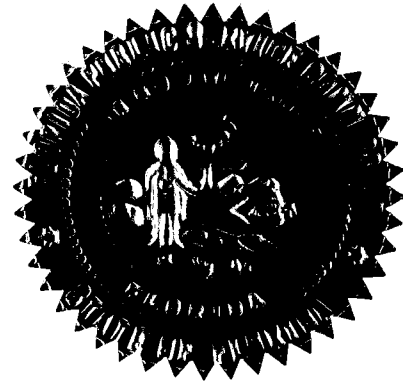


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060308-TP

In the Matter of:

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).



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 5

BEFORE: CHAIRMAN LISA POLAK EDGAR
COMMISSIONER J. TERRY DEASON
COMMISSIONER ISILIO ARRIAGA
COMMISSIONER MATTHEW M. CARTER, II
COMMISSIONER KATRINA J. TEW

DATE: Tuesday, August 15, 2006

DOCUMENT NUMBER-DATE

FLORIDA PUBLIC SERVICE COMMISSION

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1 PARTICIPATING:

2 JIM MEZA, ESQUIRE, representing BellSouth.

3 TRACY HATCH, ESQUIRE, representing AT&T

4 Communications of the Southern States, LLC.

5 JON MOYLE, JR., ESQUIRE, representing, representing

6 ITC DeltaCom, NuVox Communications, XO Communications and

7 Xspedius Communications.

8 HOWARD E. ADAMS, ESQUIRE, representing Time Warner

9 Telecom of Florida, L.P.

10 JASON FUDGE, ESQUIRE, representing the Florida

11 Public Service Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN EDGAR: And that will bring us beginning our
3 discussions to Item 5.

4 MR. FUDGE: Item 5 is staff's recommendation --

5 CHAIRMAN EDGAR: Hang on a moment. Let's go ahead
6 and let people get settled so we can be sure that we hear you
7 clearly.

8 Okay. Mr. Fudge.

9 MR. FUDGE: Thank you.

10 Commissioners, Item 5 is staff's recommendation to
11 deny the protest filed by the Joint CLECs and Time Warner
12 because, one, the injuries alleged are not of sufficient
13 immediacy; and, two, the underlying transfer of control
14 proceeding is not designed to protect those interests.

15 CHAIRMAN EDGAR: Are you ready?

16 MR. MEZA: Yes, ma'am.

17 CHAIRMAN EDGAR: You're recognized.

18 MR. MEZA: Jim Meza on behalf of BellSouth.
19 BellSouth supports staff's recommendation. It is consistent
20 with your prior decisions on this matter. Your order is
21 consistent with prior decisions involving transfers of control
22 under 364.33 for both ILECs and CLECs, including the majority
23 of the protesting parties. And with that, I would like to
24 reserve my time to rebut any arguments necessary and also to
25 answer any questions you may have.

1 CHAIRMAN EDGAR: Thank you, Mr. Meza.

2 Mr. Hatch.

3 MR. HATCH: Tracy Hatch appearing on behalf of AT&T.

4 We also support the staff's recommendation and adopt the
5 comments of Mr. Meza. We would reserve our time as well for
6 any rebuttal or questions, if necessary.

7 CHAIRMAN EDGAR: Mr. Moyle.

8 MR. MOYLE: Thank you, Madam Chairman.

9 Jon Moyle, Jr., with the Moyle Flanigan law firm
10 appearing today on behalf of ITC DeltaCom, NuVox
11 Communications, XO Communications, and Xspedius Communications.
12 All of these are CLECs, are competitors in the telecom industry
13 here in Florida, and in the pleadings they have been referred
14 to as the Joint CLECs.

15 Staff has outlined why we are here. Just briefly,
16 you all adopted a PAA order, and the Joint CLECs timely filed a
17 protest and sought a hearing under 120.569 and 120.57, which is
18 a factual hearing where we want to bring forth evidence that we
19 would ask you to consider about the effect of this merger on
20 the CLECs.

