BEFORE THE FLORIDA 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

Filed: July 14, 2006

JOINT CLECS' PROTEST OF PROPOSED AGENCY ACTION

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 (Xspedius) (collectively, Joint CLECs), pursuant to rule 28-106.201, Florida Administrative Code, hereby protest Order No. PSC-06-0531-PAA-TP (*PAA Order*) in which the Commission proposes to approve the application for indirect transfer of control of telecommunications facilities from BellSouth Corporation (BellSouth) to AT&T Inc. (AT&T). If the transaction is completed, BellSouth will be a wholly-owned subsidiary of AT&T and AT&T will control BellSouth.[1] In support of their protest, Joint CLECs state:

[1] *PAA Order* at 2.

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BACKGROUND

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

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

The docket number is: Docket No. 060308-TP. Joint CLECs received notice of the Commission's decision via a fax of the *PAA Order* on June 23, 2006.

2. ITC^Delta Com's address is:

ITC^DeltaCom Communications, Inc.
1791 O.G. Skinner Drive, Suite 400
West Point, GA 31833

3. NuVox's address is:

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

4. XO's address is:

XO Communications Services, Inc.
5904A Hampton Oaks Parkway
Tampa, FL 33610

5. Xspedius' address is:

Xspedius Management Co. Switched Services, LLC
Xspedius Management Co. of Jacksonville, LLC
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6. The names and addresses of Joint CLECs' representatives in this proceeding are:

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7. NuVox is a facilities-based carrier certified by this Commission as a competitive local exchange company operating in the State of Florida. NuVox provides telecommunications services in the state.

8. XO is a facilities-based carrier certified by this Commission as a competitive local exchange company operating in the State of Florida. XO provides telecommunications services in the state.

9. Xspedius is a facilities-based carrier certified by this Commission as a competitive local exchange company operating in the State of Florida. Xspedius provides telecommunications services in the state.

10. ITC^DeltaCom is a facilities-based carrier certified by this Commission as a competitive local exchange company operating in the State of Florida. ITC^DeltaCom provides telecommunications services in the state.

11. Joint CLECs protest the preliminary action of the Commission approving the transfer of control from BellSouth to AT&T on the grounds that such transfer of control, without certain conditions and limitations, is not in the public interest.

GROUNDS FOR PROTEST

12. On March 31, 2006, AT&T and BellSouth (Joint Applicants) filed a "Joint Application for Approval of Indirect Transfer of Control of Facilities" with the Commission. In this filing, Joint Applicants sought approval of transfer of control of telecommunications facilities from BellSouth to AT&T. The Joint Applicants alleged in their Application that "the public interest will be served and Florida consumers will reap the benefits of this merger…."[2] In addition, Joint Applicants alleged that the transfer "will have no adverse effect on service to consumers in Florida"[3] and that the transfer "will have no adverse impact on competition."[4]

[2] Joint Application. at 2, ¶ 5.
[3] *Id.* at 10.
[4] *Id.* at 20. In fact, Joint Applicants assert that the "evidence" on this point is "irrefutable." *Id.* at 20, ¶50.

13. In the *PAA Order*, the Commission properly noted that section 364.01, Florida Statutes, requires it to apply a "public interest" standard to transfer requests.[5] However, Joint Applicants failed to prove that the transfer satisfies that standard.[6] Further, the Commission, in relying on section 364.01 for its public interest review authority, apparently relied on only ***one*** of numerous subsections directly applicable to this transaction. The Commission noted that it is to exercise its jurisdiction "to protect 'the public health, safety, and welfare' as it relates to basic local telecommunications services."[7] While this is certainly the case, section 364.01 encompasses many other public interest requirements which the *PAA Order* fails to address or consider.

14. In addition to the subsection in section 364.01 upon which the Commission relies in the *PAA Order*, section 364.01 also *requires* the Commission to:

- 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;[8]
- Promote competition by encouraging innovation and investment in telecommunications markets;[9]
- Encourage all providers of telecommunications services to introduce new or experimental telecommunications services;[10]
- Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior.[11]

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[5] *PAA Order* at 3.
[6] While Joint Applicants have asserted, without proof, certain benefits, such as "increased video competition," there has been no demonstration of any benefits that will accrue to any of the merged company's customers – residential, business or wholesale -- through more choice or lower prices. In fact, the benefits Joint Applicants list appear to be benefits to the merged company, not to the merged company's retail or wholesale consumers.
[7] *PAA Order* at 3-4.
[8] § 364.01(4)(b).
[9] § 364.01(4)(d).
[10] § 364.01(4)(e).
[11] § 364.01(4)(g).

15. As the Attorney General of Florida stated in his correspondence to the Commission regarding this matter:

> [W]hen evaluating the impact of any such merger, due regard must be given to the maintenance of competitive markets and the protection of all consumers.[12]

The Attorney General further said that:

> By statute, this Commission is charged with ensuring the availability of service at reasonable prices, and encouraging competition in the wireline market so that consumers will have the widest possible range of choices among services and providers.[13]

16. However, the Commission's *PAA Order* fails to address any of the above statutory requirements and how they will be impacted by the requested transfer. The Commission narrowly, restrictively and impermissibly interpreted its public interest review to encompass only "the public health, safety, and welfare as it relates to basic local telecommunications services" and further limited that review to only the "financial, management, and technical capabilities of the Applicants . . . ."[14]

17. Such a review is far too narrow for the transaction at issue. It wholly fails to consider or address the many other pertinent public interests issues, such as the impact of this huge transaction on the competitive marketplace which serves end users. The proposed transaction will have broad reaching impact on the telecommunications market in Florida, which the Commission has failed to consider but which it must consider if it is to apply the appropriate public interest standard. For example, Joint Applicants have failed to demonstrate that allowing the largest telecommunications merger in the history of the state and reassembling a substantial portion of the Bell legacy system will not harm

