ORIGINAL

BEFORE THE SUPREME COURT
STATE OF FLORIDA

NuVox Communications, Inc., *et al.*, *Appellants*, v. The Florida Public Service Commission, AT&T Inc., BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., *Appellees*.	Case No.: SC06- Lower Case No.: Docket No. 060308-TP

JOINT OPPOSITION OF AT&T AND BELLSOUTH TO EMERGENCY MOTION FOR STAY

Stephen H. Grimes
Florida Bar No. 032005
D. Bruce May, Jr.
Florida Bar No. 0354473
HOLLAND & KNIGHT
315 South Calhoun Street
Suite 600
Tallahassee, Florida 32301
850-224-7000
850-224-8832 (facsimile)
Counsel for AT&T Inc.

Major B. Harding
Florida Bar No. 0033657
John Beranek
Florida Bar No. 0005419
AUSLEY & MCMULLEN
Post Office Box 391
Tallahassee, Florida 32302
850-224-9115
850-222-7560 (facsimile)
Counsel for BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc.

MP ____
DM ____
TR ____
CR ____
CL ____
PC ____
CA ____
CR ____
GA ____
EC 1
TH Lockard

September 18, 2006

INTRODUCTION AND SUMMARY

Appellees AT&T Inc. ("AT&T") and BellSouth Corporation, BellSouth Telecommunications, Inc. ("BST"), and BellSouth Long Distance, Inc. (collectively "BellSouth"), all of whom were parties to the proceeding below, respectfully file this opposition to the emergency motion for stay filed by NuVox Communications, Inc., XO Communications Services, Inc. ("XO"), Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Jacksonville, LLC, and Time Warner Telecom of Florida, L.P. ("Time Warner") (collectively, "Movants").

Without first attempting to seek any relief from a lower tribunal, Movants ask this Court to take the extraordinary action[1] of granting a discretionary stay pending review in order to impede completion of a holding-company merger that the Florida Public Service Commission ("PSC") and every other expert state agency to review this transaction – **19 separate expert agencies in all** – have concluded is consistent with the public interest. As AT&T and BellSouth have demonstrated to all those agencies, the merger will bring many significant benefits to consumers (including new and innovative wireline and wireless products, increased video competition, and improved service to governmental customers, including in the critical areas of national security and disaster recovery) without in any way jeopardizing the high-quality service that consumers currently obtain from BellSouth and AT&T.

---

[1] *See State ex rel. Price v. McCord*, 380 So. 2d 1037, 1038 n.3 (Fla. 1980) (per curiam) (demonstrating that the factors to be considered when evaluating a motion for stay are nearly identical to those considered when evaluating a motion for temporary injunction); *Provident Mgmt. Corp. v. City of Treasure Island*, 796 So. 2d 481, 485 & n.9 (Fla. 2001) (noting that, under the similar test for injunctive relief, the grant of such remedy is "extraordinary"); *Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (noting that such relief is "an extraordinary remedy which should be granted sparingly") (internal quotation marks omitted).

The sooner the merger is completed, the sooner these benefits can be brought to the public. Indeed, it is telling that *no* consumer, consumer group, or government agency representing consumers (including the Attorney General[2] and the Office of Public Counsel) opposed this merger before the PSC.

At the same time that the merger offers great public benefits, it is *undisputed* that it will have no effect on the relevant BellSouth subsidiaries' obligations as a wholesale provider of telecommunications services and facilities to competitors such as Movants. As a matter of law, after the merger, the BellSouth subsidiaries (and the AT&T subsidiaries) will still be required to provide Movants the *same* nondiscriminatory wholesale access that Movants rely upon today to serve their retail customers. Simply put, the completion of the merger will have *no* effect on the existing relationships between AT&T and BellSouth and Movants. Likewise, no party disputes that the PSC's jurisdiction, like that of the FCC, will be unaffected by this merger. Crucially, therefore, after the merger, in the unlikely event that any of the future, potential harms alleged by Movants actually materializes, the PSC and the FCC will remain able to address those harms, just as they can today.

[2] The Attorney General's letter to the PSC, partially quoted and paraphrased by Movants, speaks for itself. Movants, however, fail to advise this Court that, by its terms, the Attorney General's letter (1) "do[es] not reflect any opposition to a merger in the telecommunications industry or otherwise"; (2) "recognize[s] [that the PSC's] authority in the matter is limited"; and (3) recommends that the PSC "file comments with the [Federal Communications Commission ("FCC")] providing direction on the issues presented by the merger," which the PSC has done. App. 219-20.

Against this backdrop, the attempt of a few companies[3] seeking to further their own private interests by delaying what the PSC and 18 other agencies have determined to be in the public interest should fail for multiple reasons.

First, Movants have not demonstrated "good cause" for failing to file their motion with the PSC, as required by the Florida Rules of Appellate Procedure. The "emergency" that Movants claim excuses this normal requirement is entirely of their making. The PSC voted unanimously to deny their protests on August 15, 2006, and issued its order reflecting that decision on August 24. Yet Movants sat on their hands for weeks on end (until September 13) before seeking "emergency" relief from this Court. Movants cannot claim that they have "good cause" for circumventing the PSC when they never even tried to obtain relief from that agency during the weeks in which they took no action whatsoever. Movants' delay is also significant because it is inconsistent with their claims that they are threatened with imminent, grave injury and for that reason "counsels against the grant of a stay." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1318 (1983) (Blackmun, J., in chambers).

Second, Movants have no likelihood of success on the merits. The "great deference" this Court grants to determinations of the PSC, *Crist v. Jaber*, 908 So. 2d 426, 430 (Fla. 2005) (per curiam), should be, and is, heightened even further when, as here, the agency's decision is supported by settled case law and follows a long series of prior PSC precedents. Indeed, the PSC's decision follows established law in two independent respects.

As an initial matter, following the precedent of this Court and other Florida courts, the PSC has repeatedly concluded that, to intervene in proceedings such as this one, a party bears the

[3] Because the merger will not affect these wholesale obligations or the PSC's jurisdiction, it is unsurprising that only five of the more than 370 competitive carriers certificated in Florida have come to this Court seeking the extraordinary remedy of a stay.

burden of establishing direct and immediate injury and, moreover, that future, potential economic injury is insufficient to meet this burden. The PSC's straightforward application of those long-established principles to this case was especially appropriate because (1) Movants relied solely on claims of future, potential economic injury to attempt to establish standing; (2) it is undisputed that the relevant BellSouth subsidiaries will be subject to the *same* obligations to Movants after this merger as before the merger; and (3) the regulatory authority of the PSC and the FCC to address any future anticompetitive concerns will not be affected by this merger.

Equally unassailable is the PSC's independent determination that a change-of-control proceeding is not designed to protect the competitive interests asserted by Movants. On at least 40 occasions – *including in transactions involving the same parties that are Movants here* – the PSC has determined that the appropriate inquiry in a Section 364.33 change-of-control proceeding such as this one is whether the transaction will negatively affect the provision of efficient, reliable telecommunications service to end users. *See* Addendum A (collecting citations). The PSC has applied this standard to all carriers, including competitors such as Movants and incumbents such as Verizon and now BellSouth. The PSC, moreover, has consistently rejected the argument that a Section 364.33 proceeding is an appropriate forum for inquiring into alleged competitive harms or protecting competitors' interests.

Movants' arguments to the contrary do not overcome the "great deference" owed to the PSC's understanding of the statute it administers. Movants do not even rely on any language in Section 364.33. Instead, they implausibly claim that the PSC must apply *all* the highly general goals enunciated in Section 364.01 in Section 364.33 proceedings. But Section 364.01 is a broad enabling statute, and nothing in that provision prevents the PSC from reasonably concluding that

some of the goals discussed in Section 364.01 are best implemented through other agency proceedings under Chapter 364.

Third, the balance of harms and the public interest compel denial of the motion. On one side of the balance, Movants provide no evidence, by sworn affidavits or otherwise, establishing any basis for their assertions of future harm, much less have they provided evidence of imminent or *irreparable* harm, as is required for injunctive relief. Instead, they rely upon the same unsupported, nebulous, and speculative assertions of competitive injury that the PSC has rejected. Movants are thus asking the Court to stay a nationwide merger that 19 state commissions have concluded is in the public interest, without providing the Court evidence of any kind to support their extraordinary request. The Court should reject that invitation.

