

ORIGINAL

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Subject: E-filing - Docket No. 060308-TP
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Docket Nos. and titles: Joint Application for Approval of Indirect Transfer of Control of Facilities Relating to Merger of AT&T Inc. and BellSouth Corporation
 Docket No. 060308-TP

Filed on behalf of: NuVox Communications, Inc. ("NuVox")

Number of pages: 9

Document attached: Petition to Intervene

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Joint Application for Approval of
Indirect Transfer of Control of Facilities
Relating to Merger of AT&T Inc. and
BellSouth Corporation

Docket No. 060308-TP

Filed: May 4, 2006

NUVOX COMMUNICATIONS, INC.'S PETITION TO INTERVENE

NuVox Communications, Inc. (NuVox), pursuant to rules 25-22.039 and 28-106.201, Florida Administrative Code, files this Petition to Intervene in the above proceeding. As grounds therefore, NuVox states:

1. The name and address of the affected agency is:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

The agency's file number is: Docket No. 060308-TP.

2. Petitioner received notice of this docket by reviewing the Commission's website.

3. The name, address and telephone number of Petitioner is:

NuVox Communications, Inc.
Two North Main Street
Greenville, SC 29601
864.331.7323

4. Petitioner's representatives for purposes of service in this case are:

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Background

5. In early March 2006, AT&T Inc. (AT&T) and several BellSouth entities (BellSouth) (collectively, Joint Applicants) announced the merger of these two companies. This \$67 billion merger is one of the largest transactions ever seen in the United States. The Wall Street Journal, in a March 6, 2006 article, described the merger as “the fifth largest U.S. deal ever, based on equity values....”

6. On March 31, 2006, AT&T and BellSouth filed a “Joint Application for Approval of Indirect Transfer of Control of Facilities” with this Commission. In this filing, Joint Petitioners seek approval of transfer of control of telecommunications facilities from BellSouth to AT&T. After the consummation of the merger, BellSouth will be a wholly-owned, first tier subsidiary of AT&T.¹ The Joint Applicants allege that “the public interest will be served and Florida consumers will reap the benefits of this merger....”²

7. Joint Applicants assert: “[t]his indirect transfer of control of facilities and operations will further the public interest and benefit consumers in Florida in multiple ways.”³ Joint Applicants spend much of the remainder of the Joint Application

¹ Joint Application. at 7, ¶16.

² *Id.* at 2, ¶ 5.

³ *Id.* at 2, ¶ 4.

describing the “significant benefits” they allege the merger will provide and why they assert that the merger is in the public interest.⁴

8. Finally, Joint Applicants allege that it is “irrefutable” that the merger will not adversely affect competition in Florida.⁵

9. The Commission may not, and should not, simply accept these untested statements. The Joint Applicants’ allegations noted above, as well as many others made in the Joint Petition, require vetting through the evidentiary process.

Substantial Interests

10. In this docket, the Commission will consider whether or not to approve the transfer of assets from BellSouth to AT&T in order to facilitate one of the largest mergers in telecommunications history. The transaction will have broad reaching impacts in the telecommunications market in Florida – for consumers (both wholesale and retail) as well as for competitors of the new consolidated telecommunications giant. The transaction will create a new, much larger telecommunications company and at the same time eliminate a fierce market competitor.

11. A press release from the Consumers Union and Consumer Federation of America issued on March 5, 2006, stated, in part:

If approved, this merger will lead to higher local, long distance and cell phone prices for consumers across the country . . . [T]he impact would be particularly devastating on consumers from the Carolinas to Florida and across the Southeastern U.S. where AT&T will no longer compete with BellSouth’s regional near-monopoly for telephone and DSL services.

12. The Consumer Federation of America, in the same press release, noted:

Telecommunications has now gone from a regulated monopoly to an unregulated duopoly with just two major players Consumers know

⁴ *Id.* at pp.12-20, ¶¶27-49.

⁵ *Id.* at p. 20, ¶ 50.

that is not enough competition to lower their prices and drive innovation, especially when the two companies providing Internet access have a long history of anti-competitive, anti-consumer behavior.

13. NuVox is a duly certificated telecommunications provider in the state of Florida. It provides services to end users in Florida and it purchases wholesale services from BellSouth.

14. NuVox meets the substantial interest test of *Agrico v. Department of Environmental Regulation*, 406 So.2d 478 (Fl. 2d DCA 1981), for intervention in this matter. The first prong of the *Agrico* test requires a showing of injury in fact of sufficient immediacy to warrant a hearing.

15. In this instance, the merger of these two companies will have a dramatic impact on both retail and wholesale consumers and competition in Florida. Joint Applicants comment that: “The *only* difference will be that AT&T will own BellSouth and thus indirectly control [the BellSouth entities]. . . .”⁶ NuVox suggests that this is a highly significant and critical difference. And it is a “difference” that the Commission must review to determine if it is in the interest of the state.

