. FCC*, No. 99-1441, at 37 (D.C. Cir. filed Aug. 11, 2000).

of these structural separation filings are made when AT&T and other entities make the internal decision that the ILEC can meet the 271 requirements and obtain the ability to enter the interLATA toll market in a particular state. The Commission should not condone such action for at least one important reason. It is also Verizon's actual experience that it is the grant of 271 authority that provides the impetus for nondominant carriers to really compete in the local exchange market. Verizon has 271 authority in New York, Connecticut, Pennsylvania and Massachusetts at the present time. All of the Petitioners are suddenly able to compete and do so vigorously when the market requires them to do so as opposed to expending all their energy engaging in regulatory arbitrage before state regulatory bodies. The Authority should reject the requested relief and allow the market to operate. The market will bring competition to Tennessee - not structural separation.

Respectfully submitted,

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[29] 235 F.3d at 668

CERTIFICATE OF SERVI CE

I hereby certify that on November 28, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[x] Mail
[ ] Facsimile
[ ] Overnight

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APPENDIX A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecom-munications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries.	DOCKET NO. 010345-TP ORDER NO. PSC-01-2178-FOF-TP ISSUED: November 6, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING BELLSOUTH'S MOTION TO DISMISS AT&T'S AND FCCA'S PETITIONS FOR STRUCTURAL SEPARATION

BY THE COMMISSION:

BACKGROUND

The Federal Telecommunications Act of 1996 (the Act), P.L. 104-104, 104th Congress 1996, provides for the development of competitive markets in the telecommunications industry. Part III of the Act establishes special provisions applicable to the Bell Operating Companies (BOCs). In particular, BOCs must apply to the FCC for authority to provide interLATA (long distance) service within their in-region service areas. A BOC shall receive such authority after a showing that the local market is sufficiently open. The FCC must consult with the Attorney General and the appropriate state commission before making a determination regarding a BOC's entry into the interLATA market. See Subsections 271(3)(2)(A) and (B). In complying with our obligations under the Act, we have opened several dockets and conducted numerous hearings in an effort to address BellSouth Telecommunications, Inc.'s

(BellSouth) application for long distance service and the status of the local telecommunications market.

On March 21, 2001, AT&T Communications of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecommunications, Inc. (AT&T) filed a petition requesting that this Commission institute proceedings and enter an order requiring the structural separation of BellSouth "into two distinct wholesale and retail corporate subsidiaries." Subsequently, 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, Florida Competitive Carriers Association (FCCA) filed its Request for Commission Investigation Concerning the 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 to Dismiss FCCA's Request.

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, attended by the full Commission (Workshop) was held on July 30 and 31, 2001, in Tallahassee.

The purpose of the workshop was to discuss AT&T's Petition, our legal authority, the problem to be remedied, the costs and benefits of the suggested remedies, legal impediments to remedies other than structural separation, and the effect structural separation would have on BellSouth's obligations under the Act and Chapter 364, Florida Statutes.

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 (Second Motion to Dismiss), Motion for More Definite Statement, and Motion to Strike Clarified and Amended Petition.

On September 10, 2001, AT&T filed its Response to BellSouth's Second Motion to Dismiss.

We have jurisdiction over the Petitions pursuant to Section 364.01(4)(g), Florida Statutes.

FIRST MOTION TO DISMISS

The arguments raised by BellSouth in its Motion assert that "(1) the Commission lacks subject matter jurisdiction over the relief requested; (2) AT&T fails to state a cause of action upon which relief can be granted; and (3) the Commission is barred by the operation of the Telecommunications Act of 1996 (Act) and other federal law from granting the requested relief." These arguments addressed the sole issue of whether we could order full structural separation as requested by AT&T in its original petition.

By Order No. PSC-01-1615-PCO-TP, issued August 8, 2001, AT&T's Motion to Amend its Petition was granted. AT&T's amended petition clarified that it requests us to consider all relief necessary or appropriate under the circumstances.

Consequently, BellSouth's First Motion to Dismiss filed April 10, 2001, which was based solely upon our alleged inability to grant full structural separation, has been rendered moot. See Vanderberg v. Rios, 2001 Fla. App. LEXIS 15035.