Independently, and in any event, Movants cannot show *irreparable* injury when, as here, the PSC will retain full jurisdiction after the merger. Even if any competitive injury were to arise, the PSC would be able to address it, thus precluding any finding that these alleged future harms are irreparable.

While Movants' showing is notably weak and unsupported, on the other side of the balance, AT&T and BellSouth have provided the Court a sworn affidavit from Rick L. Moore of AT&T establishing that those companies would suffer direct and immediate injury of $129 million per month (about $4 million per day) if the merger closing is delayed. Those losses, moreover, are in addition to other significant harms to BellSouth shareholders discussed in the attached sworn affidavit of Marshall M. Criser III of BellSouth. Beyond that, if a stay were granted, the public would suffer because the significant public-interest benefits that agency after agency has found compelling would be delayed. In these circumstances, the equitable balance tips decisively against Movants' extraordinary request.

Finally, Movants have not offered to provide any bond to cover the enormous costs they would impose on AT&T and BellSouth if the stay were granted and the merger closing delayed. If the Court were to grant a stay (which it emphatically should not do), it should make that stay contingent on Movants providing a bond of at least $258 million, which assumes that, if a stay is granted, this proceeding would cause a delay in closing of approximately two months.

BACKGROUND

On March 31, 2006, AT&T and BellSouth filed with the PSC a Joint Application for Approval of Indirect Transfer of Control Relating to the Merger of AT&T Inc. and BellSouth Corporation ("Joint Application") under Section 364.33, Florida Statutes. The Joint Application demonstrated that, because the merger was a holding-company transaction between AT&T Inc. and BellSouth Corporation, two companies that do not provide telecommunications service in Florida, the BellSouth subsidiaries that provide service in Florida (BST and BellSouth Long Distance) would continue to provide existing services just as they do today, so that the merger would be seamless for consumers. *See* App. 7-8, 10-12. The Joint Application further demonstrated that the merger would provide significant benefits to consumers and the public, including converged wireless-wireline services, enhanced video competition, better service to government customers (including in the crucial areas of national security and disaster recovery), and enhanced research and development. *See* App. 12-20.

After the PSC's Staff recommended approval of the transaction, *see* App. 208-16, the PSC addressed the Joint Application at a June 20, 2006 agenda conference at which five competitors raised concerns about the merger, *see* App. 221-73. After hearing those arguments, the PSC voted 5-0 to approve the transaction. Accordingly, on June 23, 2006, the PSC issued its *Notice of Proposed Agency Action; Order Approving Indirect Transfer of Control*, in which it

concluded that, "based on the Applicants' management, technical, and financial capability, the transfer of control is in the public interest." App. 278.

Movants here, as well as a few other parties, then waited the full 21 days permitted by law, until July 14, to protest the PSC's decision. *See* App. 281-312, 313-33. In a detailed response filed two business days later, AT&T and BellSouth demonstrated that, under multiple, established PSC precedents, Movants' assertions of injury were nothing more than claims of future, potential economic harms and were thus too speculative to permit a protest. AT&T and BellSouth also separately established that the PSC does not consider the interests of competitors in this particular type of proceeding. *See* App. 334-53. Movants again waited the full period of time allowed by law to respond to these arguments. *See* App. 354-78.

After the PSC Staff recommended that the PSC dismiss the protests for lack of standing, *see* App. 379-88, the PSC again voted unanimously (5-0) to adopt that recommendation on August 15, 2006, *see* App. 406. The PSC issued an order reflecting that conclusion on August 24, 2006. *See* App. 409-18. That order contained two independent determinations. First, citing to prior Commission precedent and this Court's decision in *AmeriSteel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997) (per curiam), the PSC determined that Movants had not carried their burden to establish standing because their claims amounted to "mere speculation as to perceived future economic harm." App. 414. The PSC found that "[w]hile it may be possible to trace these effects back to the proposed merger 'the causal chain has too many links in it to view the downstream effects [as] "direct" or "immediate." ' " App. 415 (quoting Order No. PSC-06-0033-FOF-TP at 6 (Jan. 10, 2006) ("*Nextel Order*")). Second, and in any case, the PSC found that Movants were asserting harms that Section 364.33 was "not designed to protect." App. 416. The PSC explained that it has consistently "held that the appropriate inquiry in a transfer of

control proceeding is the effect of the transfer of control on service to consumers, not on the interests of competitors." *Id.* (citing Order No. PSC-98-0702-FOF-TP at 20 (May 20, 1998) ("*MCI Order*"); Order No. PSC-00-0421-PAA-TP at 8 (Mar. 1, 2000) ("*Sprint Order*")).

Although the PSC's August 15 vote gave Movants ample notice of the PSC's conclusion, between August 24, the date the PSC released its order, and September 13, Movants took no action either to seek reconsideration of or to stay the PSC's decision.

LEGAL STANDARD

To obtain a stay pending appellate review, the party seeking the stay must demonstrate: (1) the public interest in the stay; (2) a likelihood of prevailing in the appellate court; and (3) irreparable harm if the stay is not granted. *See White Constr. Co. v. Florida Dep't of Transp.*, 526 So. 2d 998, 999 (Fla. 1st DCA 1988) (per curiam). In addition, particularly in the context of an emergency motion to stay administrative proceedings, a court must consider "the possibility of harm to other parties if relief is granted." *Freeman v. Cavazos*, 923 F.2d 1434, 1437 (11th Cir. 1991); *see Belcher v. Birmingham Trust Nat'l Bank*, 395 F.2d 685, 686 (5th Cir. 1968).

Courts have emphasized repeatedly that a stay is an "extraordinary" remedy and should not be granted absent an exceptional showing as to each of the foregoing factors. *E.g.*, *Provident*, 796 So. 2d at 485; *Hadi*, 927 So. 2d at 38; *see also United States v. Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992) (stay pending review is "exceptional"); *Cuomo v. United States Nuclear Reg. Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (per curiam) (characterizing request for stay of agency order pending appeal as "extraordinary"); *Johnson v. Mortham*, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) ("A stay is 'extraordinary relief' for which the moving party bears a

'heavy burden' to demonstrate.") (quoting *Winston-Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers)).[4]

ARGUMENT

I. THE MOTION FAILS TO ADHERE TO APPLICABLE RULES

Movants have improperly filed their emergency motion to stay with this Court, and not the PSC, in violation of Florida Rule of Appellate Procedure 9.190(e)(2)(A). Under that rule, a party seeking to stay an administrative action must, in the first instance, file its motion to stay with the lower tribunal, here the PSC, unless it can show "good cause" for filing with this Court. *Id.* In light of Movants' extraordinary delay in seeking relief, there can be no good cause for their circumvention of the PSC.

The undisputed fact here is that Movants waited three weeks after the PSC's August 24 order to seek *any* relief from *any* entity, even though the PSC's August 15 vote gave them ample notice of the PSC's conclusion. During that period, Movants could readily have sought a stay from the PSC on an expedited basis, and then, if the PSC failed to act after a reasonable period, have filed a motion at this Court to explain why they could not wait any longer for an agency decision. Instead, Movants did absolutely nothing for weeks on end. Movants should not, through their own delay, be allowed to force the Court to act (and to do so on an "emergency" basis) without the helpful guidance of the expert agency as to the equitable and other issues presented by the stay motion. *See Cianbro Corp. v. Jacksonville Transp. Auth.*, 473 So. 2d 209, 212 (Fla. 1st DCA 1985) (per curiam) (noting, in analogous context, that "[a]n emergency

[4] In construing Florida Rule of Appellate Procedure 9.190(e)(2)(A), federal law regarding stays is instructive and persuasive. *See Miami Heat Ltd. P'ship v. Leahy*, 682 So. 2d 198, 200-01 (Fla. 3d DCA 1996) (reviewing federal authority to interpret a Florida Rule of Appellate Procedure and stating that "[t]his court has previously held that where, as here, state rules are 'closely patterned' on their federal counterparts, decisions and commentaries interpreting the federal rules are persuasive in construing the state rules") (citation omitted).

created wholly by an agency's failure to take timely action cannot justify extraordinary suspensions or extensions") (internal quotation marks omitted); *Environmental Def. Fund, Inc. v. EPA*, 716 F.2d 915, 921 (D.C. Cir. 1983) (per curiam) (no good cause for avoiding ordinary procedures where "emergency" caused by party's own conduct); *Natural Res. Def. Council, Inc. v. United States Envtl. Protection Agency*, 683 F.2d 752, 765 (3d Cir. 1982) ("[T]he imminence of a deadline or the 'urgent need for action' is not sufficient to constitute 'good cause' within the meaning of the [Administrative Procedure Act ("APA")], where it would have been possible to comply with both the APA and with the statutory deadline.").

