BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint application for approval of indirect transfer of control of telecommunications facilities resulting from agreement and plan of merger between AT&T Inc. (parent company of AT&T Communications of the Southern States, LLC, CLEC Cert. No. 4037, IXC Registration No. TJ615, and PATS Cert. No. 8019; TCG South Florida, IXC Registration No. TI327 and CLEC Cert. No. 3519; SBC Long Distance, LLC, CLEC Cert. No. 8452, and IXC Registration No. TI684; and SNET America, Inc., IXC Registration No. TI389) and BellSouth Corporation (parent company of BellSouth Telecommunications, Inc., ILEC Cert. No. 8 and CLEC Cert. No. 4455); and BellSouth Long Distance, Inc. (CLEC Cert. No. 5261 and IXC Registration No. TI554).	DOCKET NO. 060308-TP ORDER NO. PSC-06-0907-FOF-TP ISSUED: October 31, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER DENYING MOTION FOR STAY

BY THE COMMISSION:

Case Background

On March 31, 2006, AT&T Inc., BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively referred to as "Applicants") submitted a joint application for approval of indirect transfer of control of telecommunications facilities from BellSouth Corporation to AT&T Inc. resulting from an Agreement and Plan of Merger jointly executed by the two companies.

On June 23, 2006, we issued our Proposed Agency Action Order Approving the Indirect Transfer of Control. On July 14, 2006, ITC^DeltaCom Communications, Inc. (ITC^DeltaCom), NuVox Communications, Inc. (NuVox), XO Communications Services, Inc. (XO), and Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC

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(Xspedius) (collectively "Joint CLECs") filed a protest of the PAA Order. Also on July 14, 2006, Time Warner Telecom of Florida, L.P. (Time Warner Telecom) filed a protest of the PAA Order and Request for Formal Proceeding.

On August 15, 2006, we approved our staff's recommendation to deny the protests and on August 24, 2006, issued Order No. PSC-06-0711-FOF-TP (*Order Denying Protests*) finding that the protests do not allege injuries of sufficient immediacy to confer standing and the protests did not demonstrate Joint CLECs or Time Warner have suffered a type of injury that the underlying transfer of control proceeding is designed to protect.

On September 13, 2006, the Joint CLECs filed their Notice of Administrative Appeal with this Commission. In addition, because the filing of the appeal does not stay enforcement of the agency decision, Joint CLECs filed an Emergency Motion to Stay Florida Public Service Commission order No. PSC-06-0711-FOF-TP and to Expedite Appeal with the Florida Supreme Court. *See Section* 120.68(3), Florida Statutes, (2006). On September 18, 2006, Applicants filed their Response. On September 19, 2006, we filed our Response. Also on that date, Joint CLECS filed a Motion for Leave to File Reply. On September 28, 2006, the Court denied Joint CLECs' Motion for Leave to File Reply and forwarded the Emergency Motion to Stay for our consideration.

I. Joint CLECs Motion[1]

Joint CLECs contend that the purpose of a stay is to preserve the status quo during review. Joint CLECs state that the factors to be considered in whether to grant a stay are the likelihood of success on the merits and the likelihood of harm if a stay is not granted.

A. Likelihood of Success on the Merits

Joint CLECs claim that they have a high likelihood of success on the merits because the "*Order Denying Protests* makes a fundamental error of law and misinterprets the Commission's statutory obligations in reviewing the proposed transaction." Motion ¶ 32, pg. 11. First, Joint CLECs argue that our determination that Joint CLECs' allegations are not of sufficient immediacy puts Joint CLECs in an untenable position. Joint CLECs claim that the only way they could ever allege standing would be after they have incurred injury, which could only occur after the merger.

Joint CLECs state that the merger will result in removal from the marketplace of AT&T, one of the most vigorous competitors to BellSouth's monopoly power. Joint CLECs allege that AT&T competes with BellSouth to provide special access service to CLECs and that this competitive option will disappear after the merger. Joint CLECs allege that this "huge market consolidation will reduce consumer choice, on both a retail and wholesale level and harm Joint CLECs ability to compete in the consolidated market." Motion ¶ 34, pg. 13

[1] In summarizing the Motion and Response, we have used the section headings verbatim from the respective Motion and Response.

Next, Joint CLECs argue that our determination that the injuries alleged are not the type the proceeding is designed to protect is in error. Joint CLECs contend that our recitation of a public interest standard requires that we examine this transaction in light of all the criteria enumerated in section 364.01(4), Florida Statutes. In addition, Joint CLECs attempt to distinguish *Agrico*, because "the environmental permitting statute at issue in *Agrico*, did not direct the agency to consider competitive issues as does Chapter 364."