SECOND MOTION TO DISMISS

BellSouth

According to the ILECs, structural separation is premised on the belief that local telecommunications remains essentially a natural monopoly. To the contrary, ILECs perceive local telecommunications as rapidly becoming a natural competitive market. In addition to the one-time and ongoing costs of structural separation, which will be passed on to end users in the form of higher rates, ILECs argue that such a plan would reduce BellSouth's incentive to invest. In addition, ILECs believe that ALECs would also have less incentive to invest, since entrants could rely on the BellSouth wholesale entity and minimize the inherent risks associated with investing. Less investment would translate into less innovation.

BellSouth argues that to the extent the Clarified and Amended Petition seeks structural separation as relief, BellSouth moves that we dismiss AT&T's Amended Petition. In support of this Motion, BellSouth incorporates by reference all arguments set forth in its First Motion to Dismiss.[1]

BellSouth argues that no statute expressly nor impliedly grants us the authority to order structural separation. BellSouth states that when AT&T cites to an order of the Pennsylvania Commission in support of structural separation, AT&T fails to point out that the Pennsylvania Commission had the express authority to order structural separation. The same or similar authority does not exist in Florida. Consequently, we do not have the express authority to order structural separation.

Next, BellSouth states that any implied authority must be derived from fair implication and intendment incident to any express authority. See Atlantic Coast Line R.R. Co. v. State, 74 So. 595, 601 (Fla. 1917); State v. Louisville & N.R. Co., 49 So. 39 (Fla. 1909). Moreover, if there is any reasonable doubt as to whether we do or do not have the authority to order structural separation, BellSouth argues that it must be found that the we lack the power. State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977).

Counsel for BellSouth has argued that a finding that we have the implied power to structurally separate BellSouth would require a finding that the legislature intended to allow us to deregulate the newly formed wholesale entity.[2] BellSouth contends that such an intent is unpalatable.

In support of its argument, BellSouth cites to Section 364.02(12), Florida Statutes, which defines "telecommunications company" as "every corporation, partnership, and person . . .

[1]These arguments were also incorporated in BellSouth's Motion to Dismiss FCCA's Request. Consequently, we find the conclusion reached herein is equally applicable to that Motion.

[2]BellSouth also argued that the Florida Legislature and Congress clearly envisioned a single "local exchange telecommunications company" providing both wholesale and retail services.

offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility." This definition expressly excludes "an entity which provides a telecommunications facility exclusively to a certified telecommunications company." § 364.02(12)(a), Florida Statutes. If BellSouth were structurally separated into two distinct retail and wholesale entities, the company contends that the wholesale entity would then cease to provide telecommunications service to the public and would be providing telecommunications facilities exclusively to certificated telecommunications carriers.

ALECs

The Alternative Local Exchange Companies (ALECs) take the position that attempting to develop local competition by continued reliance on regulatory enforcement is very time consuming, resource intensive, and ineffective. Structural separation is seen as a way of aligning incentives such that BellSouth's wholesale entity would be dealing with all retail entities on an equal footing. According to the ALECs, this would eliminate the inherent conflict of interest with BellSouth being the dominant retail provider and also the dominant supplier upon which its competitors rely.

DECISION

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

While we have broad authority to regulate the telecommunications industry, we only have those powers expressly granted by statute or necessarily implied. See Florida Interexchange Carriers Ass'n v. Beard, 624 So. 2d 248, 251 (Fla. 1993); Deltona Corp. v. FPSC, 220 So. 2d 905, 907 (Fla. 1969). Section 364.01, Florida Statutes, states that "the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and provide for the development of fair and effective competition . . . ." Moreover, Section 364.01(4)(g), Florida Statutes, requires us to exercise our exclusive jurisdiction to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint."

We find it unfathomable that the Legislature intended to grant us authority so broad that it would ultimately negate our express authority over the ILEC under Section 364.02(12), Florida Statutes. See State v. Mayo, 354 So. 2d 359, 361 (Fla. 1977)(holding that if there is any reasonable doubt as to whether the Commission does or does not have the authority to do a certain act, it must be found that the Commission lacks the power). Consequently, we find that the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation.