21 In preparing for this, and Vicki Kaufman has been
22 doing most of the work and is on vacation and asked me to pinch
23 hit for her today, which I agreed to do, you know it's a
24 standing issue. And I went back and, you know, Agrico is
25 cited, Agrico this, Agrico that. And the two tests in Agrico

1 are, you know, is an injury alleged of sufficient immediacy.
2 And, if so, is the proceeding one that is designed to protect
3 that injury. And, you know, staff, I think, has suggested
4 maybe what we alleged isn't enough. But in their staff
5 recommendation, they do make a comment that accepting
6 petitioners' allegations as true, there may be a high degree of
7 potential economic injury. And I think we have alleged -- you
8 know, these are not in the petition -- but we have alleged we
9 are going to get clobbered by this merger. It's going to
10 affect us, it's going to affect competition, and we would ask
11 that you guys take a look at this thing before you approve it.

12 Let me just spend a couple of minutes talking about
13 Agrico. Your new general counsel, I think, is probably learned
14 in this area, having come from DEP. And the Agrico case was a
15 case involving air permits and a wastewater treatment system.
16 It was an environmental case under Section 403, Florida
17 Statutes. 403 deals with environmental issues. And some
18 competitors got in that case and challenged the issuance of the
19 permits. And it went up to the appellate court and the
20 appellate court said, "Wait a minute. These permitting
21 statutes are not designed to protect competitive interests.
22 Therefore, you don't have standing." Okay. Well, that seems
23 to make sense.

24 So the analysis here, in my mind, then becomes is the
25 statute that you all are operating under designed to protect

1 competitive interests. And I would argue clearly that it is.

2 And let me just walk you through the reasoning and
3 the rationale as to why I believe that this statute, 364, and
4 related statutes are designed to protect competitive interests.
5 Which if you agree with that, then the Joint CLEC's allegations
6 regarding the fact that we are going to get clobbered, I think,
7 would justify us having standing to move forward and seek a
8 hearing in front of the Commission.

9 364.33 is the transfer of control statute that you
10 all have looked at. And the transfer of control statute is two
11 or three sentences, and it really says you guys have to approve
12 the transfer of control. It doesn't give you, really, any
13 criteria to look at when you make that decision. So what you
14 have done is historically you have applied a public interest
15 test, and that's referenced in your PAA and staff has
16 referenced that, that public interest is what you guys have
17 historically looked to.

18 Staff makes a comment in their recommendation that
19 little guidance has been provided on what constitutes public
20 interest. And while that may be true, I think that you are
21 obligated to look at and follow what guidance the legislature
22 has provided with respect to a public interest. And I don't
23 think you have to look much further than 364.01, which has the
24 following sentence, and I will just quote it and read it into
25 the record in which the legislature has expressly found that

1 competition is in the public interest. Here is the section of
2 the statute. Quote, "The Legislature finds that the
3 competitive provision of telecommunication services, including
4 local exchange telecommunications services, is in the public
5 interest."

6 So if you are doing a public interest test, which you
7 have historically done, you have an express finding of the
8 Legislature that competitive telecommunications services,
9 including local exchange telecommunications, is in the public
10 interest.

11 You know, Agrico has good reasoning and whatnot, but
12 I would argue that in that section you had environmental
13 statutes, it didn't have any reference to competitive
14 interests. Here 364 says competition is important, it needs to
15 be promoted in the state of Florida, and my clients have
16 alleged that we are going to get clobbered by this merger. And
17 we think it warrants a close look.

18 A related point, because the staff recommendation,
19 you know, we have alleged things like, and I'm quoting, the
20 proposed transfer will immediately and negatively impact Joint
21 CLECs' ability to compete in the Florida market. We have made
22 reference to it being a death knell and things like that.

23 If there is a thought that, well, maybe that's not
24 specific as to what instrument is going to be used to deliver
25 the death knell blow, Florida law provides an opportunity for a

1 petitioner to state with more specificity, to come back and
2 replead, rather than face a dismissal without the opportunity
3 to amend. And I would refer you to 120.569, which is what we
4 have plead under, and there is a sentence in here that says
5 dismissal of a petition shall at least once be without
6 prejudice to petitioners filing a timely amended petition
7 curing the defect unless it conclusively appears from the face
8 of the petition that the defect cannot be cured.

9 I would argue that we have alleged enough in this
10 petition to say we are going to get clobbered. If there needs
11 to be more specificity, then the proper approach is not to
12 dismiss it with prejudice, but to give us an opportunity to
13 provide more detail and say here is how we're going to get
14 clobbered with more specificity.