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[12] Correspondence from Attorney General Charlie Crist to Ms. Lisa Polak Edgar, Chairwoman at 1, June 19, 2006 (*Attorney General Letter*). The Attorney General's concerns are not addressed in the *PAA Order*.
[13] *Id.* at 2.
[14] *PAA Order.* at 4.

competition,[15] by, for example, reducing competitive alternatives, increasing market concentration, and increasing prices throughout the state. As the Attorney General noted: "other competitors must remain in the market to offer [customers] real, cost-effective options."[16]

18. Just this week, in a move that may signal additional federal scrutiny of the AT&T/BellSouth proposed merger, U.S. District Judge Emmet Sullivan held a hearing pursuant to the Tunney Act to begin review of the former SBC Communications, Inc.'s takeover of AT&T Corp. Judge Sullivan could decide whether to impose new conditions on the SBC/AT&T merger. According to Judge Sullivan, on July 25th, he may announce whether he will require additional hearings and call in expert witnesses and government officials who initially scrutinized the transactions. Judge Sullivan questioned whether these mergers had been in the public interest. In his Order setting a hearing, which was held on July 12th, he specifically asked the parties to be prepared to address, among other matters, the following issue:

> Through the eyes of a layperson, the mergers, in and of themselves, appear to be against public interest given the apparent loss in competition. In layperson's terms, why isn't that the case?[17]

Judge Sullivan repeatedly stressed during the July 12th hearing that he was "not a rubber stamp." The public policy implications of this merger for Florida are significant and certainly worthy of the scrutiny that would be afforded by an evidentiary proceeding in this case. Joint CLECs urge this Commission to follow Judge Sullivan's example and not

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[15] Joint Applicants have simply filed pages of untested assertions.

[16] *Attorney General Letter* at 1.

[17] *United States of America v. SBC Communications, Inc. and AT&T Corp*, Civil Action No. 03-2512 (EGS); *United States of America v. Verizon Communications, Inc. and MCI, Inc.*, Civil Action No. 03-2513 (EGS), Order (July 7, 2006), at 3. Order attached as Exhibit A. *See also*, New York Times article and Wall Street Journal article describing the proceedings. Exhibit B.

simply "rubber stamp" the enormous, industry-changing transaction that this proposed merger represents. The merger's effect on competition is critical to the Commission's public interest review.

19. Thus, the Commission must review each of the statutory standards listed above in an evidentiary proceeding to determine if the public interest test has been met; however, the *PAA Order* fails to analyze or apply these standards to the proposed transaction or to consider the imposition of conditions on the transaction which would help ensure compliance with these standards.

20. Though several parties have sought to intervene in this docket and to formally oppose the merger or to oppose the merger without certain conditions, the Commission has not considered the positions of such parties. Moreover, the Commission has failed to require that Joint Applicants' claims regarding alleged public interest benefits and lack of harm to competition be subjected to the rigors of cross-examination. Considering the magnitude of the proposed merger (one of the largest in U.S. history), its impact on a large majority of Floridians – both residential and business customers -- and the filings in opposition, the Commission should hold a public hearing in this matter. At such a hearing the Commission should hear from interested members of the public, consider testimony from Joint Applicants and any intervenors, and judge for itself the merits of Joint Applicants' case, based on cross-examination and questions from the Commissioners, Staff and the parties. Failure to set this matter for hearing would constitute an unacceptable refusal by the Commission to seriously assess the public interest merits of the proposed merger and of proposed conditions.

21. BellSouth will no doubt tout recent approvals of the proposed transfer in Tennessee and Louisiana. With respect to Tennessee, Joint CLECs would point out that, unlike the process used in this case, a full evidentiary hearing was held before the Directors of the Tennessee Regulatory Authority regarding Joint Applicants' transfer request. Though the transfer was approved on a 2 to 1 vote, during deliberations, Director Jones said:

> The intervenors were compelling in my opinion in their testimony that they potentially could experience disadvantage and that no matter what the nature of competition in a particular Tennessee market, the transfer will make it more difficult postmerger for a competitor to access that market.
>
> . . .
>
> It is only through the imposition of safeguards on access to the last mile and other incumbent controlled facilities that the current environment which I have concluded encourages competition without regard to technology will flourish. Moreover, the imposition of conditions to approval will not hamper the merged entities' freedom to provide consumers the benefits set forth as a justification for this agency's approval of the transfer. In fact, past megamerger conditions involving AT&T have not dampened the approval process but have sought to strengthen the competitive environment and consistent with the state of Tennessee's declaration of telecommunications policy will in my opinion do so here.
>
> . . .
>
> [T]he transfer should be approved pursuant to Tennessee Code Annotated Section 65-4-113 contingent upon approval by the Federal Communications Commission and completion of the investigative processes of the Department of Justice and Federal Trade Commission, but that conditions should be placed on the incumbent to ensure the continuation of quality service and an environment that permits the level of competition that Tennessee has enjoyed over the past ten years. It is further my opinion that the Authority should defer any decision establishing conditions until this transaction is addressed by federal agencies.[18]

[18]Transcript Excerpt of Tennessee Regulatory Authority Conference, Docket No. 06-00093, July 10, 2006 at 5-6. Exhibit C.

The same evidence that one third of the Directors in Tennessee found compelling regarding the negative effects on competition from the proposed transaction will never even be heard or considered by this Commission unless an evidentiary hearing is held in this matter.

