ORIGINAL

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Subject: E-filing - Docket No. 060308-TP

Attachments: Response to Opposition for Lack of Standing 07.25.06.pdf

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Docket No. and title: 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 on behalf of: ITC^DeltaCom Communications, Inc. (ITC^DeltaCom), NuVox Communications, Inc. (NuVox), Time Warner Telecom of Florida, LP (TWTC), XO Communications Services, Inc. (XO), and Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC (Xspedius) (collectively, Joint CLECs)

Number of pages: 25

Document attached: Joint CLECs' Response to "Opposition for Lack of Standing"

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7/25/2006

ORIGINAL

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 25, 2006

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JOINT CLECS' RESPONSE TO "OPPOSITION FOR LACK OF STANDING"

ITC^DeltaCom Communications, Inc. (ITC^DeltaCom), NuVox Communications, Inc. (NuVox), Time Warner Telecom of Florida, LP (TWTC), 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 28-106.204(1), Florida Administrative Code, hereby respond to Joint Applicants' "Joint Response in Opposition for Lack of Standing." Joint Applicants' "opposition to" Joint CLECs' Protest of Order No. PSC-06-0531-PAA-TP (*PAA Order*) should be denied. In support of thereof, Joint CLECs state:

BACKGROUND

1. On May 22, 2006, AT&T Inc., BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance (Joint Applicants) filed a request

for approval of transfer of control among the various entities (Joint Petition). The Joint Petition seeking approval was 26 pages long and touted the many alleged benefits of the proposed transaction. Joint Applicants claimed that the transaction would have no adverse impact on the competitive marketplace.[1]

2. The Commission considered the application at its June 20, 2006 Agenda Conference. Numerous CLECs appeared to raise concerns with the transaction. The Attorney General of the State of Florida sent a letter to the Commission expressing his concerns regarding the transaction.[2]

3. Nonetheless, the Commission entered the *PAA Order* tentatively approving the transaction on June 23, 2006.

4. Joint CLECs timely protested the *PAA Order* on July 14, 2006.

5. On July 18, 2006, Joint Applicants filed a pleading seeking to dismiss Joint CLECs' protest.

JOINT CLECS' RESPONSE IS PROCEDURALLY APPROPRIATE

6. Joint Applicants have given their pleading the creative title of: "Joint Response in Opposition for [sic] Lack of Standing to Joint CLECs' and Time Warner's Protests and Petitions for Formal Proceeding" (Motion). Having thus named their pleading, Joint Applicants then assert that Joint CLECs may not file a response because they "have the burden of establishing standing...."[3] Throughout their pleading, Joint Applicants assert that the protest should be dismissed.[4]

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[1] Joint Petition at 20, ¶ 50.
[2] Correspondence from Attorney General Charlie Crist to Ms. Lisa Polak Edgar, Chairwoman, June 19, 2006 (*Attorney General Letter*).
[3] Motion at 1-2, n.3.
[4] For example, Joint Applicants assert the protests should be "summarily dismissed," Motion at 1-2, and that the Commission is required "to dismiss these petitions...." Motion at 8.

7. Whatever Joint Applicants may name their filing, it is clearly a motion to dismiss the Joint CLECs' protest.[5] As such, Joint CLECs are entitled to respond.

8. The Commission order[6] upon which Joint Applicants rely to support their claim that Joint CLECs may not respond to the motion to dismiss is not on point. In the cited proceeding, certain parties had filed a petition to intervene in a wastewater certificate proceeding. The utility responded to the petition objecting to the intervention and the intervening parties filed a memorandum in opposition to the response. The Commission recognized, as it has in many cases, that the memorandum in opposition constituted an unauthorized reply.