15 Finally, there is a comment in the Agrico case that I
16 just wanted to bring to your attention about standing. And as
17 I understand it, it goes like this. If somebody says, "We have
18 standing, here is why," and they go into hearing and then they
19 fail to prove that up, the other party has an opportunity to
20 challenge it. So if we said, "We're going to get clobbered
21 economically, here is why," and didn't come forward with proof
22 of that, that would be an appropriate time to challenge the
23 standing. But at this point we have made the allegations in
24 the petition, they have to be taken as true for the purposes of
25 ruling on this, and I think we've satisfied the requirements

1 under law and under Agrico to prove that we have standing.

2 That's really the legal argument. Let me just step
3 back for a minute and make a couple of other arguments that I
4 would suggest encourage moving forward with a hearing. And,
5 again, I haven't been in the middle of this, but in reading and
6 trying to prepare, here are some of the things that I've
7 learned. I was telling somebody that really this is the case
8 -- you've all heard about the 800-pound gorilla. This is the
9 case of the 1,600-pound gorilla, because you've got two
10 800-pound gorillas getting together.

11 And it's the biggest telecom merger in the history of
12 the country, as I understand it. There is a Wall Street
13 Journal article that says it's the fifth biggest deal ever.
14 And, you know, I think it has the potential to impact not only
15 my clients as competitors, but the consumers of the state of
16 Florida.

17 I would argue that a deal of that magnitude and of
18 that significance and proportions ought to be reviewed in
19 greater detail by this Commission than it has to date. And to
20 date, you know, I don't think there has been the first shred of
21 evidence that has been provided to you. There have been some
22 pleadings that are filed and whatnot, but no witness has been
23 sworn, no documents have been entered into evidence. And I
24 would argue that given the magnitude of this deal that this is
25 something that the Commission, even on its own motion, ought to

1 take a look at.

2 I mean, I know everyone wants to hurry up. This is
3 important, let's go, let's go, the FCC is going to review it.
4 But, you know, I don't believe the Governor said, well, wait a
5 minute, pass it to the FCC. You guys take a look at it and
6 satisfy yourself that it's going to not do some of the things
7 that we believe it will do and conduct an evidentiary hearing
8 on it. You know, 120.57, 120.569 provide that opportunity. We
9 think the law provides it, and we think you all have inherent
10 power to assert jurisdiction over it, and to take some evidence
11 on the issue.

12 You know, I noticed that others have echoed a similar
13 view on this. And, you know, the Attorney General of the state
14 had written a letter to you all expressing concerns. I saw a
15 couple of sentences that I just wanted to highlight. He said
16 my concern here is that the merged -- I'm quoting, "My concern
17 here is that the merged company might squeeze out real
18 competition to the detriment of consumers, particularly seniors
19 and residential and small business customers." He also says
20 that unless proper conditions are attached, the merger could,
21 indeed, have a detrimental impact on competition.

22 You know, that's the chief law enforcement officer of
23 the state making these comments, which I would argue are
24 further evidence or compulsion for you guy to go ahead and tee
25 it up and take a look at it, swear some witnesses, take some

1 evidence to see, indeed, whether this is in the public
2 interest.

3 I mean, that's the test. That is what you have
4 historically used. We believe the legislature said the public
5 interest includes the effect on competitors, therefore we have
6 standing. But there are a lot of other things in the public
7 interest, as referenced in this letter; impact on consumers,
8 impact on small businesses, and whatnot. And I would urge you
9 to satisfy yourself through an evidentiary hearing that,
10 indeed, this is in the public interest before approving it
11 without taking any evidence.

12 So that concludes my remarks. I'll be happy to
13 answer any questions. And I'd urge -- I know people want to
14 move this thing along, but I would urge you to try to get it
15 right rather than get it fast. Thank you.