Nor is Movants' inaction excused by their speculation that the PSC would not have acted promptly in response to such a motion. By Movants' own account, the PSC is authorized to act on an expedited basis, may waive the rule requiring a Staff Recommendation 10 days before a PSC meeting (as it has in fact done previously in this case), and has an agenda conference in September, before Movants themselves claim any harm will occur. *See* Motion at 9 & n.28. In addition, the PSC held an agenda conference on August 29, 2006, and is scheduled to have another on October 3, 2006. Thus, the PSC will meet on three occasions at which it could have voted on a stay request before any harm could conceivably have occurred to Movants. Of course, no one will ever know whether the PSC would have promptly addressed a stay request, because Movants chose instead to create the alleged "emergency" with which they now present the Court.

Movants' delay in seeking a stay is also independently relevant here because, by itself, it undermines their claims that they are threatened with significant imminent harm. Movants' failure to act expeditiously to protect themselves from the supposedly grave harms they claim the merger will cause "vitiates much of the force of their allegations of irreparable harm," *Beame v.*

Friends of the Earth, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers), and "counsels against the grant of a stay," *Ruckelshaus*, 463 U.S. at 1318 (Blackmun, J., in chambers); *see Tough Traveler, Ltd. v. Outbound Prods.*, 60 F.3d 964, 968 (2d Cir. 1995); *Majorica, S.A. v. R.H. Macy & Co.*, 762 F.2d 7, 8 (2d Cir. 1985) (per curiam).

II. MOVANTS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

A. This Court's Review of the PSC's Decision Is Highly Deferential

As this Court's decisions make plain, its review of PSC orders is highly deferential.[5] "'[O]rders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.'" *GTC, Inc. v. Garcia*, 791 So. 2d 452, 456 (Fla. 2000) (per curiam) (quoting *United Tel. Co. v. Public Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986)); *see BellSouth Telecomms., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998); *General Tel. Co. of Florida v. Carter,* 115 So. 2d 554, 556-57 (Fla. 1959).

Additionally, the PSC's "interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous." *BellSouth Telecomms.*, 708 So. 2d at 596. Deference to such an agency interpretation is particularly great when, as here, the agency interpretation at issue is consistent with a series of prior determinations. *See Smith v. Crawford*, 645 So. 2d 513, 520 (Fla. 1st DCA 1994). The party challenging the PSC's order bears the burden of overcoming these presumptions by showing a departure from the essential requirements of law. *See GTC*, 791 So. 2d at 459; *BellSouth Telecomms.*, 708 So. 2d at 597.

[5] Movants fail to address the relevant standard of review in their motion.

B. Movants Have No Likelihood of Overcoming this Deference on Either of Two Independent Grounds for the PSC's Decision

1. The PSC Has Consistently Denied Competitor Standing in Cases Such as this One on Two Independent Grounds

The PSC determinations at issue here – that Movants failed to demonstrate a direct and immediate injury sufficient to entitle them to a Section 120.57 hearing,[6] and that, in any case, Movants' competitive interests were outside the scope of the transfer-of-control statute (Section 364.33) – are consistent with established precedent and the text and structure of the Florida code.

To protest a proposed agency action, a party must provide "an explanation of how the petitioner's substantial interests will be affected by the agency determination." Fla. Admin. Code R. 28-106.201(2)(b). As this Court determined in *AmeriSteel*, the established test to determine "substantial interest" is that announced in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981). *See also Nextel Order* at 5-7; *Sprint Order* at 6.[7] Movants acknowledge that *Agrico* provides the appropriate legal framework here. *See* Motion at 16.

Under *Agrico*, a party has a "substantial interest" in the outcome of an administrative proceeding if: (1) the party will suffer injury in fact that is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing, *and* (2) the substantial injury is of a type or nature that the proceeding is designed to protect. *See* 406 So. 2d at 482. "The first aspect of this test deals with the degree of injury. The second deals with the nature of the injury." *Id.* Movants had the

---

[6] *See* Section 120.57, Florida Statutes (prescribing procedures for the conduct of administrative hearings).

[7] This last PSC order, which also approved a holding-company merger, was ultimately vacated because the merger was not consummated, so approval of the transfer of control was no longer necessary. *See* Order No. PSC-00-1667-FOF-TP (Sept. 18, 2000). That has no bearing on the Commission's reasoning in concluding there was no standing.

burden of demonstrating that they met *both* prongs of this test. *See, e.g.*, *AmeriSteel*, 691 So. 2d at 477-78.

The PSC has consistently applied the *Agrico* test to deny standing to competitors in transfer-of-control proceedings involving telecommunications companies. For example, in the Commission's 1998 proceeding involving the MCI/WorldCom merger, GTE sought to establish standing based on alleged injuries it would suffer as a wholesale customer due to the decrease in competition between MCI and WorldCom in the wholesale market. GTE also argued that its interests as a competitor would be affected by the merger. The PSC found that both bases of GTE's asserted injuries – as a customer and as a competitor – were too speculative to confer standing under the first prong of *Agrico*. *See MCI Order* at 14 ("Speculation as to the effect that the merger . . . will have on the competitive market amounts to conjecture about future economic detriment."). The PSC further held that the asserted injuries were beyond the scope of a transfer-of-control proceeding because Section 364.33 "does not give us the ability to protect the competitive interests asserted." *Id.* at 19.

Two years later, the Commission issued a virtually identical ruling in a proceeding under Section 364.33 involving the proposed merger of MCI WorldCom, Inc. and Sprint Corporation. *See Sprint Order* at 6-8 (finding both that competitive carrier trade association's "speculation as to the effect that the merger of MCI WorldCom and Sprint will have on the competitive market amounts to conjecture about future economic detriment," which was insufficient to establish standing, and that, because Section 364.33 "is not a merger review statute," trade association's assertion of the competitive interests of its members was insufficient to meet the nature-of-injury

prong); *see also Nextel Order* at 5 ("The 'injury in fact' must be both real and immediate and not speculative or conjectural.").[8]

In addition, in at least 40 approval orders issued under Section 364.33, including transfers involving some of the Movants here, the PSC made plain, just as it did here, that its review under Section 364.33 is designed to determine whether the transaction will harm *consumers' interest in efficient, reliable telecommunications service*, without considering competitors' interests. *See* Addendum A; Order No. PSC-03-0298-PAA-TP at 2 (Mar. 5, 2003) ("In accordance with our authority under Section 364.33 . . . we have reviewed the petition of [two Time Warner Telecom affiliates] and find it appropriate to approve it. We have based our review and decision upon an analysis of the public's interest in efficient, reliable telecommunications service."); Order No. PSC-02-1709-PAA-TP at 2 (Dec. 6, 2002) ("In accordance with our authority under Section 364.33 . . . we have reviewed the Application of XO Long Distance Services, Inc., XO Florida Inc., and their parent, XO Communications, Inc., and find it appropriate to approve it. We have based our review and decision upon an analysis of the public's interest in efficient, reliable telecommunications service."). In no instance has the PSC ever adopted the analysis now urged by Movants.

2. *Movants Are Unlikely To Succeed in Showing that the PSC Departed from the Essential Requirements of Law by Following these Established Precedents*

The PSC's adherence to these precedents creates no clear error of the type that would warrant reversal of the PSC under the deferential standard established by this Court's precedents.

---

[8] More recently, and in an analogous situation, the Commission denied the Communications Workers of America's attempt to establish standing and to protest the Commission's approval of the transfer of control of Sprint-Florida and Sprint Payphone from Sprint-Nextel to LTD Holding Company pursuant to Section 364.33. *See Nextel Order.*

First, the PSC reasonably concluded that Movants' speculative allegations of potential future economic injury demonstrated no imminent injury of the kind that might satisfy the first prong of the *Agrico* test. Indeed, in their filing at the PSC, the "Joint CLECs" sought to establish standing through just a few conclusory paragraphs that spoke vaguely of alleged harms to their "ability to compete" and about the supposed "undue competitive advantages" that the merger will allegedly give BellSouth and AT&T, without providing any substance or specificity that could even arguably demonstrate the likelihood of imminent harm, as established standards require. *See* App. 290-91.