However, our analysis does not end there. To address the remainder of the Petitions' lesser included remedies, we note that in fulfilling the Legislative mandate to promote competition our decisions must not be made in a vacuum. We must not only carefully examine the decision before us, but we must also cautiously examine how each of our other actions affect the parties involved, their employees and investors; the effect on other industry stakeholders; and most importantly, the consumers of their services.

Almost three years ago a Petition was filed by FCCA and AT&T, among others, who argued that the quickest way to competition was through the following:

(a) Establishment of a generic BellSouth Unbundled Network Element (UNE) pricing docket to address issues affecting local competition;

(b) Establishment of a Competitive Forum to address BellSouth operations issues;

(c) Establishment of third-party testing of BellSouth's Operational Support Systems (OSS);

(d) Initiation of a rulemaking proceeding to establish expedited dispute resolution procedures applicable to all local exchange carriers (LECs); and

(e) Provision of such other relief that the Commission deems just and proper.

To date, we have initiated an investigation into UNE pricing; established third party testing of BellSouth's OSS; established permanent performance measures and self-executing remedies; created an expedited dispute resolution process; and established a collaborative process to resolve systemic problems arising from interconnection agreements. Some of these were opened at the insistence of the Petitioners now before us.

In addition to the above named dockets, we have also initiated an investigation into alleged anticompetitive behavior by BellSouth.[3] That docket will examine the systemic deficiencies that the Petitioners have alleged herein. The goal of that docket is to discover what the problems are, if any, and to apply specific solutions to those problems.

In the instant docket, however, the Petitioners are requesting that we establish our authority to order a remedy, so that we may investigate whether the facts justify exercising that authority. This is a solution in search of problem. While we always encourage innovative ways to remedy current problems, we are wary of searching for problems for which to apply innovative solutions.

[3]Similar dockets have been opened to investigate the alleged anticompetitive behavior of other ILECs.

Moreover, while some of those dockets are pending, AT&T and FCCA have petitioned this Commission for additional relief. This most recent Petition requests relief so draconian that of the states that have examined the issue, all have rejected it.[4] To find that structural separation is necessary to promote competition, as the Petitioners urge, implies at best, that we question our confidence that the other dockets will promote competition; and at worst, that our earlier efforts have been in vain. Similarly, this most recent Petition either is cumulative, or will interfere with, our earlier efforts, many of which are ongoing. In any event, pursuing this course of action will further deplete our limited resources to the detriment of other pending dockets, some of which, as mentioned earlier, were initiated at the request of the Petitioners before us.

This most recent Petition also suggests that the way to fix a problem is to apply numerous remedies in the hopes that one will work. We find that this is an inefficient way to encourage competition. Each additional regulation imposed on BellSouth creates costs and inefficiencies; may interfere with other regulations previously imposed; and brings uncertainty to an industry in which stability is necessary to foster competition. Not only is it premature to judge the efficacy of our earlier efforts, but it is also premature to determine that another solution is necessary.[5]

As stated above, our decisions are not made in a vacuum. In the instant docket, we have benefitted from a full two days of workshop testimony during which each stakeholder, including the Petitioners here, had full opportunity to discuss and relate to us the many ramifications of structural separation and other potential remedies, as well as the bearing of our other pending dockets on matters here alleged.

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[4]Pennsylvania approved functional separation.

[5]At the Agenda Conference AT&T was afforded the opportunity to withdraw its Petition, with leave to pursue this matter once the other dockets had been resolved.

We cannot indulge hypertechnical interpretation of procedural protocol where the interests of Florida ratepayers are at stake. In this proceeding, like all others, we need to take a common sense approach, considering costs and benefits of suggestions which come before us. In the workshop, we were advised that a bifurcation of BellSouth would inevitably lead to greater costs - greater costs which would be ultimately borne by Florida's ratepayers. We learned of the necessity for certainty in this industry - certainty which would be upset by further investigation of such a draconian measure. We were advised that the fracture of BellSouth would discourage both innovation and investment - innovation and investment which would have otherwise inured to the benefit of the ALEC community, and to Florida's ratepayers. Indeed, investment and innovation are among the many reasons we are mandated to foster competition to begin with.