9. In this case, Joint Applicants have filed an affirmative pleading seeking to dismiss Joint CLECs' protest. Joint CLECs have responded herein; this is not an unauthorized "reply" but a response to Joint Applicants' motion.[7]

STANDARD FOR RULING ON A MOTION TO DISMISS

10. As discussed above, Joint Applicants have filed a motion to dismiss Joint CLECs' protest. This Commission has often recognized and articulated the standard for ruling on a motion to dismiss. *See*, *Varnes v. Dawkins*, 624 So.2d 349 (Fla. 1st DCA 1993). Pursuant to that standard, the Commission must take all of Joint CLECs' allegations as true. When this standard is applied, it is clear that the standing requirements have been satisfied.

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[5] *See,* rule 28-106.204(1), Florida Administrative Code, providing that [a]ll requests for relief shall be by motion." Joint Applicants' filing seeks affirmative relief, and thus is a motion, regardless of what it is named.

[6] *In re: Application for Certificate To Provide Wastewater Service*, Order No. PSC-04-0333-PCO-SU, Docket No. 020745-SU (March 30, 2004).

[7] In the cases that Joint Applicants rely on elsewhere to suggest that Joint CLECs' protest should be dismissed, objections to PAA protests were denominated and processed as motions to dismiss. *See, i.e.*, Order No. PSC-06-0033-FOF-TP; Order No. PSC-98-0702-FOF-TP.

JOINT CLECS HAVE STANDING TO PROTEST THE *PAA ORDER*

11. The thrust of Joint Applicants' filing is their claim that Joint CLECs lack standing to protest the *PAA Order*. They correctly articulate the two-prong test for standing set out in the *Agrico* case.[8] *Agrico* requires: 1. a showing of injury in fact of sufficient immediacy to warrant a hearing, and 2) a showing that the injury is of the type the proceeding is designed to protect.[9] Joint CLECs satisfy both parts of the *Agrico* test for standing.

Injury in Fact

12. The fallacy of Joint Applicants' position is illustrated by their parsing of the *Agrico* case. Under Joint Applicants' reading, it appears that *no one* – other than the applicants themselves (who are unlikely to protest the grant of approval they have requested) – can meet the first prong of the *Agrico* test. Joint Applicants assert that the *PAA Order* "directly and immediately impacts *only* the respective corporate parents of the regulated entities."[10] Such an assertion must be rejected out of hand.

13. It is undisputed that this transaction is the largest telecommunications merger to ever occur in the United States. It is further undisputed that Joint CLECs are participants in the Florida marketplace.

14. This transaction will create the largest telecommunications company in the country and in doing so have the effect of creating a telecommunications behemoth akin to the former Bell monopoly system. The new company will have over 70 million end user telephone lines, almost half of the total lines in the United States. It will control the

[8] *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981).
[9] *Id.* at 482.
[10] Motion at 9, fn. 12, emphasis supplied.

nation's largest wireless company, the best-funded VOIP company as well as additional wireless spectrum.

15. The combined resources of the new company will dwarf the resources of all other telecommunications competitors. The annual revenue of the largest regional competitive carrier in the BellSouth region – ITC^DeltaCom – is less than one half of one percent of the revenue of a combined AT&T and BellSouth. The new merged company will have a 30% nationwide market share of the customer segment primarily targeted by Joint CLECs – small and medium businesses.

16. It is not speculation to assert that this transaction will create a critical resource imbalance in the State of Florida between CLECs and the newly-created mammoth incumbent. The concentration of incumbent resources into one company will make it impossible for the negotiation and arbitration process of the Telecommunications Act of 1996 to result in reasonable agreements and prices. Even more than in the past, the new AT&T will hold all the cards in negotiations. This critical imbalance will make it exceedingly difficult for Joint CLECs to participate successfully in the Florida market and to bring choice and innovation to Florida consumers.

17. The size, scope and reach of the new merged company are facts, not speculation. Nor is it speculation to note that this expansion of the combined company's footprint, which will be unmatched by any other carrier, will further reduce competition for Florida business customers. It is also a fact that by combining AT&T and BellSouth, the largest competitor of BellSouth, AT&T, will no longer compete with BellSouth in the Florida market. These facts demonstrate that Joint CLECs will be significantly impacted by the transfer.