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

This failure to provide any cogent demonstration of imminent harm was particularly significant because no Movant contested before the PSC (or disputes here) that, after the merger, the BellSouth subsidiary (BellSouth Telecommunications, Inc. or "BST") that operates as an incumbent provider in Florida will remain subject to the same obligations to provide wholesale facilities and services to Movants that it is today. Those obligations are set forth in what are known as "interconnection agreements," which are instruments that BellSouth is required to

negotiate as a matter of federal law, and which the PSC is required to arbitrate if negotiations fail. *See* 47 U.S.C. § 252(a)-(c). These interconnection agreements implement detailed federal access and nondiscrimination requirements, and they are approved by and filed with the PSC. *See generally* 47 U.S.C. §§ 251, 252; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999) (discussing this federal-law scheme). This means that, after the merger, Movants will be legally and contractually entitled to receive the very same services on the same terms and conditions from BST (and any AT&T subsidiaries) that they receive today. Likewise, all other current wholesale nondiscrimination and interconnection obligations under the federal Telecommunications Act of 1996 ("1996 Act"), the rules of the FCC, and the rules and orders of the PSC will be unaffected by the merger. Among those PSC rules are detailed performance measures that gauge whether BST is providing nondiscriminatory service to companies such as Movants, and penalties if certain standards are not met.

Thus, regardless of how much emphasis Movants place on the "size, scope and reach of the new merged company," Motion at 14, the bottom line here is that the contractual arrangements and the legal rules under which Movants obtain facilities and services to serve their retail customers will not be affected in any way by the merger. In light of that uncontroverted fact, it was more than reasonable for the PSC to determine, consistent with the decisions of this Court, that the injuries alleged by Movants were "mere speculation as to perceived future economic harm." App. 414.[9]

---

[9] Likewise, under established precedent, Movants' reference (at 12, 14) to the alleged loss of a single wholesale special access supplier (AT&T) does not demonstrate imminent injury. *See Sprint Order* at 3, 11 (claim that the proposed merger "will result in a narrowing of competitive network service providers" and therefore "may adversely affect TRA members providing telecommunications services in Florida, who rely on wholesale network service provided by Sprint or MCI," was insufficient to create standing because "the 'loss' of a competitor in the market, in itself," does not demonstrate harm); *MCI Order* at 17 ("[T]he 'loss' of a competitor in

Additionally in this regard, there was no dispute before the PSC or in this Court that, in the unlikely event that some discrete anticompetitive harm occurs in the future, the PSC will retain its full current jurisdiction to address it. *See, e.g.*, App. 10. Movants' argument thus boils down to a claim that, contrary to this Court's proper presumption that the PSC acts reasonably and lawfully, *see GTC*, 791 So. 2d at 456, if actual competitive harm arises, the PSC will fail to take appropriate steps to address it. Such an assertion does not establish direct and immediate injury.

Nor does the PSC's reasoned decision place all protesters in a "catch 22" under which they can meet *Agrico*'s imminent injury requirement only after injury has incurred. *Compare* Motion at 11. If a competitor could demonstrate, for instance, that a merger would invalidate existing wholesale agreements, that might well present a different case. Those were not the facts in the record here, however.[10] Likewise, the fact that a few competitors could not demonstrate standing does not show that other parties could not have protested the PSC's proposed order if they had been aggrieved by it.

---

the market does not, in itself, demonstrate a harm to GTE. Companies drop out of markets quite frequently for a variety of reasons.").

The PSC's repeated conclusion on this point makes perfect sense. Unless, at the least, Movants could establish that there are not adequate *other* wholesale alternatives from whom they could obtain service – something that Movants have never tried to show – the fact that there is one fewer alternative is, in itself, not relevant. *See, e.g.*, Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 18025, ¶ 173 n.476 (1998) ("We find that there are a sufficient number of market participants on our list below to allay anticompetitive concerns in the larger business market; therefore, we conclude that we need not reach the question of whether the types of companies identified by Applicants are potential competitors in this market.").

[10] Movants also cannot meet their burden by asserting (at 12) that end-user consumers – parties that Movants do not represent – will be harmed by the merger. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) ("'In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'") (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

Second, although the Court need go no further than the PSC's reasonable resolution of the first part of the *Agrico* standard, the PSC also reasonably concluded that Movants did not meet the second prong of that test. As discussed above, the PSC has explained repeatedly and in plain language that a transfer-of-control proceeding under Section 364.33 is designed to protect consumers' interest in receiving efficient, reliable telecommunications service, not to address purported competitive injuries or to protect competitors. *See supra* pp. 4, 7.[11]

Movants have no tenable basis to claim that Section 364.33 so clearly requires a different inquiry that the deference due the PSC is likely to be overcome. Movants do not even claim (nor could they) that the PSC's decision is inconsistent with the language of Section 364.33, the specific statutory provision that all parties agree governs transfer-of-control proceedings. Instead, they contend that Section 364.01, a general statutory provision setting forth the "powers" conferred on the PSC, *mandate*s a broader inquiry in a Section 364.33 proceeding. Nothing in Section 364.01 requires such an inquiry, and the PSC was certainly within its authority in determining that transfer-of-control proceedings need not address *all* of the goals laid out in this highly general statutory provision. *See* App. 415-16. Indeed, many of these general goals, such as ensuring the existence of "a transitional period in which new and emerging technologies are subject to a reduced level of regulatory oversight," Section 364.01(4)(d), Florida Statutes, are quite evidently not applicable to Section 364.33 proceedings. The PSC thus

[11] Contrary to Movants' footnote argument (at 12 n.32), Section 364.33 does not have different standards, one for incumbents and one for other companies. Rather, the same analysis applies to all applicants regardless of the size of the entities involved or whether the parent of an incumbent local exchange carrier is involved in the transaction. *See, e.g.*, Order No. PSC-98-1645-FOF-TP at 3 (Dec. 7, 1998) (approving merger of GTE, an incumbent provider like BellSouth in Florida, and Verizon without any discussion of Section 364.01). In that decision, like here, the PSC determined that its decision that the indirect transfer-of-control was in the public interest "in no way prevented the Commission from addressing any concerns that may arise regarding the transaction to the appropriate federal agency." *Id.*

reasonably determined that some of the goals set forth in Section 364.01 are better implemented through Chapter 364 proceedings other than transfer-of-control proceedings. *See* App. 416.

The PSC's decision as to the best way to interpret these two statutory provisions, neither of which has language directly supporting Movants' claims here, is precisely the kind of administrative determination to which this Court properly defers. Indeed, if the PSC's analysis were invalid, the PSC would have been applying an incorrect legal standard in all of its prior Section 364.33 transfer-of-control proceedings, including those involving Movants XO and Time Warner. That is an extraordinary result that Movants have not come close to justifying. At the very least, they are unlikely to prevail on such a claim.

III. THE BALANCE OF EQUITIES STRONGLY COUNSELS AGAINST A STAY

A. Movants Have Not Established Irreparable Injury

Movants rest their claim of irreparable injury primarily on the same allegations they use to support their standing claim – *i.e.*, that, absent a stay, they will be unable to compete in the telecommunications markets in Florida. *See* Motion at 11-13, 18. That is so, the theory goes, because the merger will diminish competition in the provision of wholesale telecommunications services and create a "resource imbalance" that will make it harder to negotiate and arbitrate future agreements as contemplated by the 1996 Act. According to Movants, those effects, in turn, will render it difficult for them to gain access on fair and reasonable terms to the wholesale inputs they claim they need to compete in Florida. *See id.*

As explained above, *see supra* pp. 3, 10, Movants' own delay in seeking relief undermines their assertion that they are faced with significant irreparable injury. Movants' claims are even further undermined by their notable failure to substantiate their assertions with affidavits or factual support of any kind. *Cf. Church of Scientology Flag Serv. Org., Inc. v. City*

of Clearwater, 777 F.2d 598, 608 (11th Cir. 1985) (party seeking a preliminary injunction must offer an affidavit or other "evidence . . . establish[ing] a right to an injunction"); *see White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir. 1989). Movants are asking this Court to take drastic action – staying a nationwide merger that state commissions across the country have concluded is consistent with the public interest – based solely on self-serving assertions, without evidence or proof of any kind. Such a showing does not remotely justify the extraordinary relief they seek.