22. Though Louisiana did not conduct a hearing on the transfer, it did accept comments from interested parties and supporting affidavits. In Louisiana, though the transfer was approved, the Commission voted to investigate many of the issues the CLECs raised, including a "fresh look" window for consumers.[19] Further, the Louisiana vote was 4 to 1, with one Commissioner voting not to approve the transfer at all, calling it "anti-consumer."[20] This Commission should clearly conduct a hearing to determine, after hearing the evidence, whether it has similar concerns to those expressed by Commissioners in other BellSouth states.

SUBSTANTIAL INTERESTS

23. The substantial interests of Joint CLECs are affected by any Commission action approving the transfer of control from BellSouth to AT&T without a thorough investigation as to how the proposed transaction will affect competitors, the competitive marketplace, and the ultimate provision of telecommunications services to end users.[21] Further, in the event that the transfer is approved, Joint CLECs' substantial interests will

[19] Motion approved by Louisiana Public Service Commission, Docket No. U-29427, July 12, 2006. Exhibit D. Certainly, the Florida Commission has authority to open a docket on its own to investigate the competitive concerns which the proposed transfer implicates.

[20] See July 13, 2006 article in The Times-Picayune at http://www.nola.com/enter/index.ssf?/business/t-p/index.ssf%3f/base/money-1/115279169899340.xml&coll=1.

[21] Joint Applicants will no doubt argue that Joint CLECs have not met the requirements which would entitle them to a hearing in this matter. However, under Joint Applicants' view, it is doubtful that *anyone* would be permitted to participate in this case. Unlike other transfer of control applications, approval of the one at issue in this docket will affect the state of competition in Florida, particularly in the business market in which Joint CLECs compete. The Commission should solicit and consider the views of those participating in the Florida market.

be affected if the transaction is approved without the imposition of appropriate conditions to ensure that there is a viable competitive market in Florida. The proposed transfer raises issues which will directly impact Joint CLECs and which are directly related to Joint CLECs' businesses and on-going operations in the state of Florida, including, but not limited to, the undue competitive advantages that Joint Applicants will have in the marketplace if the proposed transfer is approved.

24. If this transaction is approved, one of the most vigorous competitors to BellSouth's monopoly power in Florida – AT&T -- will be silenced. This competitor will not only be effectively and permanently removed from the marketplace, but it will be reincarnated as and combined with a regional Bell operating company. Not only will this loss affect Florida consumers, but it will also further exacerbate the lack of competitive network facilities available to CLECs in Florida. AT&T competes today with BellSouth to provide special access services to CLECs in some areas of Florida. These competitive options will disappear after the merger. The combined resources of AT&T and BellSouth will surpass by many magnitudes all other telecommunications competitors, resulting in the death knell for competition in this state – despite the fact that the Florida Legislature has clearly made the competitive market place an important goal of Chapter 364, Florida Statutes. The proposed transfer will immediately and negatively impact Joint CLECs' ability to compete in the Florida market. It will result in a huge market consolidation that will reduce consumer choice, on both a retail and wholesale level and harm Joint CLECs' ability to compete in the consolidated market.

25. In Order No. PSC-98-0562-PCO-TX[22], the Commission found MCI (a competitor) to be an appropriate party in a certification proceeding involving BellSouth's subsidiary, BellSouth BSE, because MCI "alleged an immediate threat of harm"[23] from a PAA Order that proposed to grant a certificate to BellSouth BSE to enable it to provide long distance service. In this instance, the merger and consolidation of two huge telecommunications giants poses an immediate threat of harm to Joint CLECs in Florida.

DISPUTED ISSUES OF MATERIAL FACT

26. 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;
- Whether this transaction will result in an inappropriate resource imbalance between the merged companies and other telecommunications providers;
- Whether, if the transfer is approved, conditions should be placed on the transfer;
- What post-transfer conditions are appropriate, if the transfer is approved.

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[22] *In re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc.*, Docket No. 971056-TX, Order No. PSC-98-0562-PCO-TX (Apr. 22, 1998).
[23] *Id.* at 3.

ULTIMATE FACTS ALLEGED

27. Ultimate facts alleged include, but are not limited to, the fact that this transaction is not in the public interest and thus the transfer should not be approved, unless appropriate post-transfer conditions are imposed on the merged company.

STATUTES AUTHORIZING RELIEF

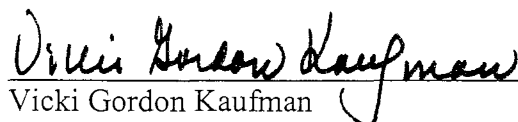
28. Joint CLECs are entitled to relief under Chapter 120 and Chapter 364, Florida Statutes, and Chapter 25-22, Florida Administrative Code.

WHEREFORE, Joint CLECs protest the *PAA Order* proposing to approve the transfer of control. Joint CLECs request that the Commission:

a. hold an evidentiary hearing pursuant to sections 120.569, .57, Florida Statutes, on the issue of whether approval of transfer of control is in the public interest;

b. determine the appropriate conditions to impose on the transfer of control, if it is approved; and

c. grant such other relief as is necessary and proper under the circumstances.