16. Through this merger, one of the most vigorous competitors to BellSouth’s monopoly power in Florida will be removed from the marketplace and reincarnated as a regional Bell operation company. Not only will one of BellSouth’s strongest competitors be neutralized, AT&T’s market share will be combined with BellSouth’s. As one of the remaining competitors providing local telecommunications service in Florida, this transaction, which consolidates two of the largest providers in the Florida market, will immediately and negatively impact NuVox’s ability to compete in the Florida market.

⁶ *Id.* at 7-8, ¶ 17, emphasis supplied.

This market consolidation will further reduce consumer choice, on both a retail and wholesale level.

17. Joint Applicants assert that the “competitive overlap” between BellSouth and AT&T will be “relatively narrow.”⁷ This statement overlooks the obvious: *AT&T will own BellSouth*. They will become one company with the same financial and corporate objectives and goals. While these two companies once competed head to head, they will now become one entity.

18. Joint Applicants admit that the Commission may review the effect of the transaction has on “providing service to Florida consumers.”⁸ The elimination and consolidation of the market will directly affect NuVox’s participation in the retail market and its ability to provide service to end users. It will affect NuVox’s ability to secure the wholesale services which it needs and which it currently purchases from BellSouth pursuant to an interconnection agreement approved by this Commission. Further, the transaction will affect the quality of service to consumers in Florida. Less competition means less choice and less choice translates to less responsiveness to customers and as well as less incentive to develop and offer innovative products.

19. The Joint Applicants recognize that the transaction’s impact on competition is critical to this Commission’s review of their application and its public interest determination. Despite this explicit recognition, they attempt to suggest that the Commission may not look at the competitive impact of the transaction; however, Joint Applicants then spend some six pages alleging that the transaction will not adversely

⁷ *Id.* at p. 22, ¶ 54.

⁸ *Id.* at p. 20, ¶ 50.

impact competition.⁹ These allegations must be tested to determine if this is actually the case and the Commission should hold a full and open process so that it may receive all relevant evidence on this issue rather than relying on one-sided unproven allegations.

20. NuVox meets the second part of the *Agrico* test as well. The second prong of *Agrico* requires that the injury be of the type this proceeding is designed to protect. In Order No. PSC-06-0033-FOF-TP¹⁰ (Sprint Nextel Order), the Commission clearly articulated that the standard to be applied in dockets like this is one of “public interest.”

The Commission found:

. . . [W]e believe that a public interest standard may be applied to our decision under Section 364.33, Florida Statutes. Section 364.01, Florida Statutes, appears to provide this Commission some guidance in the approval process, in that we can reject an application for transfer of control if, after reviewing the relevant information, it finds that the transaction would not be in the public interest.¹¹

21. Among other things, section 364.01(4) charges the Commission to:

- Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices;
- Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure availability of the widest possible range of consumer choice in the provision of all telecommunications services;
- Promote competition by encouraging innovation and investment in telecommunications markets;
- Encourage all providers of telecommunications services to introduce new or experimental telecommunications services;

⁹ *Id.* at pp. 20-25, ¶¶ 50-59.

¹⁰ 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 acknowledgement of transfer of control of Sprint Long Distance, Inc. holder of IXC Registration No. TK00-1, from Sprint Nextel Corporation to LTD Holding Company, Docket No. 050551-TP.

¹¹ Sprint Nextel Order at 6.

- Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior.

These are all areas in the zone of interest into which the Commission must inquire to determine if this transaction is in the public interest. The bald allegations of the Joint Application are insufficient to support a public interest determination. Rather such claims must be tested in an evidentiary hearing.

Disputed Issues of Material Fact

22. NuVox asserts that material issues of disputed fact include, but are not limited to,:

- Whether this transaction is in the public interest;
- Whether this transaction will adversely impact telecommunications competition in the state of Florida;
- Whether this transaction will impact the ability of telecommunications providers to purchase services at reasonable rates;
- Whether this transaction will impact the introduction of new and innovative telecommunications services products.

Ultimate Facts

23. NuVox asserts that ultimate facts alleged include, but are not limited to, the fact that this transaction is not in the public interest.

Hearing Demand

24. NuVox requests that the Commission conduct an evidentiary hearing pursuant to section 120.569, Florida Statutes, on the Joint Application.

WHEREFORE, NuVox requests that:

- a) its Petition to Intervene be granted;
- b) it be permitted to participate in this docket as a full party;

- c) the Commission conduct an evidentiary hearing on the Joint Application; and
- d) the Commission grant such other relief as is necessary.

s/ Vicki Gordon Kaufman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition to Intervene was provided by electronic and U.S. Mail this 4th day of May 2006 to the following:

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