Even apart from these dispositive threshold defects, Movants' theory of harm is demonstrably wrong, for at least three additional reasons.

First, as discussed above, and as the PSC expressly found, Movants' unsubstantiated allegations of harm "are mere speculation as to perceived future economic harm" and are in no sense "immedia[te]." App. 414. Because BellSouth and AT&T will continue to offer wholesale customers the same services on the same terms and conditions (including rates) as they do today, Movants' claimed injury is at best based on speculation about what may occur at some undefined future date when the combined company negotiates *new* agreements. It is established law that "[i]rreparable injury will never be found where the injury complained of is doubtful, eventual or contingent." *Jacksonville Elec. Auth. v. Beemik Builders & Constructors, Inc.*, 487 So. 2d 372, 373 (Fla. 1st DCA 1986) (internal quotation marks omitted). Movants' claim of harm runs afoul of that settled principle.

Movants' speculation as to these events years down the road, moreover, ignores the PSC's established authority to impose the wholesale obligations required by federal and state law through mandatory arbitrations, *see* 47 U.S.C. § 252(c)-(e); *supra* pp. 15-16, and the authority of the PSC and the FCC to enforce existing federal and state rules ensuring nondiscriminatory

wholesale access. As then-Judge Scalia explained, a claim of *irreparable* harm is "frivolous" where, as here, it depends on the "mere possibility" that in the future an agency might not provide relief that it is authorized to provide. *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (Scalia, J.); *cf. Florida Bd. of Regents v. Armesto*, 563 So. 2d 1080, 1081 (Fla. 1st DCA 1990) (per curiam) ("[t]he possibility" that agency might take certain action "is speculative and does not demonstrate that . . . administrative remedies were inadequate").

Second, even aside from the speculative nature of their claim, Movants' assertion that the merger, by increasing the size of the incumbent carrier in Florida, will result in a "resource imbalance" contrary to federal law, *see* Motion at 14, rests on a skewed understanding of the 1996 Act. Congress gave authority to the FCC and state commissions to facilitate the development of local competition through arbitrations and other proceedings precisely because it understood that competitors would *lack* many of the resources of incumbent providers. *See, e.g.*, Final Order at 9, *Joint Application of AT&T Inc. and BellSouth Corporation Together with Its Certificated Mississippi Subsidiaries for Approval of Merger*, Docket No. 2006-UA-164, 2006 Miss. PUC LEXIS 380, at *17 (Miss. Pub. Serv. Comm'n July 25, 2006) ("*Mississippi Order*") (rejecting this exact argument; explaining that "[n]othing in the 1996 Act even suggests that parity of resources among competitors is required or even contemplated by that statute").

Third, Movants' allegations of harm ignore the fact that the FCC and the United States Department of Justice ("DOJ") are presently undertaking comprehensive reviews of the transaction. As in the case of the recent merger between SBC Communications Inc. and AT&T Corp., which led to the creation of AT&T Inc. and which both agencies approved after a

painstaking analysis,[12] the FCC and DOJ reviews will address the same allegations Movants raise here – *i.e.*, that the merger poses a meaningful threat to competition and runs afoul of the 1996 Act. Indeed, although their pleading in this Court is silent on the matter, Movants are actively involved in the FCC's review of the proposed transaction and are pressing precisely the same claims in that forum as the PSC unanimously rejected and that the Movants now attempt to raise here.[13] The fact that Movants' have petitioned the FCC to deny the merger on the same grounds as they raise here, and that the FCC is continuing to review the transaction, further underscores the implausibility of Movants' claim that action from this Court is necessary to avert irreparable harm. If Movants' arguments are valid, there is no reason to believe that the FCC will reject them.[14] On the other hand, if the FCC and DOJ reject these claims of anticompetitive

---

[12] *See, e.g.*, Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, ¶¶ 24-55 (2005) (comprehensively addressing allegations of harm to special-access market); *id.* ¶¶ 177-178 (rejecting claims that merger would create "resource imbalance"); *see also id.* ¶ 15 (describing DOJ review).

[13] *See* Petition to Deny of Time Warner Telecom at 1, 3-4, 6-25, 49-74, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74 (FCC filed June 5, 2006); Joint Comments of Cbeyond Communications, Grande Communications, New Edge Networks, NuVox Communications, Supra Telecom, Talk America Inc., XO Communications Inc., and Xspedius Communications at 5-8, 15-60, 78-96, *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74 (FCC filed June 5, 2006).

[14] To the extent Movants suggest that irreparable harm arises from a purported denial of "due process and right to a hearing," Motion at 18, that claim fails on multiple levels. Movants' asserted "right to a hearing" hinges entirely on their claim that they demonstrated standing below and were entitled to a hearing. As demonstrated above, *see supra* pp. 12-14, that claim fails. As for "due process," Movants have not even attempted to identify any property (or other) interest that would give rise to due process considerations under Florida law, *see Board of Regents v. Roth*, 408 U.S. 564, 576 (1972), and in any case there is no principle that denial of a hearing necessarily constitutes a denial of due process and creates irreparable harm, *cf. Mathews v. Eldridge*, 424 U.S. 319, 339-40 (1976) (rejecting claim that due process requires pre-deprivation hearing in all circumstances). Nor does a claim of a statutory procedural violation by itself create irreparable injury. In *Sampson v. Murray*, 415 U.S. 61 (1974), the United States Supreme Court held that a government employee had not adequately shown irreparable harm, for purposes of a preliminary injunction, by alleging that she had been discharged in violation of applicable

harm, as we believe will occur, that further demonstrates that these allegations of injury are not well founded and provide no basis for relief of any kind.

B. On the Other Side of the Balance, a Stay Would Cause Substantial Harm to AT&T and BellSouth and to the Public Interest

Even if there were any merit to Movants' unsubstantiated and speculative allegations of harm, any such harm would be far outweighed by the certain injury a stay would cause to AT&T and BellSouth and, even more important, to the public.

As detailed in the record before the PSC, *see* App. 12-20, the merger between AT&T and BellSouth is a response to major technological and marketplace changes, is intended to position the combined company to be a more effective competitor in an industry marked by rapid change, and will result in substantial cost savings. Until AT&T and BellSouth have secured all requisite state and federal approvals, however, the companies are prohibited from integrating operations – and thus realizing any of those benefits – until the merger closes.

Delay in the closing date would thus put off the date on which the companies can begin to realize the benefits of the merger, to the detriment of their ability to realize costs savings and to compete in today's marketplace. As explained in the attached affidavit of Rick L. Moore,[15] AT&T estimates that each month of delay would cost the combined company more than $129 million, which is more than $4 million for each day of delay. *See* Moore Aff. ¶ 10. Additionally, as demonstrated in the attached affidavit of Marshall M. Criser III, any delay will cause BellSouth shareholders substantial additional losses. *See* Criser Aff. ¶ 8. These concrete

---

civil service regulations. *Id.* at 66, 91-92; *see id.* at 91 ("Respondent's claim here is not that she could not as a matter of statutory or administrative right [be] discharged, but only that she was entitled to additional procedural safeguards in effectuating the discharge.").

[15] Because AT&T and BellSouth sought to provide this response to the Court as soon as possible, the affidavits provided with this filing include copies of the signature pages. Original signature pages will be provided to the Court promptly.

harms supported by sworn testimony far outweigh Movants' speculative claims and alone warrant denial of the motion.

A stay would also be deeply contrary to the public interest. As the record before the PSC confirms, *see* App. 12-20 – and as 18 other state commissions have recognized – the merger will result in significant public-interest benefits. These include the deployment of new converged wireless and wireline services, enhanced video competition in Florida and elsewhere, better service to government customers and an enhanced ability to respond to natural disasters, and increased research and development in innovative services that promise to help drive the nation's economy. *See* Moore Aff. ¶ 11. As numerous state commissions have found, and as Movants do not dispute in their filing, these substantial benefits are overwhelmingly in the public interest.[16] It follows that a stay, by delaying the realization of those benefits, would frustrate the public interest.

These significant interests of the public and of AT&T and BellSouth far outweigh the speculative harms asserted by Movants. For that reason as well, the motion should be denied.