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Counsel to Joint CLECs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Protest of Proposed Agency Action was served by hand delivery (*), U.S. Mail, and electronic mail this 14th day of July 2006 to the following:

(*) Patrick K. Wiggins
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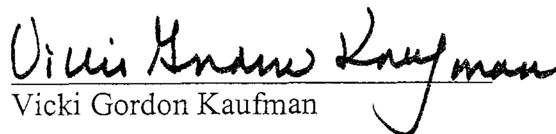

Vicki Gordon Kaufman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. SBC COMMUNICATIONS, INC. and AT&T CORP. Defendants.	)	Civil Action No. 03-2512 (EGS)
UNITED STATES OF AMERICA Plaintiff, v. VERIZON COMMUNICATIONS, INC. and MCI, INC. Defendants.	)	Civil Action No. 03-2513 (EGS)

O R D E R

A motions hearing is currently scheduled for July 12, 2006, at 9:00 AM. That hearing shall be organized and conducted in the following manner. The Court hereby

ORDERS that the principal parties to the above-captioned cases, United States, SBC Communications, Inc. ("SBC"), and Verizon Communications, Inc. ("Verizon") shall each have 45 minutes to make their principal arguments as to why the Court

EXHIBIT A

shall approve the government's Proposed Final Judgments ("PFJs"); and it is

FURTHER ORDERED that the *amici curiae*, COMPTEL and ACTel, shall each have 45 minutes to make their principal arguments as to why the PFJs are not in the interest of the public; and it is

FURTHER ORDERED that all of the principal parties and both *amici curiae* shall each have 15 minutes to respond to any arguments presented by any of the parties; and it is

FURTHER ORDERED that the parties are to consider the following questions in preparing for the hearing. However, these questions and areas of inquiry neither reflect the Court's intent to limit the scope of a party's presentation at the hearing nor reflect the Court's intent to limit the scope of the Court's inquiry at the hearing.

(1) What authority, if any, does the Court have to question the scope of the government's Complaints in these two case?

(2) What authority, if any, does the Court have to inquire of the government as to what other alternative remedies it (and the defendants) considered and why those alternatives were rejected in view of the remedies suggested?

(3) What weight should the Court give to the legislative history of the amended Tunney Act, 15 U.S.C. §16, in its determination of what the appropriate standard of review is under the 2004 amended Tunney Act?

(4) The government and the defendants contend that the Court should continue to be deferential to the government in its Tunney Act review. Is that consistent with the legislative history of the amended Tunney Act, which purport to overturn this Circuit's precedents that employed what Congress considered to be too deferential a standard in evaluating consent decrees?

(5) What specific evidence is the government relying on for its assertion that its proposed remedies would replace the competition that would be lost as a result of the two mergers?

(6) Has the government provided the Court with sufficient information for it to make an independent determination as to whether entry of the proposed consent decrees is in the public interest? If not, what other information should the government have provided to the Court?

(7) What weight, if any, should the Court give to the findings of the FCC as related to these two mergers?

(8) Through the eyes of a layperson, the mergers, in and of themselves, appear to be against public interest given the apparent loss in competition. In layperson's terms, why isn't that the case?

(9) Why isn't the government's selected remedy broader in time - i.e. IRUs longer than ten years - and in substance - i.e. focus on the transport as well as the last-mile connections?

(10) What consideration should the Court give the arguments of the Attorney General of New York, Elliot Spitzer, that the mergers will adversely affect digital subscriber lines ("DSL") and the Internet backbone?

(11) What criteria did the government use in determining which buildings should be covered by the PFJs?

IT IS SO ORDERED.

SIGNED: EMMET G. SULLIVAN
UNITED STATES DISTRICT COURT
JULY 7, 2006

The New York Times
nytimes.com

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July 13, 2006

Quick Approval of Phone Deals Uncertain

By STEPHEN LABATON

WASHINGTON, July 12 — Lawyers for the nation's two largest telephone companies and the Justice Department urged a federal judge on Wednesday to swiftly approve the antitrust settlements that permitted SBC Communications to acquire AT&T and Verizon to buy MCI.

But the federal district judge, Emmet G. Sullivan, rebuffed the request and repeatedly emphasized that he was "not a rubber stamp."

In a courtroom packed with telecommunications lawyers, analysts and major investors, Judge Sullivan spent the day trying to figure out the extent of his authority. He indicated through his questioning that he might hold more extensive hearings and take testimony from experts and government officials before concluding whether the deals were in the public interest.

But in what appeared to be a partial victory for the two large phone companies, the judge also suggested that he would limit the scope of the proceedings, not permit extensive pretrial fact-finding known as discovery, and not embark on an attempt to rewrite the settlements.

A federal law, the Tunney Act, requires a federal judge to review antitrust deals between the government and companies before deciding whether they are in the public interest. The law was adopted in the Watergate era after a scandal involving political interference at the antitrust division. The Tunney Act was weakened by a court decision in the 1990's in a case involving Microsoft, but strengthened two years ago by Congress.

The proceedings by Judge Sullivan represent the first time a district court has significantly scrutinized a major deal under the revisions to the Tunney Act — in this case, the two largest telephone acquisitions in American history. In both deals, the government forced relatively modest sales of some assets before approving them.

The two deals have already closed and even the small rival companies that continue to challenge them do not expect that the judge will have the ability to unwind them.

But lawyers for the large phone companies and the Justice Department have urged the judge to limit any further hearings, and it would be a significant political and legal setback for the antitrust division if the judge were to find that the deals were against the public interest.

EXHIBIT B

The ruling could also affect the administration's review of the proposed purchase of BellSouth by AT&T, the renamed company formed by the acquisition of AT&T by SBC.

At a time when neither the Bush administration nor Congress has shown much interest in vigorous antitrust enforcement, the proceedings by Judge Sullivan have stood in marked contrast, even though their outcome is uncertain. It was not lost on some of the lawyers that the review was being undertaken in the same courthouse where Judge Harold Greene of Federal District Court spent more than a decade supervising the telephone industry as he oversaw the breakup of AT&T.

But Judge Sullivan's options are far more limited, and telecommunications lawyers at the hearing said that the challengers to the deals — smaller telephone rivals and the New York attorney general, Eliot Spitzer — faced an uphill battle even though they drew a judge who seemed willing to consider taking an aggressive role in considering the consent decree.

The judge struggled through the day to figure out his proper role in light of the 2004 changes to the Tunney Act. He repeatedly pressed the lawyers about how much authority he had to question the deals, whether he could hold evidentiary hearings and how broadly he could inquire into how the Justice Department had performed its job.