What's more, we cannot ignore the hundreds of agreements amicably reached by and between BellSouth and the ALEC community under BellSouth's current structure. Thankfully, relatively few disputes have arisen, fewer still have come to our attention because many of the disputes have been amicably settled. The agreements and their amicable refinement contradict any notion that structural separation is a prerequisite to the establishment of competition in this industry.

The competitive marketplace has been analogized to a machine. We find that analogy appropriate here. When someone desires to repair a machine, they begin their job by discovering the source of the problem. Then, they hypothesize what will remedy that problem and apply that remedy. Next, they wait to see if the machine performs better or worse than previously. This accomplishes two things. First, it minimizes the disruption to the machine and the costs involved in fixing the problem. Second, it helps outside observers, in this case other utility commissions, see what works and what does not work for a specific problem.

The Petitioners have suggested an alternative way to fix the alleged problem. The remedy requested herein, would scrap the existing machine, ignore previous efforts that are still ongoing, and hope that the resulting machine will yield the desired result. This uncertain outcome associated with structural separation will not only impose additional costs and inefficiencies, but discourage investment in and innovation by BellSouth.

With respect to an additional important issue: at the October 16, 2001, Agenda Conference, counsel for Verizon informed us of the impacts the events of September 11 had on its operations. Verizon's counsel stated that after the destruction of its facilities in Manhattan, Verizon was told to get Wall Street back in business in less than a week; it did. Counsel for Verizon went on to state that "[t]his unprecedented achievement would not have been possible if Verizon's wholesale and retail operations were in two separate companies." This is a risk to our economy and consumers that we are not willing to take. It would be a violation of simple common sense for this Commission to erect a structural barrier to BellSouth's ability to react to national emergency in these troubled times.

In consideration of the foregoing, BellSouth's Motion to Dismiss filed August 28, 2001, and BellSouth's Motion to Dismiss FCCA's Request filed April 10, 2001, are hereby granted. The remainder of AT&T's and FCCA's Petitions are denied without prejudice to refile and explain what exactly they are requesting; what they believe the requested remedy will accomplish; and precisely why this cannot be accomplished in already pending dockets. As the request for structural separation has been addressed herein, parties are cautioned against including this again in any future pleading.

MOTION FOR MORE DEFINITE STATEMENT AND MOTION TO STRIKE

In light of our ruling on BellSouth's Second Motion to Dismiss, we find that BellSouth's Motion for More Definite Statement and Motion to Strike Clarified and Amended Petition, filed August 28,2001, have been rendered moot.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth's Second Motion to Dismiss, filed August 28, 2001, is hereby granted. It is further

ORDERED that BellSouth's Motion to Dismiss or in the Alternative Motion to Strike Florida Competitive Carriers Association's Request for Commission Investigation Concerning the Use of Structural incentives to Open Local Telecommunications markets in Support of AT&T's Petition to Initiate Proceeding, filed April 17, 2001, is hereby granted. It is further

ORDERED that the Motion to Dismiss, or in the Alternative, Motion to Strike AT&T's Petition seeking the Structural Separation of BellSouth, filed April 10, 2001, has been rendered moot. It is further

ORDERED that BellSouth's Motion for More Definite Statement, and Motion to Strike AT&T's Clarified and Amended Petition, filed August 28, 2001, have been rendered moot. It is further

ORDERED that the parties may refile their Petitions as set forth in this body of this Order. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of November, 2001.

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

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

This is a facsimile copy. Go to the Commission's Web site, http://www.floridapsc.com or fax a request to 1-850-413-7118, for a copy of the order with signature.

(S E A L)

JKF

Concurring Opinion

Chairman Jacobs concurred in part with the Commission's decision with the following opinion.

I concur in the majority opinion while offering the following clarification of the logic which led me to grant BellSouth's Motion to Dismiss.

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350

(Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

In this case I conclude that the Commission has subject matter jurisdiction. Section 364.01(4)(g), Florida Statutes, requires us to exercise our exclusive jurisdiction to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint."