---

[16] *See, e.g.*, Order at 5, *Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T Inc. and BellSouth Corporation*, Case No. 2006-00136, 2006 Ky. PUC LEXIS 591 (Ky. Pub. Serv. Comm'n July 25, 2006) ("[T]he proposed transfer is being made in accordance with law for a proper purpose and is consistent with the public interest."); *Mississippi Order* at 5, 2006 Miss. PUC LEXIS 380, at *9 ("The Commission concludes that the merger will promote the public interest.").

IV. IN THE UNLIKELY EVENT THE COURT WERE TO GRANT A STAY, IT SHOULD REQUIRE THE POSTING OF A VERY SUBSTANTIAL BOND

If the Court were to grant a stay – a result that, for the reasons stated above, is not remotely supported by the facts or law here – it should condition any such stay on the posting of "a good and sufficient bond," as provided for by Florida Rule of Appellate Procedure 9.310(a).[17]

"The purpose of the bond is to protect the party adversely affected against the consequences of the supersedeas or stay." *Bernstein v. Bernstein*, 43 So. 2d 356, 358 (Fla. 1949). Here, the consequences of a stay would be staggering, and any bond must reflect that. As is plain from the Motion, and confirmed by the declarations of AT&T and BellSouth personnel, the merger could not close while a stay is in place. *See* Moore Aff. ¶¶ 8-10; Criser Aff. ¶¶ 5-8. As discussed, the direct and immediate harm caused by such a delay in terms of lost synergies is approximately $129 million per month.[18]

As this Court has held,

> "in determining the amount and conditions of such bonds, [courts] should take into consideration the various rights adjudicated by the judgment to be superseded and accruing by reason thereof to the party in whose favor it is, and so shape both the amount and conditions of such bonds as that they will, according to the circumstances of each particular case, *fully secure and protect* the obligee *in all the varied rights accruing* to him under his suspended judgment."

Labell v. Campbell, 128 So. 422, 424 (Fla. 1930) (quoting *Palmer v. Palmer*, 26 So. 640, 641 (Fla. 1899) (per curiam)) (emphases added). A bond of at least $258 million, which assumes a

---

[17] In relevant part, Rule 9.310(a) states that "[a] stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both." Given the nature and timing of the merger, there are no conditions other than a bond that would protect AT&T and BellSouth from the full amount of damage that a stay would cause.

[18] "A good and sufficient bond is a bond with a principal and a surety company authorized to do business in the State of Florida, or cash deposited in the circuit court clerk's office." Fla. R. App. P. 9.310(c)(1).

two-month delay in closing, is the minimum necessary fully to secure and protect the rights of AT&T and BellSouth here.[19]

CONCLUSION

The Emergency Motion for Stay should be denied.

Respectfully submitted, this the 18th day of September 2006.

FOR AT&T INC.

Stephen H. Grimes
Florida Bar No. 032005
D. Bruce May, Jr.
Florida Bar No. 0354473
HOLLAND & KNIGHT
315 South Calhoun Street
Suite 600
Tallahassee, Florida 32301
850-224-7000
850-224-8832 (facsimile)

FOR BELLSOUTH CORPORATION, BELLSOUTH TELECOMMUNICATIONS, INC., and BELLSOUTH LONG DISTANCE, INC.

Major B. Harding
Florida Bar No. 0033657
John Beranek
Florida Bar No. 0005419
AUSLEY & MCMULLEN
Post Office Box 391
Tallahassee, Florida 32302
850-224-9115
850-222-7560 (facsimile)

[19] Movants have also asked for an expedited briefing schedule for the appeal. *See* Motion at 19. Just as Movants have failed to establish a likelihood of success on the merits or irreparable harm, so too have they failed to identify any exigency that would warrant expedition of their appeal. In the unlikely event the Court grants the stay, however, it should expedite the case so as to minimize the substantial harm to AT&T and BellSouth and to the public interest that would result.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand-delivery to: Vicki Gordon Kaufman, Esquire, and Jon C. Moyle, Jr., Esquire, Moyle, Flanigan, Katz, Raymond, White & Krasker, P.A., The Perkins House, 118 North Gadsden Street, Tallahassee, Florida; and, the Florida Public Service Commission, c/o Blanca Bayo, Director, Division of Commission Clerk & Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 this 18th day of September, 2006.

Stephen H. Grimes

ADDENDUM A

1. *In re: Joint Petition of Level 3 Communications, Inc. and TelCove, Inc. for Acknowledgement of Transfer of Control*, Order No. PSC-06-0505-PAA-TP, Docket No. 060392-TP (June 13, 2006).

2. *In re: Joint Application for Approval of Intracompany Reorganization and Merger Transaction Whereby Frontier Communications of America, Inc. Will Be Merged into Citizens Telecommunications Company d/b/a Citizens Communications Company*, Order No. PSC-03-0353-PAA-TP, Docket No. 030018-TP (Mar. 12, 2003).

3. *In re: Request for Approval of Pro Forma Intracorporate Restructuring Whereby Florida Digital Network, Inc. Will Merge with M/C Venture Southern Lending Corp.*, Order No. PSC-02-1346-PAA-TP, Docket No. 020845-TP (Oct. 3, 2002).

4. *In re: Request for Approval of Merger of Conestoga Enterprises, Inc. with and into D&E Acquisition Corp.*, Order No. PSC-02-1018-PAA-TI, Docket No. 020518-TI (July 26, 2002).

5. *In re: Request for Approval of Merger of PhoneTel Technologies, Inc. with Davel Communications, Inc.*, Order No. PSC-02-0945-PAA-TP, Docket No. 020402-TP (July 15, 2002).

6. *In re: Request for Approval of Merger of Conestoga Communications, Inc. into TeleBeam*, Order No. PSC-01-1526-PAA-TI, Docket No. 010091-TI (July 23, 2001).

7. *In re: Request by Advantage Group Communications, L.L.C. for Approval of Corporate Reorganization*, Order No. PSC-01-1223-PAA-TX, Docket No. 010266-TX (May 31, 2001).

8. *In re: Petition for Approval of Internal Reorganization Whereby GE Capital Communication Services Corporation d/b/a GE EXCHANGE and d/b/a GECCS and d/b/a GE Com Will Merge with GE Capital Telemanagement Services Corporation*, Order No. PSC-01-1204-PAA-TI, Docket No. 010420-TI (May 30, 2001).

9. *In re: Request for Approval of Reorganization Whereby MediaOne Florida Telecommunications, Inc. d/b/a AT&T Broadband Florida Telecommunications and d/b/a AT&T Digital Phone Will Merge with AT&T Broadband Phone of Florida, LLC d/b/a AT&T Digital Phone*, Order No. PSC-01-1205-PAA-TX, Docket No. 010394-TX (May 30, 2001).

10. *In re: Joint Application of TeleConex, Inc. and Pre-Cell Solutions, Inc. for Transfer of Control of TeleConex to Pre-Cell*, Order No. PSC-01-0205-PAA-TX, Docket No. 001754-TX (Jan. 23, 2001).

11. *In re: Request for Approval of Intra Corporate Merger of PaeTec Communications, Inc. and East Florida Communications, Inc.*, Order No. PSC-01-0164-PAA-TP, Docket No. 001739-TP (Jan. 22, 2001).

12. *In re: Request for Approval of Merger Whereby 360 Long Distance, Inc. d/b/a ALLTEL/360 Will Be Merged into ALLTEL Communications, Inc.*, Order No. PSC-01-0094-PAA-TP, Docket No. 001591-TP (Jan. 11, 2001).

13. *In re: Joint Application for Approval of Reorganization Whereby Metrolink Internet Services of Port Saint Lucie, Inc. Will Be Merged with and into ALEC, Inc., a Wholly Owned Subsidiary of DURO*, Order No. PSC-00-2407-PAA-TX, Docket No. 001427-TX (Dec. 14, 2000).

14. *In re: Request for Approval of Merger Whereby Primary Network Holdings, Inc. Will Merge with Mpower Merger Sub., Inc.*, Order No. PSC-00-1448-PAA-TP, Docket No. 000773-TP (Aug. 10, 2000).

15. *In re: Joint Application for Approval of Merger of Prestige Investments, Inc. with and into Prestige Acquisition Corp.*, Order No. PSC-00-1455-PAA-TI, Docket No. 000608-TI (Aug. 10, 2000).