16 CHAIRMAN EDGAR: Thank you, Mr. Moyle. I do have to
17 ask, is clobbered a legal term?

18 MR. MOYLE: I didn't check it in Black's Law
19 Dictionary, but --

20 CHAIRMAN EDGAR: Mr. Adams.

21 MR. ADAMS: Thank you, Madam Chairman, members of the
22 Commission. My name is Gene Adams, I'm here today representing
23 Time Warner Telecom. We believe that the Commission should
24 take the opportunity to grant these petitions and hold full
25 hearings and evidentiary hearings on this matters. The Agrico

1 test requires that we demonstrate as a substantially affected
2 party injuries that are of a sufficient immediacy to warrant
3 our intervention, and also that these proceedings are designed
4 to protect substantial interest. We believe strongly that the
5 Commission can take jurisdiction of this issue and we believe
6 that Time Warner has met those two tests of the Agrico case.

7 This is the largest merger of any telecommunications
8 companies, and we believe that as technology in the
9 telecommunications industry matures, there is certainly a
10 potential for a competitive advantage that is real and
11 immediate on the part of AT&T and BellSouth. Moreover, we
12 believe that it gives them enormous market potential and
13 control of the access to that technology that poses a
14 substantial and immediate threat to Time Warner Telecom and to
15 other competitive telecommunications companies.

16 We believe it is not speculative, that it is
17 immediate, and that there will be immediate consequences as
18 soon as this merger takes place. Now, while the staff
19 recommendation has said that these are indirect and downstream
20 effects, we believe that as you have allowed MCI and others to
21 intervene from time to time in marketplace decisions, we
22 believe, also, that Time Warner meets that test.

23 Time Warner continues, also, to urge the Commission
24 to take a more expansive look at its jurisdictional issue when
25 it reviews transfer of control issues. We believe the

1 Commission can expand its public interest jurisdiction and test
2 to look beyond that of consumer service and financial
3 capability as found in 364.33 and 364.335. We believe you have
4 that broad authority. And even a mandate from the legislature,
5 in particular as Mr. Moyle as cited for you, to ensure that
6 there is a competitive marketplace, and we believe that that
7 is, indeed, in the best interest of the consumer, which, again,
8 has been the polestar of what you review, which is the consumer
9 interest when you look at these transfer of control issues.

10 Along that line, then, we hope that you can look at
11 and ensure competitiveness in the marketplace and we will
12 continue to urge the PSC to adopt that expansive view of its
13 jurisdiction to protect these consumer interests as they may be
14 affected by the merger and which could, in fact, result in
15 decreased competitive alternatives in the marketplace. The
16 current standard is too restrictive, and we believe that its
17 application will continue to allow a very limited intervention
18 in these transfer of control issues, although they have a huge
19 impact in the marketplace.

20 Again, we believe Time Warner has met the two prongs
21 of the Agrico test, which is to demonstrate that we have both
22 an injury of immediacy, immediate harm to us and also that this
23 proceeding is and can be allowed to go forward as one which
24 would help to remedy that harm. And, accordingly, we would ask
25 that the Commission grant the petitions for formal proceeding

1 and that you go forward with testimony and then any conditions
2 which should be attached to the transfer of control be
3 considered and attached by you. And I'll be glad to answer any
4 questions you may have.

5 CHAIRMAN EDGAR: Thank you, Mr. Adams.

6 Mr. Meza or Mr. Hatch, do you have additional
7 comments at this time?

8 MR. MEZA: I just have a few. First, Mr. Moyle
9 suggested that you look to obtain some guidance, and he
10 referred you to some statutes. The guidance that you need to
11 look at is your own decisions on this exact issue. You have
12 determined that competitors and trade groups do not have
13 standing to protest indirect transfers of control under 364.33.
14 And your rationale for that on numerous occasions is very
15 sound, and staff has applied that same rationale here.

16 First, a competitive injury, future potential
17 competitive injury is insufficient to establish the first prong
18 of Agrico. That is unassailable. You have held that
19 repeatedly in your prior decisions on this issue and other
20 issues involving standing.

21 The second component as to why you found that
22 competitors don't have standing in these types of proceedings
23 is that their injury cannot be direct and immediate, and that
24 is true here, as well. The day after the merger closes the
25 Federal Telecommunications Act is still in effect. Our

1 interconnection agreements with these CLECs will still be in
2 effect and impose the same obligations that we have today.
3 Your jurisdiction today will exist tomorrow. Nothing will
4 change as far as how these companies operate post-merger. That
5 is why, even if they are right, which they are not, even if
6 they are right their injury cannot be direct and immediate
7 because your jurisdiction will still be in place, the law will
8 still be in place, our contracts will still be in place.