18. Joint CLECs are customers of BellSouth and as such will be substantially affected by the transaction as they depend on BellSouth to provide inputs to the services they provide to end users. As the dominant supplier of elements critical to Joint CLECs' provision of service, the merged company will have little incentive to make the needed elements available at fair and reasonable prices.

19. Joint Applicants' suggestion that problems resulting from the proposed transaction can be addressed after the fact in the complaint process does not ameliorate Joint CLECs' injury once the competitive harm has occurred.[11] In reality, any such after the fact remedy may well be too little too late. Joint CLECs need not wait for harm to actually occur before they have standing.[12]

Zone of Interest

20. Joint CLECs also meet the second prong of the *Agrico* test -- the "zone of interest" test. That is, the injury is of the type this proceeding is designed to protect.

21. In Order No. PSC-06-0033-FOF-TP[13] (*Sprint Nextel Order*), the Commission clearly articulated that the standard to be applied in transfer proceedings 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

[11] Motion at 3, 9, n. 11, 11.

[12] *See, i.e., Televisual Communications, Inc. v. Department of Labor & Security*, 667 So.2d 372 (Fla. 1st DCA 1995); *Professional Firefighters of Florida, Inc. v. Department of Health and Rehabilitative Services*, 396 So.2d 1194 (Fla. 1st DCA 1981). Though these cases deal with rule challenges, the standing principles are the same. *Boca Raton Mausoleum, Inc. v. Department of Banking and Finance*, 511 So. 2d 1060 (Fla. 1st DCA 1987).

[13] *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.

control if, after reviewing the relevant information, it finds that the transaction would not be in the public interest.[14]

22. Section 364.01 enumerates the powers of the Commission and the intent of the Legislature in enacting Chapter 364. Of particular relevance here is the Legislature's enunciation of the "public interest." The Legislature states:

> *The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest* and will provide consumers with freedom of choice, encourage technological innovation, and encourage investment in telecommunications infrastructure. The Legislature further finds that the transition from the monopoly provision of local exchange service to the competitive provision thereof will require appropriate regulatory oversight to protect consumers and *provide for the development of fair and effective competition. . . .*[15]

Thus, the Legislature has directed the Commission to consider impacts on local exchange competition when addressing issues of public interest.

23. In addition to the above direction, 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;

[14] *Sprint Nextel Order* at 6.
[15] Emphasis supplied.

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

Thus, these are all areas in the zone of interest which this proceeding is designed to protect. And these are all areas in which the Joint CLECs, as participants in the market, have a vital and compelling interest.

24. That this proposed transaction has clear public interest ramifications is also illustrated by the fact that the Attorney General of Florida is concerned with how this transaction will affect the competitive market:

> [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.[16]

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.[17]

25. Joint Applicants themselves recognize the need to address competitive concerns and spend many pages in their application discussing competitive issues; however, Joint Applicants' discussion does not provide the Commission with a complete or accurate picture of market issues. The Commission must hear from affected parties so that it can make an informed determination with all the facts before it.

26. Finally, as noted in Joint CLECs' protest, a federal judge recently considered the imposition of major modifications to the last two telephone mergers (SBC and AT&T, and Verizon and MCI). The judge questioned whether these mergers were in the public interest. The National Association of State Utility Consumer Advocates

[16] *Attorney General Letter* at 1.
[17] *Id.* at 2.

(NASUCA) has recently sought to participate in the federal court proceeding.[18] In its submission to the court, NASUCA noted that these merger transactions result in "re-monopolization of the nation's telecommunications network. . . ."[19] NASUCA expressed grave concern over the public interest implications of these transactions. One of the attachments to NASUCA's motion is a white paper describing the anticompetitive impact of the reformation of monopolies.[20] While Joint Applicants claim to be "mystified"[21] by discussion of this important and timely federal court proceeding, these proceedings are simply further evidence of the necessity for an appropriate public interest review *prior* to transfer approval. Whether these types of transfers, which vest huge market power in incumbents, are in the public interest, is a matter that requires close and critical examination.