At one point, he said the court's role "is to consider everything that the government considered," but at another, he agreed with the lawyers for the large telephone companies that he would not start a review from scratch and that he could not look at evidence beyond what was contained in the consent decrees.

"I'm just trying to properly define what this court's obligation is to do," he said.

"It may well be that at the end of this hearing the court is satisfied that no further review is necessary," he said. "I have doubts about that. I have doubts about that."

The companies' lawyers said that the judge had little authority to scrutinize the deals and that any effort to consider anything beyond the actual allegations in the consent decrees would violate the constitutional separation of powers between the executive branch and the judicial branch.

But the lawyers representing smaller rival companies encouraged him to dig further. Gary L. Reback, a lawyer representing one group of rivals, the Alliance for Competition in Telecommunications, said that the government had ignored clear evidence that the deals would substantially reduce competition and that prices had already begun to rise in certain markets. Instead, he said, the government proposed a modest remedy that would do nothing to preserve competition and keep prices low.

"It is as if the government is standing there in front of an elephant and that instead of confronting this beast, it's looked at its toenail," Mr. Reback said.

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July 13, 2006

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Judge to Review Phone-Merger Pacts

Scrutiny of Antitrust Terms May Impede Future Tie-Ups; A Test of Strengthened Law

By DIONNE SEARCEY and MARK H. ANDERSON
July 13, 2006; Page A7

In a hearing that may raise questions about **AT&T** Inc.'s planned takeover of **BellSouth** Corp., a federal judge said he would extensively review the antitrust agreements in two recent megamergers of Bell phone companies and long-distance companies.

U.S. District Judge Emmet Sullivan is reviewing **Verizon Communications** Inc.'s acquisition of MCI Inc. as well as the former SBC Communications Inc.'s takeover of AT&T Corp. (SBC adopted AT&T's moniker to become AT&T Inc.)

The judge could decide whether to impose new conditions on the deals by Verizon and AT&T. He said that on July 25 he may announce whether he will require additional hearings and call in expert witnesses and government officials who initially scrutinized the deals.

Both mergers closed months ago, and the new companies are fully operational. It isn't likely the judge has legal authority to outright undo the deals, say attorneys. But his actions could impede future mergers, including AT&T's planned takeover of BellSouth.

Analysts have expressed concern about questions the judge has raised about the mergers. A.G. Edwards Tuesday downgraded BellSouth to "sell" from "neutral," saying the merger with AT&T "may face greater

than expected regulatory scrutiny," said analyst Kent Custer.

Courts have more authority to review antitrust agreements under Congress's 2004 bolstering of the Tunney Act, a response to criticism that many judicial reviews were largely perfunctory. Yesterday's hearing marked one of the most significant tests of the strengthened law.

The hearing was limited to a review of the consent decree between the telecom companies and the Justice Department. Justice officials approved the deals on the condition that AT&T and Verizon opened up their fiber lines to new competitors in some of their buildings.

The judge said he had doubts whether the antitrust agreements fully addressed public-interest concerns about the mergers, though he said he may find the government's actions to be satisfactory.

Lawyers for the Justice Department and the phone companies said they didn't believe changes in the law require the judge to do an expansive review of the government's merger decisions.

Two groups representing Bell competitors as well as New York Attorney General Eliot Spitzer have challenged the mergers, arguing that the conditions imposed by the Justice Department failed to boost competition. "These are bad deals," said Gary Reback, an attorney representing groups of competitors who in the mid-1990s persuaded the Justice Department to investigate Microsoft Corp. for antitrust violations.

AT&T and Verizon could appeal a ruling not to their satisfaction, a process that could take months.

AT&T has said it expects to close its BellSouth deal by the end of the year and that the merger would be on track regardless of the judge's decision. Legal analysts, however, said it could be delayed as federal agencies await a definitive outcome of the hearings or more carefully review the merger.

"What the judge writes will be a good road map for future consent decrees," John Thorne, deputy general counsel for Verizon, said after the hearing.

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1 BEFORE THE TENNESSEE REGULATORY AUTHORITY
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9 TRANSCRIPT OF EXCERPT OF AUTHORITY CONFERENCE
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Monday, July 10, 2006
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12 IN RE: DOCKET NO. 06-00093
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Reported By:
25 Teri A. Campbell, RPR, CCR
0002
1 (The aforementioned Authority
2 Conference came on to be heard on Monday, July 10,
3 2006, beginning at approximately 1:00 p.m., before
4 Chairman Sara Kyle, Director Eddie Roberson, Director
5 Pat Miller, and Director Ron Jones. The following is
6 an excerpt of the proceedings that were had, to-wit:)
7
8 MS. DILLON: Next we have Docket No.
9 06-00093, BellSouth Telecommunications, Inc. AT&T
10 Inc.'s proposed merger with BellSouth Corporation.
11 Consider joint application.
12 CHAIRMAN KYLE: This matter came
13 before the Tennessee Regulatory Authority upon the
14 March 31st, 2006 joint filing of AT&T, Inc., BellSouth
15 Corporation, and BellSouth's certified Tennessee
16 subsidiaries regarding change of control in this
17 docket. In the joint filing, AT&T, Inc., BellSouth
18 Corporation, and BellSouth subsidiaries certificated to
19 provide telecommunication services in the state of
20 Tennessee requests the Authority's approval of the
21 change of control of the parent company of the
22 Tennessee subsidiaries of BellSouth Corporation to AT&T
23 as a result of an agreement and plan of merger executed
24 by AT&T and BellSouth Corporation on March 4, 2006.
25 Do my fellow directors have comments
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1 at this time?
2 CHAIRMAN JONES: Chairman Kyle, if
3 you're prepared to make a motion, I do have a motion.
4 CHAIRMAN KYLE: Fine. I do. I'll
5 just go ahead and put mine on the record.
6 The joint filing and the testimony
7 given during the recent hearing on this merger