However, I believe that AT&T has failed to state a cause of action upon which relief may be granted in this forum. In my view, the act of structurally separating BellSouth constitutes the imposition of an equitable remedy, the principle purpose of which is the removal of impediments to the establishment of a competitive telecommunications market. International Salt Co. v. United States, 332 U.S. 392, 401 (1947). While the implied authority of the Commission is broad enough to inquire into competitive conduct, it does not clearly authorize us to impose equitable relief. Traditionally, equitable relief of this sort has been reserved to agencies with specific statutory or antitrust authority.

Therefore, to the extent that the Petition requests the remedy of structural separation, it fails to state a cause of action for which this Commission is authorized to grant relief. To the extent that the Petition requests all other appropriate remedies, currently there is a proceeding before us wherein any findings of anticompetitive practices could afford the petitioners an opportunity to proffer appropriate remedies. Thus, petitioners suffer no real harm in dismissing these Petitions.

Dissenting Opinion

Commissioner Palecki dissented from the Commission's decision with the following opinion.

I dissent from the majority decision to grant BellSouth's August 28, 2001 Motion to Dismiss and to dismiss the petitions of AT&T and FCCA. In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition fails to state a cause of action for which relief can be granted. BellSouth has not met that burden.

While the majority found that it lacked jurisdiction to order structural separation, structural separation is but one remedy among many available to the Commission, and the proof, if any, will determine the need and nature of the remedy. Indeed, the petitioners asked the Commission to consider a wide range of remedies and for an opportunity to provide the proof which may justify one or more of those remedies. The majority chose not to give the petitioners that opportunity here. It has been suggested that the petitioners might find their point of entry in other dockets. I disagree. First, it appears that these other dockets do not provide petitioners a point of entry to pursue remedies well within our jurisdiction, including even a modest proposal to require BellSouth to redesign its systems. Second, it seems that the petitioners are entitled to present their case to the Commission by means of a vehicle of their own selection.

The Commission ought not eschew jurisdiction unless there is good reason to do so. I see no need to decide the jurisdictional question in haste, and I am concerned that the majority's decision may tie the Commission's hands in the future. The Legislature may never have contemplated structural separation. However, if evidence were provided to demonstrate the need for such a remedy, I am convinced that the Commission has the jurisdiction under its broad statutory authority[6].

Even if the Commission lacked jurisdiction to order full structural separation, the matter of the broad range of remedies sought by both petitioners remains. No party has suggested that the Commission lacks jurisdiction over these "lesser included" remedies. In fact, the FCCA petition did not request structural separation, but rather "structural incentives," which clearly are within the Commission's jurisdiction. Nevertheless, the majority sends the petitioners on their way, without first having afforded the petitioners a clear and effective point of entry into the administrative process.

It is apparent that the Commission has resolved a good number of disputed issues of material fact adversely to the petitioners without affording them an opportunity to present evidence to the Commission. Several of the arguments made at our agenda conference in favor of dismissal speak to the merits of the case. These include arguments that structural separation:

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[6]The term structural separation does not have a single, universally accepted definition. Even within the industry, the term can have different meanings. Remedies far short of the complete break-up of a utility may still fall under the definition. As early as 1912, the Supreme Court in United States v. Terminal R.R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912), used structural separation as a tool to prevent incumbents, whose facilities could not practicably be duplicated by competitors, from using those facilities as a bottleneck to foreclose competition and injure consumers. There, the Court required that non-owner railroads be provided use of the Terminal Railroad Association's facilities upon such just and reasonable terms as would place every such company upon as nearly equal plane as that occupied by the proprietary companies. The Court further noted that failure to achieve this result would lead the Court to order "complete disjoinder" of the Terminal Railroad Association from any ownership by the proprietary railroads.

1) would lead to additional costs to Florida ratepayers;

2) would discourage innovation and investment;

3) would impair a utility's ability to react to national emergencies such as occurred on September 11th;

4) would interfere with our existing efforts to promote competition;

5) is unnecessary because BellSouth and the competitive local exchange carriers (CLECs) have amicably reached numerous agreements; and

6) is a draconian measure.