Prior Commission Orders

27. As a preliminary matter, Joint Applicants' reliance on Order No. PSC-00-00421-PAA-TP (*MCI/Sprint Order*) must be rejected. This order was vacated in Order No. PSC-00-1667-FOF-TP. "Vacate" means: "to nullify or cancel; make void; invalidate <the court vacated the judgment>."[22] Because this order is a nullity and void, it may not be relied upon for any purpose. [23]

[18] Motion of the National Association of State Utility Consumer Advocates to Intervene for the Limited Purpose of Providing Consumer Views on the Public Interest and Memorandum of Points and Authorities, (*NASUCA Petition*), July 18, 2006. Exhibit A.
[19] *NASUCA Petition* at 8.
[20] See the following link for the full text of the white paper:
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6517584648
[21] Motion at 14.
[22] *Black's Law Dictionary* (8th Ed. 2004).
[23] Joint Applicants' contention that the vacation of this order has "no bearing on the Commission's decision or reasoning" therein, Motion at 5, n. 7, is astonishing and contrary to law.

28. The remaining two orders which Joint Applicants assert "require the Commission to dismiss"[24] Joint CLECs' protest of the *PAA Order* orders are readily distinguishable from the current application for a number of reasons.

29. First, as described above, the magnitude of the impact of this transaction on local exchange competition in the State of Florida is far greater and much different than the two applications upon which Joint Applicants rely. The transfer at issue here recreates much of the legacy Bell system here in Florida. In addition, the proposed transfer has the unprecedented effect of removing a vigorous competitor from the market and consolidating it (and its extensive resources) with an incumbent. That alone, distinguishes this case from the orders Joint Applicants cite.

30. Further, the two cases which Joint Applicants insist tie this Commission's hands are factually distinguishable. The first -- Order No. PSC-98-0702-FOF-TP (*MCI/WorldCom Order*) -- involved the consolidation of two CLECs – MCI and WorldCom to form MCI Communications Corporation. Neither of the entities involved in the transfer was an incumbent, like BellSouth. Nor did the new combined MCI company have anything close to the market power and scope that the merged BellSouth/AT&T company will have in the State of Florida.

31. The second order which Joint Applicants cite is Order No. PSC-06-0033-FOF-TP (*Sprint Nextel Order*). As in the *MCI/WorldCom Order*, the combined new company did not have the market power and scope that the merged BellSouth/AT&T company will have. The main issues the Communications Workers of America (CWA), the only entity to protest the order, raised regarding this transfer were a concern over

[24] Motion at 8.

service degradation and job loss by CWA members.[25] No challenge was raised regarding the competitive impact of the transaction.

32. Second, in the *Sprint Nextel Order*, issued approximately seven months ago, the Commission noted: "There is no case on all fours with the instant dispute."[26] For the factual reasons discussed above, the same is true of this transfer request – no Commission case has ever addressed a transaction of this size and scope.

33. Third, for the first time, in the *Sprint Nextel Order*, the Commission articulated, in some detail, its public interest jurisdiction. It relied explicitly on section 364.01 to inform its decision making on the public interest question. While Joint Applicants accuse Joint CLECs of "misunderstanding" the applicability of section 364.01 in this case and seeking somehow to expand its reach[27], the public interest considerations set out in section 364.01 are simply not limited in the way Joint Applicants wish.

34. The Commission's discussion in the *Sprint Nextel Order* does not confine the Commission's review to *only* section 364.01(4)(a). The Commission said:

> . . . .[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.[28]

[25] *Sprint Nextel Order* at 3.
[26] *Id.* at 5.
[27] Motion at 14.
[28] *Sprint Nextel Order* at 6.

Thus, Joint CLECs are not seeking to "circumvent" section 364.33, as Joint Applicants allege. Rather, the Commission's public interest review is informed by *all* the criteria in section 364.01(4).[29]

35. The Commission order which most closely fits this case is Order No. PSC-98-0562-PCO-TX (*BSE Order*).[30] In the *BSE Order*, 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"[31] 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.