EXHIBIT C

8 presented many interesting issues to consider. As a
9 director of the Tennessee Regulatory Authority, I must
10 weigh the evidence while being mindful of the
11 Authority's responsibilities to promote the public
12 interest and facilitate a more competitive environment
13 by ensuring that Tennesseans have the opportunity to
14 choose among many telecommunications providers that
15 will offer consumers and businesses both high quality
16 service and the latest in technological advancements.
17 After careful consideration of the
18 evidence presented by the parties in this proceeding
19 and contained in the record, I believe this transaction
20 will serve the public interest, will enhance
21 competition in communications service markets, and
22 should result in a stronger, more effective responsive
23 and innovative company better able to meet the needs of
24 Tennessee consumers.
25 With those thoughts in mind, I have
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1 reviewed the testimony offered in this case and have
2 come to the conclusion that this change of
3 control/merger of AT&T and BellSouth will indeed bring
4 many benefits to the state of Tennessee and its
5 citizens. Certainly, as evidenced by the witnesses,
6 these two companies have the managerial, technical, and
7 financial capabilities to provide telecommunication
8 services at the highest levels in Tennessee.
9 The intervenors in this docket have
10 asked the Authority to impose many conditions upon the
11 merger. After careful review, I do not believe that
12 any conditions are warranted. I do not see a
13 connection between the conditions the intervenors seek
14 to have the Authority impose upon the merger and the
15 resulting benefit to the consumer or competition. I
16 did not find any compelling evidence that this merger
17 will harm competition in any way.
18 I am always deeply concerned when any
19 proposed merger could potentially result in the loss of
20 jobs in Tennessee. However, after careful
21 consideration and review of the record in this docket,
22 I believe that the likelihood of any job losses
23 directly affecting BellSouth employees in Tennessee is
24 minimal. I believe the new entity has high
25 expectations for both business growth and employment
0005
1 growth in the future. Witnesses for the merger, while
2 recognizing the risks inherent in today's
3 telecommunications marketplace, certainly have clear
4 visions of a company needing more employees to help
5 forge the way into new fields of video and data.
6 Based on the record and the facts in
7 this docket, I find the joint filing is compliant with
8 requirements of Tennessee Code Annotated Section
9 65-4-113. I am of the opinion that the approval of
10 this merger/change of control is in the public interest
11 and should be approved with no conditions contingent
12 only upon approval by the FCC and the Department of
13 Justice. I so move.
14 And I also move that the applicants be
15 required to file with the Authority any documentation
16 from the FCC or the Department of Justice regarding
17 subsequent action on the merger and/or change of
18 control. So move.

19 CHAIRMAN JONES: I have a different
20 outcome. But first I'd like to summarize exactly what
21 it is that I evaluated in this docket.
22 The first point that has to be
23 recognized is that AT&T's proposed merger with
24 BellSouth is a very, very big and very complex
25 transaction worth billions of dollars with many, many
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1 moving parts and considerations. Accordingly, several
2 federal agencies will commit a depth of resources in
3 considering this merger request. In Tennessee,
4 however, notwithstanding the sheer magnitude of the
5 proposed transaction, my evaluation is necessarily very
6 Tennessee centric, very Tennessee specific.
7 What that means is an attempt to
8 answer at a minimum the questions: Is the proposed
9 merger good for Tennesseans? Will Tennesseans be
10 better off postmerger, worse off postmerger, or the
11 same postmerger as they were premerger? Will the level
12 or balance of technological and competitive affluence
13 in Tennessee that has been painstakingly developed over
14 the last ten years or so become jeopardized by the
15 proposed merger or will they thrive? These are the
16 questions to be answered.
17 But, first, with respect to the
18 question of jurisdiction, it is my opinion that the
19 Authority has jurisdiction over this transaction
20 pursuant to Tennessee Code Annotated Section 65-4-113.
21 This section requires approval before a certificated
22 entity such as BellSouth Telecommunications, Inc. may
23 transfer all or any part of its authority to provide
24 service often referred to as a CCN to any corporation.
25 The BellSouth companies contend that this transaction
0007
1 does not include a transfer of a regulated utility CCN.
2 I disagree.
3 In the simplest case, Section 65-4-113
4 requires approval of transactions through which the
5 certificated entity relinquishes its right to provide
6 services and hands over its CCN to another entity. In
7 a complex transfer as we have here, the certificated
8 entity's ownership changes. In this case, the
9 certificated entity continues to provide service and
10 continues to be the named holder of the CCN, but the
11 transaction requires approval because the change of
12 ownership of the certificated entity results in a
13 transfer of the CCN to the new owner.
14 Thus, in the case before us, although
15 BellSouth Telecommunications, Inc. and BellSouth Long
16 Distance, Inc. will remain the named certificated
17 entities and will continue to provide service, control
18 over the CCNs will be transferred at least to some
19 degree to AT&T, Inc., the proposed new owner.
20 Therefore, approval is required.
21 Turning to the analysis of the
22 transfer under Section 65-4-113, I must consider three
23 factors: First, the suitability, financial
24 responsibility, and capability of AT&T, Inc. Second,
25 the benefit to the consuming public. And, third, the
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1 furtherance of the public interest.
2 The record establishes that AT&T, Inc.
3 is capable of controlling and is suited to control the