9 The third reason why you found historically and
10 repeatedly that competitors don't have standing is because the
11 statute that we are coming in under and that you have analyzed,
12 364.33, is not designed to protect competitive interest. You
13 have held that repeatedly. It is not a merger review statute.
14 That is your words. It does not allow us to address
15 competitive interests. Those are your words.

16 The public interest standard, contrary to what the
17 gentlemen opposing this merger have suggested, is not a CLEC
18 interest standard. It is the public interest standard. And
19 you have already determined in your order that this transaction
20 meets that standard.

21 The second brief point I would like to make to
22 address Mr. Moyle's comment that they should have a right to
23 amend to cure whatever defects you find in their petition. And
24 he is correct in that the law does allow in particular
25 circumstances the right to amend, but only if it's not clear on

1 the face of the petition that the defects cannot be cured. And
2 here there is nothing that they can allege to give them
3 standing. All of their injuries are competitive injuries.
4 That doesn't give them standing. None of their injuries,
5 assuming they even occur, will be direct and immediate. They
6 don't have standing. And the statute that we are coming in
7 under is not designed to protect competitors, so there is
8 nothing that they can allege to give them standing.

9 And, additionally, they have actually had two shots
10 at the apple. They filed their petition and then they filed a
11 reply. Staff considered both and determined that these CLECs
12 don't have standing. So we ask that you would do what you have
13 done in all the other cases involving protests by competitors
14 in 364.33 transactions and find that these CLECs do not have
15 standing, as well. Thank you.

16 CHAIRMAN EDGAR: Mr. Hatch.

17 MR. HATCH: I would add just a couple of brief
18 comments. One, I would adopt the comments of Mr. Meza on
19 standing as well as amending the pleadings, but I also point
20 out to you with respect to the sufficient immediacy of the
21 injuries, whatever rights the CLECs have today they will have
22 post-merger. Nothing is going to change. The interconnection
23 agreements are the same, the Telecom Act is the same, Chapter
24 364 and your jurisdiction remains the same.

25 To the extent there are any competitive problems that

1 they perceive develop, then there are remedies pursuant to
2 their rights under the current law. None of that will change.
3 So there is no sufficient immediacy here to create the
4 standing. They have remedies down the road. Thank you.

5 CHAIRMAN EDGAR: Thank you. Commissioners, any
6 questions or discussion? Commissioner Tew.

7 COMMISSIONER TEW: I don't think I have any
8 questions, but I'm ready to make a motion if no other
9 Commissioners have questions.

10 CHAIRMAN EDGAR: Commissioners, questions?
11 Commissioner Tew.

12 COMMISSIONER TEW: After considering the arguments
13 today, I still feel that the staff recommendation is correct
14 and that these parties don't have standing, and so I would move
15 the staff recommendation.

16 COMMISSIONER DEASON: Second.

17 CHAIRMAN EDGAR: Commissioners, we have a motion and
18 a second in favor of the staff recommendation.

19 Is there a discussion on the motion?

20 Seeing none, all in favor of the motion say aye.

21 (Unanimous affirmative vote.)

22 CHAIRMAN EDGAR: Opposed?

23 Show the motion adopted.

24 And I do believe we have an Issue 2 on this item.

25 Commissioner Tew.

1 MR. MOYLE: Madam Chair, just so the record is clear,
2 that is without leave to amend, correct?

3 CHAIRMAN EDGAR: Mr. Cook? Mr. Fudge.

4 MR. FUDGE: Yes, Commissioner. In our recommendation
5 we said that the Joint CLECs and Time Warner would not be able
6 to cure the deficiencies in their pleadings.

7 CHAIRMAN EDGAR: Mr. Moyle.

8 MR. MOYLE: Just for the record. Thank you.

9 CHAIRMAN EDGAR: Thank you.

10 Commissioner Tew, did your motion incorporate Issue 1
11 and Issue 2?

12 COMMISSIONER TEW: Yes.

13 CHAIRMAN EDGAR: Okay. Then show Issue 1 and Issue 2
14 adopted. Thank you all for your participation.

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON)

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I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

7

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

10


I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

13

DATED THIS 22nd day of August, 2006.

14

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16

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Official FPSC Hearings Reporter
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Administrative Services
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