36. Finally, Joint Applicants' attempt to analogize this transfer with that of other CLECs[32] must be rejected. The nature of those transfers, generally small CLEC consolidations or simply transfers to new owners, was totally different than the transaction before the Commission. These transfers did not implicate any competitive concerns and no objections to the transfers were raised.

37. Joint Applicants seek approval for this transfer of control. They have the burden to prove that this transaction is in the public interest. They have filed nothing with this Commission but unsubstantiated allegations.

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[29] In an Informal Advisory Opinion, the Attorney General had occasion to discuss the public interest requirements of the Sunshine Law. He noted that he would not read that law, which was enacted in the public interest, in a manner that would foreclose meaningful public participation. 2006 WL 820570 (Fla. A. G. Mar. 23, 2006). The case before the Commission is analogous. The Legislature clearly intended, as the Commission itself has recognized, that the Commission consider all public interest concerns in this type of transaction. Failure to allow meaningful participation would be inconsistent with its public interest charge.

[30] *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).

[31] *Id.* at 3.

[32] Motion at 14-15.

CONCLUSION

38. Joint Applicants' claim that the Florida Public Service Commission does not have the authority to hear from affected parties so as to gauge whether Joint Applicants have met the important public interest test for this transfer must be rejected. Joint CLECs' participation in this case is consistent with the state law on standing. Joint CLECs have demonstrated that approval of this transfer would cause them injury and they have further demonstrated that this injury is of the type this proceeding was designed to protect. Thus, Joint CLECs have standing to protect the *PAA Order*.

WHEREFORE, Joint Applicants' motion to dismiss Joint CLECs' protest of the *PAA Order* should be denied and this matter should be set for hearing.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint CLECs' Response to "Opposition for Lack of Standing" was served by electronic mail and U.S. mail this 25th day of July 2006 to the following:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **SBC COMMUNICATIONS, INC. and AT&T CORP.,** Defendants.	Civil Case No. 1:05-CV-02102 (EGS)
UNITED STATES OF AMERICA, Plaintiff, V **VERIZON COMMUNICATIONS, INC. And MCI INC.,** Defendants.	Civil Case No. 1:05-CV-02103 (EGS)

MOTION OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES TO INTERVENE FOR THE LIMITED PURPOSE OF PROVIDING CONSUMER VIEWS ON THE PUBLIC INTEREST AND MEMORANDUM OF POINTS AND AUTHORITIES

The NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES ("NASUCA"), with offices at 8380 Colesville Road, Suite 101, Silver Spring, Maryland 20910, pursuant to Federal Rules of Civil Procedure, Rule 24 (b)(1), and the Antitrust Penalties and Procedures Act, 15 U.S.C. §§16(b)-(h) (the "Tunney Act"), moves for permissive statutory intervention in the above-captioned consolidated

EXHIBIT A

cases. NASUCA seeks to intervene for the limited purpose of assisting the Court in making its public interest determination, by presenting the views of state utility consumer advocates on these mergers, in the attached comments.

NASUCA seeks by this limited intervention to have entered into this record NASUCA's submissions that were included in the record of the Federal Communications Commission ("FCC") review of these merger applications. The NASUCA submission includes facts specific to this merger and this industry, e.g., what post-merger markets will look like.

The submission includes a detailed analysis of the history and nature of this industry related to the merger applications, by nationally-recognized expert Dr. Lee Selwyn and his colleagues at the firm of Economics and Technology Inc. This expert analysis, presented as a paper entitled "Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Implosion of Competition," shows how the mergers under review here translate into market concentration greater than those that the United States Department of Justice ("DoJ") has previously rejected in other industries. Dr. Selwyn and his colleagues compiled and analyzed extensive data derived from industry reports and filings submitted to regulators, reports to investors, and surveys by disinterested third parties. NASUCA's submission, and the exhibit prepared by Dr. Selwyn, are directly relevant to the questions the Court posed in its order of July 7, 2006.[1]

[1] Dr. Selwyn has offered, pro bono, if the Court so desires, to review the record in this case, to appear before the Court for no more than one day, and to address, as best he can, any questions that the Court may wish to ask about the procedural, substantive or constitutional issues that may arise in connection with the Court's fashioning of an appropriate procedure for the Court's duty to make a public interest determination.