16. *In re: Request for Approval of Transfer of Control of Special Accounts Billing Group, Inc. to Orion Technologies, Inc. Through a Merger with Globalinx Corporation*, Order No. PSC-00-1390-PAA-TI, Docket No. 000661-TI (July 31, 2000).

17. *In re: Request for Approval of Merger of Adelphia Business Solutions of Florida, LLC into Adelphia Business Solutions Investment, LLC*, Order No. PSC-00-1395-PAA-TP, Docket No. 000453-TP (July 31, 2000).

18. *In re: Request for Approval of Transfer of Control of ATX Telecommunications Services to CoreComm Limited*, Order No. PSC-00-1362-PAA-TP, Docket No. 000607-TP (July 28, 2000).

19. *In re: Request for Approval of Agreement and Plan of Merger and Reorganization Whereby NewSouth Communications Corp. Will Merge with and into UniversalCom, Inc.*, Order No. PSC-00-1270-PAA-TP, Docket No. 000398-TP (July 11, 2000).

20. *In re: Request for Approval of Merger of Cyberlink, Inc. with RSL COM U.S.A., Inc.*, Order No. PSC-00-1244-PAA-TI, Docket No. 980506-TI (July 10, 2000).

21. *In re: Request for Approval of Merger of America Online, Inc. and Time Warner Inc., Indirect Whole Owner of Time Warner Connect*, Order No. PSC-00-0882-PAA-TP, Docket No. 000264-TP (May 5, 2000).

22. *In re: Request for Approval of Merger of America Online, Inc. with Time Warner Inc.*, Order No. PSC-00-0781-PAA-TP, Docket No. 000204-TP (Apr. 21, 2000).

23. *In re: Request for Approval of Merger of US WATS, Inc. d/b/a US WATS Enterprises, Inc. into Capsule Communications, Inc.*, Order No. PSC-00-0782-PAA-TI, Docket No. 000133-TI (Apr. 21, 2000).

24. *In re: Request for Approval of Transfer of Control Whereby Z-Tel Technologies, Inc. Will Acquire Touch 1 Communications, Inc.*, Order No. PSC-00-0436-PAA-TP, Docket No. 000110-TP (Mar. 2, 2000).

25. *In re: Joint Application of PaeTec Communications, Inc., Campuslink Communications Systems, Inc. d/b/a Parklink Communications, Inc., and CAMPUSLINK Communications Systems, Inc. d/b/a PARKLINK Communications, Inc. for Approval of Intra-Corporate Merger*, Order No. PSC-00-0442-PAA-TP, Docket No. 000047-TP (Mar. 2, 2000).

26. *In re: Request for Approval of Merger of J D Services, Inc. d/b/a American Freedom Network into J D Services, Inc., a Nevada Corporation*, Order No. PSC-00-0443-PAA-TP, Docket No. 000062-TP (Mar. 2, 2000).

27. *In re: Joint Application of MCI Worldcom, Inc. and Sprint Corporation for Acknowledgment or Approval of Merger*, Order No. PSC-00-0421-PAA-TP, Docket No. 991799-TP (Mar. 1, 2000).

28. *In re: Request by Access One Communications Corp., OmniCall Acquisition Corp., and OmniCall, Inc. for Approval of Transfer of Control*, Order No. PSC-99-2424-PAA-TP205, Docket No. 991622-TP (Dec. 10, 1999).

29. *In re: Request for Transfer of Control of Econophone Services Inc. to Viatel, Inc.*, Order No. PSC-99-2318-PAA-TI20, Docket No. 991618-TI (Dec. 2, 1999).

30. *In re: Joint Application by Qwest Communications International, Inc. and U S WEST Interprise America, Inc. d/b/a Interprise America, Inc. for Approval of Plan of Merger*, Order No. PSC-99-2319-PAA-TP22, Docket No. 991404-TP (Dec. 2, 1999).

31. *In re: Request for Approval of Pro Forma Corporate Restructuring Whereby RCN Telecom Services, Inc. and RCN Long Distance Company Will Merge with and into RCN Telecom Services, Inc.*, Order No. PSC-99-2264-PAA-TP232, Docket No. 991496-TP (Nov. 18, 1999).

32. *In re: Request for Approval of Transfer of Control of International Telephone Group, Inc. to NUI Corporation Through Plan of Merger*, Order No. PSC-99-2054-PAA-TI, Docket No. 991236-TI (Oct. 20, 1999).

33. *In re: Request for Transfer of Control Whereby Trailblazer Acquisition Corporation and Parent Company, Advanced TelCom Group, Inc., Agree to Acquire Shared Communications Services, Inc. Through Merger*, Order No. PSC-99-1722-PAA-TI, Docket No. 990868-TI (Sept. 2, 1999).

34. *In re: Request for Approval of Merger of Telecom One, Inc. into Eclipse Telecommunications, Inc.*, Order No. PSC-99-1723-PAA-TI, Docket No. 990823-TI (Sept. 2, 1999).

35. *In re: Request for Approval of Merger Agreement Whereby Global Crossing Ltd. Will Acquire Control of Frontier Corporation*, Order No. PSC-99-1487-PAA-TP, Docket No. 990555-TP (Aug. 3, 1999).

36. *In re: Request for Approval of Transfer of Control of StormTel, Inc. to CCC Merger Corp.*, Order No. PSC-99-1488-PAA-TI, Docket No. 990801-TI (Aug. 3, 1999).

37. *In re: Application by Technology Acquisitions, Ltd. and Gemini II, Inc. for Approval of Purchase and Merger*, Order No. PSC-99-1156-PAA-TP, Docket No. 990528-TP (June 7, 1999).

38. *In re: Request for Approval of Intra-Corporate Pro Forma Reorganization Whereby TresCom USA, Inc. Will Merge with and into Primus Telecommunications, Inc.*, Order No. PSC-99-0939-PAA-TI, Docket No. 990260-TI (May 11, 1999).

39. *In re: Request for Approval of Transfer of Control of Coastal Telecom Limited Liability Company d/b/a Coastal Telephone Company to Eclipse Telecommunications, Inc.*, Order No. PSC-99-0833-FOF-TI, Docket No. 990115-TI (Apr. 23, 1999).

40. *In re: Request for Approval of Merger of Logix Communications Corporation and American Telco, Inc., and Cancellation of IXC Certificate No. 4372 and American Telco's Tariff*, Order No. PSC-99-0353-FOF-TI, Docket No. 981577-TI (Feb. 19, 1999).

BEFORE THE SUPREME COURT
STATE OF FLORIDA

NuVox Communications, Inc., *et al.*, *Appellants*, v. The Florida Public Service Commission, AT&T Inc, BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., *Appellees*.	Case No. SC06- PSC Docket No. 060308-TP

AFFIDAVIT OF RICK L. MOORE

I, Rick L. Moore, do hereby declare as follows:

1. I am Managing Director-Corporate Development for AT&T Inc. ("AT&T").

2. The purpose of this affidavit is to describe the harm that AT&T, its shareholders, and the public would suffer from a stay of the Florida Public Service Commission's ("Commission's") Order No. PSC-06-0711-FOF-TP, Order Denying Protests (Fla. P.S.C. Aug. 24, 2006) ("Order"). As I explain in more detail below, for every month that the merger close is delayed, it will cost AT&T and its shareholders approximately $129 million in lost savings.

I. BACKGROUND

3. I am responsible for certain of AT&T's mergers and acquisitions activities. For more than 20 years, I have been involved in strategy development and responsible for the analysis, negotiation, and execution of dozens of transactions on behalf of AT&T and its

affiliates. I was directly involved in the evaluation of SBC Communications Inc.'s strategic options and the analysis in connection with its decision to acquire AT&T Corp. in 2005. I joined Southwestern Bell in 1976 and held various sales, product marketing, and product management positions prior to divestiture in 1984. I hold a B.S. degree in Economics from Southwestern Missouri State University.

4. This affidavit is organized as follows: First, I will briefly describe the merger and the various regulatory proceedings in which the merger has been reviewed. Second, I will discuss why the merger of AT&T and BellSouth will benefit the public interest. Third, I will discuss the harm that will result if this merger is prevented from closing on schedule.