4 CCNs of the BellSouth Tennessee certificated entities.
5 AT&T, Inc. currently controls four other entities
6 certificated in Tennessee to provide telecommunications
7 services. Further, AT&T has the financial means to act
8 as the parent of the BellSouth Tennessee certificated
9 entities.
10 Consideration of the benefits of the
11 transaction to the consuming public is next. I view
12 this consideration very narrowly and without regard to
13 any potential harm to consumers as I will discuss that
14 aspect of this case later in my comments. AT&T, Inc.
15 and the BellSouth companies adamantly maintain that the
16 benefits to consumers will be great. Accordingly,
17 through these companies, consumers will receive more
18 effective disaster recovery efforts and enhanced
19 wireline, wireless, and video services through the
20 research efforts of AT&T labs in the integration of the
21 companies' networks and operations.
22 I must conclude from the evidence that
23 the proposed merger can likely result in such benefits
24 to the consuming public. This agency has on numerous
25 occasions recognized the advantages created through the
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1 combining of companies' resources.
2 The question now becomes whether the
3 proposed merger is injurious or harmful to the
4 consumers such that disapproval of the transfer or the
5 imposition of conditions is justified. The question
6 leads to the final consideration: Public interest.
7 In 1995, the Tennessee General
8 Assembly defined the term public interest in my opinion
9 through the declaration of the telecommunications
10 services policy in Tennessee Code Annotated Section
11 65-4-123. In that statute, the General Assembly
12 instructed this agency, quote, To foster the
13 development of an efficient, technologically-advanced
14 statewide system of telecommunications services by
15 permitting competition in all telecommunications
16 services markets, end quote.
17 The General Assembly further acclaimed
18 in this statute that our regulation, quote, Shall
19 protect the interests of consumers without unreasonable
20 prejudice or disadvantage to any telecommunications
21 service provider, end quote.
22 Thus, an action is in the public
23 interest for the purposes of telecommunications in
24 Tennessee if the action at a minimum permits
25 competition, protects consumer interests, and does not
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1 unreasonably disadvantage any telecommunications
2 service providers. With this standard in mind, I
3 evaluated the record in this case.
4 CLECs argue that the merger will
5 adversely affect competition for business customers and
6 thereby adversely affect the service provided to those
7 customers. The CLECs contend that the merged entity
8 will immediately acquire a market share of sufficient
9 size to allow it to force competitors out of the
10 business markets in Tennessee.
11 The CWA, AFL-CIO contends that job
12 loss and technical operation closures could harm
13 service quality. It is my opinion that while these
14 arguments raise substantial concerns, they alone do not

15 support denial of approval of the transfer of BellSouth
16 certificated entity CCNs to AT&T, Inc. The arguments
17 do, however, cause me to evaluate whether a need exists
18 to impose conditions on the transfer.
19 BellSouth asserts that conditions
20 should only be used to address concrete harms that are
21 a direct result of the merger. It is my opinion that
22 such a standard is far too rigid and fails to allow the
23 flexibility necessary for this agency to fulfill its
24 obligation to promote an environment that fosters and
25 sustains competition. If BellSouth's standards were
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1 adopted, it is likely, if not certain, that conditions
2 could never be justified under any circumstances.
3 AT&T, Inc. and the BellSouth companies
4 rely on studies and statistics used in similar merger
5 dockets along with the testimony of Dr. Aron to
6 establish that competition, particularly business
7 market competition, will not be adversely affected.
8 This evidence is compelling, but it does not address
9 the market dominance and resources that the merged
10 entities will immediately attain as a result of the
11 transfer.
12 The intervenors were compelling in my
13 opinion in their testimony that they potentially could
14 experience disadvantage and that no matter what the
15 nature of competition in a particular Tennessee market,
16 the transfer will make it more difficult postmerger for
17 a competitor to access that market.
18 In my opinion, Tennessee statute, the
19 declaration of telecommunications policy, imposes an
20 affirmative obligation to ensure that providers and
21 consumers alike suffer no direct, indirect, or
22 collateral disadvantage. Traditionally, competitors in
23 Tennessee are entitled to the same support as are
24 providers who are technologically differentiated.
25 It is only through the imposition of
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1 safeguards on access to the last mile and other
2 incumbent controlled facilities that the current
3 environment which I have concluded encourages
4 competition without regard to technology will flourish.
5 Moreover, the imposition of conditions to approval will
6 not hamper the merged entities' freedom to provide
7 consumers the benefits set forth as a justification for
8 this agency's approval of the transfer. In fact, past
9 megamerger conditions involving AT&T have not dampened
10 the approval process but have sought to strengthen the
11 competitive environment and consistent with the state
12 of Tennessee's declaration of telecommunications policy
13 will in my opinion do so here.
14 As to the arguments of the CWA,
15 AFL-CIO, I agree with the proposition that lost jobs
16 and operational closures can degrade the quality of
17 service received by customers. However, I'm unable to
18 find based on the record here that such a degradation
19 will or is likely to happen as a result of the merger.
20 The record is unclear as to the number of jobs that
21 will be lost in Tennessee or operations that will be
22 closed. Until further information which is in the
23 hands of AT&T, Inc. is received, necessary conditions,
24 if any, addressing this issue cannot be crafted.
25 Further, without this additional

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1 information, it cannot be determined that the
2 Authority's service quality rules alone afford
3 consumers sufficient protection. Thus, it is my
4 opinion that this issue be developed more fully in
5 future proceedings.
6 Based on the foregoing, it is my
7 opinion that the transfer should be approved pursuant
8 to Tennessee Code Annotated Section 65-4-113 contingent
9 upon approval by the Federal Communications Commission
10 and completion of the investigative processes of the
11 Department of Justice and Federal Trade Commission, but
12 that conditions should be placed on the incumbent to
13 ensure the continuation of quality service and an
14 environment that permits the level of competition that
15 Tennessee has enjoyed over the past ten years. It is
16 further my opinion that the Authority should defer any
17 decision establishing conditions until this transaction
18 is addressed by federal agencies.
19 In a 1930 speech, former President
20 Herbert Hoover said that, quote, Competition is not
21 only the basis of protection to the consumer but is the
22 incentive to progress, end quote. With his statement,
23 I agree. It is my hope that whatever the decision of
24 the panel today that the result is a marketplace of
25 technologically-advanced options for all types of