B. Likelihood of Harm

Joint CLECs claim that if they are "correct and the Commission erred in refusing to hear from them regarding this transaction, they will be irreparably harmed if the *Order Denying Protests* is not stayed while th[e] appeal is considered." Motion ¶ 49, pag. 18. Joint CLECs state that if the transaction closes before we conduct an evidentiary hearing, little will have been accomplished.[2]

II. AT&T and BellSouth Response

Applicants enumerate the legal standard in determining whether a stay should be granted as: "(1) the public interest in the stay; (2) a likelihood of prevailing in the appellate court: and (3) irreparable harm if the stay is not granted." *See White Constr. Co. v. Florida Dept. of Transp.*, 562 So. 2d 998, 999 (Fla. 1st DCA 1988)(per curiam). In addition, Applicants state that in the context of an emergency motion to stay administrative proceeding, a court must consider "the possibility of harm to the other parties if relief is granted." *Freean v. Cavazos,* 923 F.2d 1434, 1437 (11th Cir. 1991): *see Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 686 (5th Cir. 1968).

A. Movants have no likelihood of success on the merits

Applicants state that the Court's review of PSC orders is highly deferential and thus the PSC's interpretation of a statute it is charged with enforcing will be approved by the Court unless it is clearly erroneous. Response pg. 11. *GTC, Inc. v. Garcia*, 791 So. 2d 452, 456 (Fla. 2000)(per curiam)(*quoting United Tel. Co. v. Public Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986); *BellSouth Telecomms., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998). Applicants allege that Joint CLECs have no likelihood of overcoming this deference on two independent grounds. First, this Commission has consistently denied competitor standing in cases such as this. Second, Joint CLECs are unlikely to succeed in showing that we departed from the essential requirements of law by following these established precedents.

[2] Joint CLECs state that "the Federal Communications Commission (FCC) is expected to act on the merger at its October 12 meeting and closing is expected to occur when the FCC acts. Fn. 27, Motion pg. 9.

1. PSC has consistently denied competitors standing

Applicants review the "substantial interest" test as enumerated in *Agrico* and argue that we have consistently applied this test to deny standing to competitors in transfer of control proceedings involving telecommunications companies. *See* Order No. PSC-98-0702-FOF-TP, issued, in Docket No. 971604-TP[3] ("*MCI Order*"); Order No. PSC-00-0421-PAA-TP, issued March 1, 2000, in Docket No. 991799-TP[4] ("*Sprint Order*"); Order No. PSC-06-0033-FOF-TP, issued January 10, 2006, in Docket No. 050551-TP[5] ("*Nextel Order*").

Applicants go on to cite the MCI/WorldCom merger in which GTE sought to establish standing based on alleged injuries it would suffer as a wholesale customer due to the decrease in competition between MCI and WorldCom in the wholesale market. GTE also alleged injuries as a competitor. In that case, we found that GTE's asserted injuries, as a customer and as a competitor, that were too speculative to confer standing. In addition, we held that the asserted injuries were beyond the scope of a transfer of control proceeding because section 364.33 "does not give us the ability to protect the competitive interests asserted." *MCI Order*.

In addition, Applicants claim that "in at least 40 approval orders issued under Section 364.33, including transfers involving some of the Movants here, the PSC made plain, just as it did here, that its review under Section 364.33 is designed to determine whether the transaction will harm *consumers' interest in efficient, reliable telecommunications service*, without considering competitors' interests." Motion pg. 14.

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[3] In re: Request for approval of transfer of control of MCI Communications Corporation (parent corporation of MCI Metro Access Transmission Services, Inc., holder of AAV/ALEC Certificate 2986, and MCI Telecommunications Corporation, holder of IXC Certificate 61, PATS Certificate 3080, and AAV/ALEC Certificate 3996) to TC Investments Corp., a wholly-owned subsidiary of WorldCom, Inc. d/b/a LDDS WorldCom.

[4] In re: Joint application of MCI WorldCom, Inc. and Sprint Corporation for acknowledgment or approval of merger whereby MCI WorldCom will acquire control of Sprint and its Florida operating subsidiaries, ASC Telecom, Inc. d/b/a AlternaTel (holder of IXC Certificate No. 4398), Sprint Communications Company Limited Partnership (holder of PATS Certificate No. 5359 and ALEC Certificate No. 4732), Sprint Communications Company, Limited Partnership d/b/a Sprint (holder of IXC Certificate No. 83), Sprint Payphone Services, Inc. (holder of PATS Certificate No. 3822), and Sprint-Florida, Incorporated (holder of LEC Certificate No. 22 and PATS Certificate No. 5365). While this order was later vacated because the merger was not consummated, as the Commission stated in the *Order Denying Protests,* "[w]hile a vacated order may not have precedential value, the analysis and reasoning does has value." See Smith v. State Farm Mutual Automobile insurance Co., 964 F.2d 636, 638 (7th Cir. 1992)(noting that while vacated decisions may have no weight as authority, that is distinct from the weight that any document might have because of the quality of its reasoning.); HOA v. HO, 1994 Fla. Div. Adm. Hear. LEXIS 5298 (stating that "[a]lthough this court's decision was vacated as moot, it has no precedential value, however, the analysis and reasoning has value." citing County of Los Angeles v. Davis, 440 U.S. 625, 634 n.6 (1979).