MEMORANDUM OF POINTS AND AUTHORITIES

NASUCA AND ITS INTEREST

NASUCA is a voluntary, national association of 44 consumer advocates in 41 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.[2] Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

NASUCA has extremely limited resources to expend on a vast number of complex proceedings at the FCC, including those resources required when seeking judicial review of FCC Orders. NASUCA's presence at the federal level is largely in the form of volunteer hours offered by NASUCA members who nonetheless retain the primary and demanding responsibility of representing consumers in proceedings in the state in which they are located. NASUCA's extensive filings at the FCC in this and other mergers (and those of its state members before state regulators reviewing these same mergers) strained resources available to the organization. In its ongoing effort to expend its limited resources prudently, NASUCA concluded that past and recent FCC and DoJ

[2] *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d).

decisions that evidence disregard for the public interest did not justify diverting additional time and effort to these mergers.

NASUCA was, however, heartened by press accounts that cited questions raised and concern about the public interested as expressed by this Court. Accordingly, NASUCA wishes to take all reasonable actions to ensure that the record here includes NASUCA's previous submissions, especially that of its expert, that were included in the FCC record.

NASUCA's members' interest in the protection of utility consumers makes NASUCA uniquely qualified to address the public interest implications of these mergers. No other party to these proceedings represents these interests.

Through various accounts, it has come to our attention that at the opening of this Court's July 12, 2006, Tunney Act hearing on the mergers of SBC/AT&T and Verizon/MCI (the "Bell mergers"), questions were raised regarding the apparent absence of consumer group representation at the hearing and the significance of that absence. We understand that some may have offered their supposition that consumer groups intended to signal to the Court by their non-presence that they were not troubled by the merger approval. NASUCA assures the Court that nothing could be further from the truth.

NASUCA and many of its individual members participated actively in state and federal proceedings **in opposition to** these Bell mergers, including the above-discussed comments filed at the FCC.[3] Our submissions and advocacy were essentially ignored by the FCC, and the substantial resources we expended on our effort appeared to us to have

[3] Given the nature of their formation under state law, NASUCA's members focus on activity at state and federal agencies like the FCC and the Federal Energy Regulatory Commission, hence do not typically become involved in Tunney Act proceedings.

been in vain, as the FCC imposed conditions on the mergers decidedly insufficient to protect consumer interests.[4]

We understand that the United States Department of Justice ("DoJ") has not been welcoming to consumer interests in previous telecommunications merger proceedings. We also understand that the DoJ has made clear in the instant matter its position that the Court's Tunney Act review is limited to the specific remedy adopted by the Department – a ten-year lease on facilities in a few hundred buildings across the country. The merging companies agree. All other issues, the Department and the companies have argued, are outside the scope of this proceeding – including, presumably, the numerous issues raised by NASUCA and its members in opposition to the Bell mergers. We believe that the DoJ and the companies are wrong in their interpretation of the limited scope of this review, but the DoJ's refusal to permit further examination of its failure to address consumer concerns helps explain consumers' disinclination to participate.

DISCUSSION OF RELEVANT PORTIONS OF THE LAW

Pursuant to §5(e) of the Tunney Act, 15 U.S.C. §16(e), the proposed final judgments pending in these cases may only be entered upon the Court's determination "that the entry of such judgment is in the public interest." In making its public interest determination, the Tunney Act authorizes the Court to take such action "as the court may deem appropriate," 15 U.S.C. §16(f)(5).

[4] Our profound disappointment with the FCC's treatment of the SBC/AT&T and Verizon/MCI merger proceedings is shown clearly by the very brief comments NASUCA recently filed on the proposed AT&T/BellSouth merger. A copy of those comments is also attached to this filing.