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1 consumers be they wholesale providers, retail, business
2 consumers, or residential subscribers. This is a
3 result mandated by the telecommunications services
4 policy of our state. I so move.
5 DIRECTOR MILLER: Based on the
6 representations made by BellSouth and AT&T in this
7 record, I've concluded that the merger has potential
8 for improving broadband deployment into rural areas of
9 our state by bringing to bear new technologies that are
10 not currently available to those customers. I also
11 think there's a potential for video services -- the
12 introduction of video services into this marketplace by
13 the merged company that offers the potential for
14 competition in the video market area that doesn't exist
15 today and would greatly benefit the consumers of the
16 state of Tennessee.
17 However, I have a hefty skepticism of
18 that deployment. When I was in third grade -- I think
19 that's about 1966 -- I went on a tour of a local
20 Western Electric plant and the centerpiece of that tour
21 was a preview of new AT&T technology to provide video
22 services. Well, my son graduated from third grade last
23 year and that technology hasn't been rolled out yet.
24 But based on the testimony in the
25 record and the new technology available through AT&T, I

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1 think that it would greatly serve the citizens of
2 Tennessee to have that technology available and in the
3 marketplace in Tennessee. I think that is -- will come
4 in the new future hopefully before my son's son
5 graduates from third grade.
6 And I think that deployment will
7 require an increase in the need for employees by
8 AT&T/BellSouth. I think that very much is in the
9 public interest especially to the citizens of the state
10 of Tennessee.

11 Finally -- well, first of all, I want
12 to address the conditions as set out by the intervening
13 parties. I find that there are adequate existing
14 safeguards in place today to protect the interests of
15 the competitors that are within our jurisdiction.
16 And, finally, the Attorney General's
17 Consumer Advocate Division's lack of participation in
18 this docket I think speaks volumes. It demonstrates
19 that they have little concern for the potential harm of
20 consumers of the state of Tennessee. And I agree with
21 that conclusion.
22 Therefore, I second Chairman Kyle's
23 motion and vote aye because, based on the record, I
24 believe this merger meets all the statutory
25 requirements and is in the public interest of all

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1 Tennessee consumers.
2 CHAIRMAN KYLE: Thank you.
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5 (Conclusion of exerpt.)
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1 REPORTER'S CERTIFICATE
2 STATE OF TENNESSEE)
3 COUNTY OF DAVIDSON)
4 I, Teri A. Campbell, Registered
5 Professional Reporter, Certified Court Reporter, and
6 Notary Public for the State of Tennessee, hereby
7 certify that I reported the foregoing proceedings at
8 the time and place set forth in the caption thereof;
9 that the proceedings were stenographically reported by
10 me; and that the foregoing proceedings constitute a
11 true and correct transcript of said proceedings to the
12 best of my ability.
13 I FURTHER CERTIFY that I am not related to
14 any of the parties named herein, nor their counsel, and
15 have no interest, financial or otherwise, in the
16 outcome or events of this action.
17 IN WITNESS WHEREOF, I have hereunto
18 affixed my official signature and seal of office this
19 11th day of July, 2006.
20

____

21 TERI A. CAMPBELL,
REGISTERED PROFESSIONAL
22 REPORTER, CERTIFIED COURT
REPORTER, AND NOTARY PUBLIC
23 FOR THE STATE OF TENNESSEE
24
My Commission Expires:
25 July 19, 2008

MOTION: I make a motion to adopt the Staff's Position Statement in this matter, and that this Commission issue a letter of non-opposition to the proposed merger, without prejudice to the authority of this Commission to make investigations and require any reasonably necessary change it may legally find to be in the public interest. I further move that we adopt Staff's recommendations with respect to factors 4, 12, 14, 15 and 18 of this Commission's General Order dated March 18, 1994. Specifically, those recommendations are as follows:

1. In the ongoing SQM review pending in Docket No. U-22252, Subdocket C, Staff is directed to seek comments on the addition of additional wholesale service quality measurements, with particular emphasis on modifying the *force majeure* provisions to ensure that BellSouth continues to provide parity service in such situations.

2. Additionally, Staff shall seek comments in pending docket No. U-24802, Subdocket A regarding the imposition of additional retail service quality measurements.

3. The Commission shall open a global rulemaking docket to address a number of concerns raised by the 3 CLEC interveners, particularly with respect to the creation of a "fresh-look window", and other *force majeure* related concerns. Staff anticipates any rules adopted by way of this docket shall be included in the *Local Competition Regulations.*

4. Assuming this merger is approved by all required agencies, both on the state and federal level, the Commission shall open post-merger a docket to ensure that Louisiana customers, both retail and wholesale, are protected by receiving the benefit of any conditions or concessions available in other jurisdictions. By way of this docket, the Commission can ensure that retail and CLEC customers receive the most pro-competitive options, whether they are offered in the former SBC or BellSouth regions.

Finally, and as part of this motion, this Commission wants to make it clear to the applicants that, in issuing a letter of non-opposition, we are in no way absolving BellSouth of its obligations implemented at the April 26, 2006 Commission meeting to report certain information regarding restoration efforts in New Orleans on a weekly basis. This Commission has asked and received assurances from BellSouth that it is committed to restoring service to the New Orleans area and communicating with those residents desiring telephone service. We expect BellSouth to continue to abide by those assurances and we will continue to monitor the reports and will take whatever action may be necessary to ensure that they do.

EXHIBIT D