[5] In re: Joint application for approval of transfer of control of Sprint-Florida, Incorporated, holder of ILEC Certificate No. 22, and Sprint Payphone Services, Inc., holder of PATS Certificate No. 3822, from Sprint Nextel Corporation to LTD Holding Company, and for acknowledgment of transfer of control of Sprint Long Distance, Inc., holder of IXC Registration No. TK001, from Sprint Nextel Corporation to LTD Holding Company.

2. Movants are unlikely to succeed in Showing that the PSC Departed from the Essential Requirements of Law by Following these Established Precedents

Applicants argue that our determination that Joint CLECs' allegations of potential future economic injury did not satisfy the first prong of the *Agrico* test, is consistent with the Court's determination that claims of future, potential economic injury are insufficient to establish standing. *See AmeriSteel,* 691 So. 2d at 477-78 (affirming PSC's decision that entity did not have standing to protest PSC order because customer's claims of future economic harm was "not an injury in fact of sufficient immediacy to entitle" the customer to a Section 120.57 hearing)(*citing International Jai-Alai Players Ass'n v. Florida Pari-Mutual Comm'n,* 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990)(per curiam)(potential economic detriment was too remote to establish standing); *Florida Soc'y of Opthalmology v. State Bd. of Optometry*, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988)(some degree of loss due to economic competition is not of sufficient "immediacy" to establish standing)).

Applicants claim that Joint CLECs did not dispute that the BellSouth subsidiary (BellSouth Telecommunications, Inc. or "BST"), that operates as an incumbent provider in Florida, will remain subject to the same obligations to provide wholesale facilities and service to Joint CLECs that it is today. Applicants maintain that after the merger Joint CLECs will be legally and contractually entitled, pursuant to interconnection agreements, to receive the same services on the same terms and conditions from BST that they receive today.

Next, Applicants address the second part of the *Agrico* test, and state that Joint CLECs "have no tenable basis to claim that Section 364.33 so clearly requires a different inquiry that the deference due the PSC is likely to be overcome." Response pg. 18. Applicants argue that we reasonably determined that some of the goals set forth in Section 364.01 are better implemented through Chapter 364 proceedings other than transfer of control proceedings.

B. The Balance of Equities Counsels Against a Stay

1. Joint CLECs Have Not Established Irreparable Injury

Applicants argue that Joint CLECs' assertion that they are faced with significant irreparable injury is undermined by their delay in seeking relief[6] and their failure to substantiate their assertions with affidavits or factual support of any kind. Applicants contend that Joint CLECs are asking for the drastic action of staying a nationwide merger based solely on self-serving assertions, without evidence or proof of any kind. Applicants maintain that Joint CLECs' allegations of harm run afoul of the established law that "[i]rreparable injury will never be found where injury complained of is doubtful, eventual, or contingent." *Jacksonville Elec. Auth. v. Beemik Builders & Constructors, Inc.*, 487 So. 2d 372, 373 (Fla. 1st DCA 1986).

[6] Applicants state that although "[t]he PSC voted unanimously to deny their protests on August 15, 2006, and issued its order reflecting that decision on August 24 . . . [Joint CLECs] sat on their hands for weeks on end (until September 13) before seeking 'emergency' relief from [the] Court." Response pg. 3.

Next, Applicants contend that Joint CLECs allegations of harm ignore the fact that the FCC and the United States Department of Justice ("DOJ") are undertaking comprehensive reviews of the transaction that "will address the same allegations Joint CLECs raise here – *i.e.*, that the merger poses a meaningful threat to competition and runs afoul of the 1996 Act." Response pg. 22.

2. A Stay Would Cause Substantial Harm to AT&T and BellSouth and to the Public Interest

Applicants claim that a "delay in the closing will put off the date on which the companies can begin to realize the benefits of the merger, to the detriment of their ability to realize costs savings and to compete in today's marketplace." Response pg. 23. Applicants estimate that each month of delay would cost the combined company more than $129 million, which is more than $4 million for each day of delay. In addition, Applicants claim that a delay will be contrary to the public interest because it would delay "deployment of new converged wireless and wireline services enhanced video competition in Florida and elsewhere, better service to government customers and an enhanced ability to respond to natural disasters, and increased research and development in innovative services that promise to help drive the nation's economy." Response pg. 24.