It appears that this Court has recognized that the 2004 amendments to the Tunney Act significantly enhance the Court's role in reviewing the Department's disposition of these mergers, and that its function is not merely to rubber-stamp the position of the DoJ. The law, of course, requires the Court in this proceeding to consider "any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest."[5] The law also requires the Court to consider "the impact of competition in the relevant market or markets, upon the public generally...."[6]

In furtherance of these duties, the Court issued its order of July 7, 2006. The Court's order raised, *inter alia*, the following questions:

> (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 the public interest given the apparent loss in competition. In layperson's terms, why isn't that the case?

We understand that concerns were raised at the July 12 hearing about the failure of the DoJ to provide the Court any meaningful data or information upon which an independent judicial review of the merger approval could be conducted.[7] NASUCA

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[5] 15 U.S.C. § 16(e)(1)(A).

[6] 15 U.S.C. § 16(e)(1)(B).

[7] As of the date of this Motion, no transcript of the July 12, 2006 hearing was available to NASUCA.

submits these comments and attachments in response to those concerns.[8] Should the Court elect to hold further proceedings, NASUCA stands ready to assist the Court by any means deemed appropriate.

DESCRIPTION OF NASUCA'S SUBMISSIONS

NASUCA submits for the Court's information the following documents, attached hereto:

1) the White Paper authored by Dr. Selwyn and colleagues, "Confronting Telecom Industry Consolidation: A Regulatory Agenda for Dealing with the Implosion of Competition," which describes in detail the anti-competitive impacts of the SBC/AT&T and Verizon/MCI mergers.
2) the Comments that NASUCA filed with the FCC in its SBC/AT&T merger proceeding. The comments show the breadth of the issues engaged by this merger. The comments also address necessary conditions well beyond what is set forth in the Proposed Final Judgment. (The Verizon/MCI merger proceeding raised, from the consumer perspective, substantially similar issues. Thus we have not included the essentially duplicative comments on the Verizon/MCI merger that NASUCA filed at the FCC.)
3) a brief *ex parte* letter filed with the FCC subsequent to the above-cited comments.[9] The letter summarizes the conditions that NASUCA believed

[8] It should be noted that NASUCA's response to Question (7) would be, "Very little." NASUCA's response to Question (8) would be that it is not only laypeople who view the mergers as against the public interest, as shown by the attached NASUCA submissions to the FCC.

[9] The Court should be aware that the filing of such *ex parte* submissions is common practice at the FCC and is provided for in the FCC's procedural rules. *See* 47 C.F.R. § 1.206(b).

would have to be ordered by the FCC in order to have the merger approval approach being in the public interest.

4) the brief comments NASUCA recently filed with the FCC regarding the AT&T/BellSouth merger. These comments express the frustration of NASUCA and its members with the merger review process and the result of that process at the FCC.

These submissions by NASUCA are presented to aid the Court in the determination of the public interest required by 15 U.S.C. § 16(e), and are relevant to the specific considerations required by 15 U.S.C. § 16(e)(1) and (2).

CONCLUSION

NASUCA and its members remain opposed to the Bell mergers (and, indeed, the pending acquisition of BellSouth by AT&T[10]) on behalf of the millions of American consumers who reside in the states represented by NASUCA members. These consumers will face higher prices and fewer choices as a result of the re-monopolization of the nation's telecommunications network. We ask the Court to grant our intervention for the limited purpose of providing the attached information to aid the Court in its public interest determinations.

We urge the Court to reject the notion that our previous lack of presence as a party to the Tunney Act judicial review somehow indicates consumer satisfaction with DoJ's merger review process. We also urge this Court to reject the Department's deficient decree and remand the matter for further proceedings consistent with the public interest, rather than the private economic interests of Bell conglomerates.

[10] As also shown in the attached AT&T/BellSouth comments.

Respectfully submitted,

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July 18, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2006, a true and correct copy of the Motion of the National Association of State Utility Consumer Advocates to Intervene for the Limited Purpose of Providing Consumer Views on the Public Interest and Memorandum of Points and Authorities was filed with the clerk's office and copies were served via U.S. mail to:

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