These are not issues appropriately considered in deciding a motion to dismiss. During discussion of this matter at our agenda conference, I had a great deal of difficulty separating these issues, many of which were also discussed during an earlier 2-day informal workshop, from the matter at hand -- the motion to dismiss and the applicable standard. We allowed the parties to make numerous arguments addressing the merits of the case. Our decision seemed more like a vote after a hearing than a vote on a motion to dismiss. Unfortunately, neither the arguments made at the informal workshop or at our agenda conference constitute sworn testimony or provide a point of entry under the law. At this time, the Commission has heard no evidence in the form of sworn testimony to either support or counter arguments of the parties. We should not prejudge disputed issues of material fact without having first given all parties the opportunity to present such evidence.

Where we have jurisdiction (and with respect to the "lesser includeds," no one argues that we do not), Florida administrative law requires that we hear what the petitioners have to say. Thus, we have not only dismissed the prayer for structural separation on jurisdictional considerations, we have denied all other prayers for relief on the merits. We have jurisdiction over these matters, and we have afforded no point of entry.

A Modest Proposal

In the pursuit of robust local competition in the telecommunications industry, we have witnessed excessive litigation and regulation since the Telecommunications Act of 1996.

Refereeing disputes between incumbent local exchange carriers (ILECs) and CLECs and micromanaging the conduct of the ILECs toward the CLECs in minute detail, have become primary occupations of this Commission.

Currently, BellSouth serves its own retail customers with one set of systems and processes and the CLEC customers with a separate, discreet set of systems and processes. In numerous Commission dockets, the CLECs have claimed that these systems do not work and do not allow them to fairly compete. The Commission has responded repeatedly with additional regulation designed to improve BellSouth's service to the CLECs. Yet, we have been unable to diminish the level of complaints and litigation.

The instant docket would have provided a vehicle to explore options or modifications to our current command and control approach. One option that could have been explored in a full and fair hearing is whether BellSouth could serve both the retail side of its business and the CLECs through the same systems and processes. Evidence may show that under such a plan, it would be in BellSouth's self-interest to make sure the systems work properly so that its own customers are served properly, and CLECs (using the same systems) would, in turn, be served properly. Such an approach may give CLECs the perception that they are treated equally with the retail side of BellSouth, that they are all going through the same processes and lined up at the same ticket window. This may well mitigate the current level of costly litigation and regulation. BellSouth, the CLECs, consumers, and the taxpayers of this state stand to benefit from reduced litigation and increased competition. I believe this docket afforded us with an opportunity to consider testimony on these matters.

The following are some issues that the Commission might have been able to consider within this docket:

- Since implementation of the Telecommunications Act of 1996, what has been the expense to BellSouth, its shareholders, and the ratepayers of establishing separate and distinct systems and processes to provide service to CLECs?

- Are any benefits derived from BellSouth serving CLECs through systems and processes that are separate from the systems and processes it uses to serve the retail side of its own business?

- Could BellSouth serve both the retail side of its business and the CLECs through the same systems and processes, and at what cost?

- What costs have BellSouth, the ratepayers, and the taxpayers incurred as a result of regulation and litigation (before the commissions, the FCC, and the courts) regarding BellSouth's conduct toward the CLECs?

- Could this Commission eliminate the current brittle system of trying to deter in advance every act of misconduct between BellSouth and the CLECs by asking BellSouth to evaluate its systems and processes and propose how they could be designed so that the retail side of its business would use the same systems and processes as the CLECs?

- Will ratepayers benefit through head-to-head competition, in which BellSouth retail and the CLECs are served through the same systems and processes?

No Point of Entry

No existing Commission docket gives AT&T and FCCA a point of entry to explore these issues. Upon inquiry during the agenda conference, BellSouth acknowledged that a non-docketed "collaborative process" was probably the best vehicle currently before the Commission to explore these issues. Unfortunately, this "collaborative process" does not provide a point of entry for petitioners to present their case.

Conclusion

The recommendation of our staff that the Commission hear the evidence and determine the appropriate remedy, based on the record in its entirety, is a reasonable one. Given this Commission's broad authority, including specific legislative directives to foster competition in the telecommunications industry, I cannot support the majority's dismissal of the petitions.

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.