Finally, Applicants request that in the unlikely event that a stay is granted, we should require the posting of a substantial bond. Applicants state that "[t]he purpose of the bond is to protect the party adversely affected against the consequences of the supersedeas or stay." *Bernstein v. Bernstein*, 43 So. 2d 356, 358 (Fla. 1949). Applicants claim that the merger could not close while a stay is in place which would create a direct and immediate harm of approximately $129 million per month. Consequently, Applicants request a bond of at least $258 million, which assumes a two month delay in closing.

III. Decision

As stated above, Joint CLECs' Motion was originally filed with the Court. Consequently, neither the Motion nor the Response directly address our Rule on a Stay Pending Judicial Review, Rule 25-22.061(2), which provides:

> Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. A stay pending review may be conditioned upon the posting of a good and sufficient bond or corporate undertaking, other conditions, or both. In determining whether to grant a stay, the Commission may, among other things, consider:
>
> (a) Whether the petitioner is likely to prevail on appeal;
> (b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and

(c) Whether the delay will cause substantial harm or be contrary to the public interest.

A. Likelihood of Success

In support of their Motion for Stay, Joint CLECs reiterate their concerns about the resulting size of the merged company and the impact this will have on their ability to compete. Assuming arguendo that the merger could create a resource imbalance and result in an expansion of the combined company's national footprint, the Joint CLECs have failed to establish any cognizable causal link between the size of the merged company and the alleged harms. As the Applicants correctly point out, "the bottom line here is the contractual arrangements and the legal rules under which [Joint CLECs] obtain facilities and services to serve their retail customers will not be affected in any way by the merger." Response pg. 16.

Next, Joint Applicants allege error in our failure to examine the transfer of control in light of all the criteria enumerated in section 364.01(4), Florida Statutes. Joint CLECs contend that because section 364.33, has no standards, we must look to section 364.01, which contains the specific standards we must apply. However, our determination as to the scope of inquiry in transfer of control proceedings is consistent with prior precedent. *See MCI Order; Sprint Order*; *Nextel Order*. Consequently, this consistent interpretation coupled with the deference afforded this Commission in interpreting our own statutes makes it highly unlikely that Joint CLECs will prevail on appeal. *See Smith v. Crawford*, 645 So. 2d 513, 520 (Fla. 1st DCA 1994); *GTC*, 791 So. 2d at 459; *BellSouth Telecomms*., 708 So. 2d at 597.

B. Irreparable Harm if Stay is Not Granted

We agree with Applicants' argument that Joint CLECs own delay in seeking relief undermines their assertion that they are faced with significant irreparable injury. In addition, as stated above, Joint CLECs will continue to obtain facilities and services to serve their retail customers after the merger pursuant to existing interconnection agreements in accordance with both state and federal law.

Finally, the concerns of the Joint CLECs over the "size scope and reach of the new merged company" will be addressed by the FCC and DOJ. "The DOJ reviews mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to lessen competition substantially in any line of commerce. The [FCC,] on the other hand . . . , is charged with determining whether the transfer of control serves the broader public interest . . . . In addition to considering whether the merger will reduce existing competition, [the FCC] must [also] focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger's effect on future competition." *See In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18445, ¶ 18. Therefore, we find that Joint CLECs have been unable to show that they will suffer irreparable harm if the stay is not granted.

C. Likelihood of Substantial Harm Resulting From Delay

The third factor we may consider under Rule 25-22.061(2) is whether "granting the delay will cause substantial harm or be contrary to the public interest." This criterion invites a balancing test to ensure that we do not grant a stay to protect one party to the detriment of the other party or somehow violate the public interest. Given that we have found that Joint CLECs failed to satisfy the first two factors, we find it unnecessary to evaluate avoidance of collateral harm as a further basis for denying the requested stay. Likewise, we find it unnecessary to address Applicants' request that Joint CLECs be required to post a bond if we were to grant a stay.

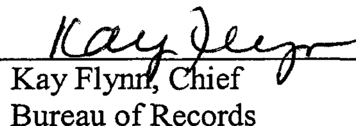
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Stay filed by NuVox Communications, Inc., XO Communications Services, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Jacksonville, LLC, and Time Warner Telecom of Florida, L.P. is denied. It is further

ORDERED that this docket shall remain open pending resolution of the appeal with the Florida Supreme Court.

By ORDER of the Florida Public Service Commission this 31st day of October, 2006.

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

By: 
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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.