II. THIS IS A HOLDING COMPANY MERGER THAT HAS BEEN SUBJECT TO EXTENSIVE REGULATORY REVIEW

5. The proposed merger will occur at the holding-company level; it will not involve the transfer of property for any utility certificated in Florida. According to the Merger Agreement, all of the issued and outstanding shares of BellSouth will be purchased by AT&T. BellSouth shareholders will receive AT&T stock. After the merger, BellSouth will become a wholly owned, first-tier subsidiary of AT&T.

6. From the perspective of the Florida Commission, there will be no change in the ownership structure of any BellSouth-affiliated entity subject to the Commission's regulatory authority. Likewise, the transaction will not result in any change in the ownership of any of the AT&T subsidiaries certificated in Florida. The merger will not impede the Florida Commission's ability to regulate and effectively audit the intrastate operations of any BellSouth or AT&T entities certificated by the Florida Commission that are under the direct or indirect control of AT&T or BellSouth. Upon consummation of the merger, all of those entities will

continue to hold all of the state certificates that they currently hold. There will be no transfer of assets of those certificated entities in connection with the merger.

7. Including the Florida Commission, 19 state public service commissions have now reviewed and approved this merger. In addition to these state proceedings, the merger has been the subject of extensive review by both the U.S. Department of Justice and the Federal Communications Commission ("FCC"). *See AT&T Inc. and BellSouth Corp. Applications for Approval of Transfer of Control*, WC Docket No. 06-74 (FCC filed Mar. 31, 2006). The FCC's review is nearly complete, and we expect to be in a position to close the merger by the end of October 2006.

III. STAYING THE FLORIDA COMMISSION'S ORDER WILL IMPOSE SIGNIFICANT COSTS ON AT&T AND BELLSOUTH

8. If this Court were to enter a stay, the merger will not be able to close while any such stay is pending.

9. The harm that such a decision would impose on AT&T and BellSouth shareholders, as well as to the public interest, is substantial. AT&T and BellSouth have estimated that the net present value of the synergies resulting from this merger, after costs to achieve, will be approximately $18 billion. The annual run rate of cost savings will exceed $2 billion by 2008, increasing to an annual run rate of greater than $3 billion in 2010. We expect that cost reductions will make up more than 90 percent of the total synergies.

10. A decision to stay the Order, thereby delaying the closing of this merger, will prevent AT&T and BellSouth from realizing these synergies. Based on the net present value of the synergies anticipated from the merger and the weighted average cost of capital, AT&T has

estimated that, for every month that merger close is delayed, it will cost it and its shareholders approximately $129 million in lost savings. This comes to about $4 million per day.

IV. STAYING THE MERGER WILL ALSO POSTPONE SUBSTANTIAL BENEFITS TO CONSUMERS AND HARM THE PUBLIC INTEREST

11. Finally, postponing the merger will forestall the significant consumer benefits that AT&T and BellSouth described in their Joint Application filed with the Florida Commission on March 31, 2006. AT&T and BellSouth described how the merger not only will allow the combined company to become a more effective and efficient competitor (which itself is a public benefit), but also will have a number of other specific public benefits, including: allowing the integration of the internet protocol ("IP") networks of AT&T, BellSouth, and Cingular; providing the combined company enhanced economies of scale to support research and development opportunities; and offering consumers the benefits of enhanced competition for video services. These benefits will accrue to mass-market and business consumers and will be highly beneficial to government customers.

I affirm under the penalties of perjury that the contents of the foregoing Affidavit are true to the best of my knowledge, information, and belief. This Affidavit was executed on September 18, 2006, in San Antonio, Texas.

Rick L. Moore

Sworn to and signed before me
this 18 day of September, 2006.

MARIBEL HURTADO
Notary Public, State of Texas
My Commission Expires
December 05, 2007

Notary Public

My commission expires:

BEFORE THE SUPREME COURT
STATE OF FLORIDA

NuVox Communications, Inc., *et al.*, *Appellants*, v. The Florida Public Service Commission, AT&T Inc, BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., *Appellees*.	Case No. SC06- PSC Docket No. 060308-TP

AFFIDAVIT OF MARSHALL M. CRISER III

I, Marshall M. Criser III, do hereby declare as follows:

1. I am the State President – Florida for BellSouth Telecommunications, Inc.

2. The purpose of this affidavit is to describe the harm that BellSouth, its shareholders, and the public would suffer from a stay of the Florida Public Service Commission's ("Commission's") Order No. PSC-06-0711-FOF-TP, Order Denying Protests (Fla. P.S.C. Aug. 24, 2006) ("Order").

I. BACKGROUND

3. I was named State President in 2005 and remain in that position today. In this job, I have overall responsibility for BellSouth Telecommunications, Inc.'s regulatory and external affairs operations in Florida. In addition, I oversee the operations

of BellSouth Telecommunications, Inc. in Florida as they relate to employment, communications, economic development, community, and government issues.

4. I have 26 years of experience in the telecommunications industry. I began work for Southern Bell Telephone and Telegraph Company in 1980, first working in the regulatory, internal audits, and comptrollers organizations. I later held various other positions with BellSouth, including Director of State and Agency Relations for BellSouth Corporation in Washington, D.C., Vice President-Regulatory and Strategic Planning for BellSouth International, and Regulatory & External Affairs Vice President for BellSouth Telecommunications in Florida. I earned a bachelors degree in business administration from the University of Florida, and I also completed the Advanced Management Programme at INSEAD in Fountainebleau, France.

II. STAYING THE FLORIDA COMMISSION'S ORDER WILL IMPOSE SIGNIFICANT COSTS ON BELLSOUTH AND PREVENT THE REALIZATION OF SUBSTANTIAL MERGER BENEFITS

5. I have reviewed the Affidavit of Rick L. Moore submitted in opposition to the Emergency Motion to Stay the Order, and I agree with its contents. I add the paragraphs that follow to explain further harms that delay of our merger with AT&T Inc. would cause.

6. The harm that staying the Order would impose on each company's shareholders, as well as to the public interest, is substantial. As Mr. Moore explains, AT&T and BellSouth have estimated that approximately $18 billion in synergies will be achieved as a result of this merger. But a decision to stay the Order, thereby delaying the closing of this merger, will prevent the parties from realizing these synergies for at least

the duration of the stay. I agree that the loss to the combined companies of preventing the merger close will be approximately $129 million per month in lost savings.

7. I also agree with Mr. Moore that preventing the merger from going forward will delay and potentially eliminate altogether the retail and wholesale customer benefits that AT&T and BellSouth described in the Joint Application filed with the Florida Commission in March 31, 2006.

8. In addition, BellSouth shareholders would be separately harmed if a stay were granted. At the time the merger agreement was signed by the two companies, the transaction created a premium of approximately $10 billion for BellSouth shareholders, as measured by the pre-agreement closing price of BellSouth stock and the price that reflected the deal's terms.[1] Since the signing of the agreement, the stock market has recognized the public interest value of the deal and has gradually reflected that value in BellSouth's stock price. Over time, as the benefits of the transaction were explained and as many regulatory agencies approved it, the gap between the trading price of BellSouth stock and the price reflecting the agreement's terms has shrunk. Because the transaction has not closed, however, BellSouth stock still trades at a discount off the price reflecting the agreement's terms. At the market's close on Friday, September 15, 2006, the gap between the two prices represents an approximate value of $550 million that BellSouth

[1] The premium is estimated by the difference in the closing price ($31.46) of BellSouth stock on the day before the merger agreement was signed and the stock price ($37.09) computed in accordance with the merger agreement's exchange ratio of 1.325 shares of AT&T stock for each share of BellSouth stock (AT&T closed at $27.99, and that price multiplied by 1.325 equals $37.09). The difference of $5.63 ($37.09-$31.46) multiplied by the approximately 1.8 billion outstanding BellSouth shares equals approximately $10.1 billion.

shareholders are waiting to receive.[2] As long as the closing of the transaction is delayed, BellSouth shareholders are, at a minimum, denied the benefits of this value. If it became clear that the closing of the transaction were going to be delayed further, the trading gap described above would almost certainly widen, and the value to BellSouth's shareholders would accordingly be delayed.

9. Finally, I want to discuss one additional benefit that is especially important to Florida: recovery from natural disasters. Florida's unique geography regularly subjects it to hurricanes and their aftermath, and BellSouth has developed and implemented recovery mechanisms more efficiently with each hurricane experience. As good as BellSouth's response mechanisms are today, they will improve when BellSouth combines with AT&T. AT&T has invested in 350 mobile infrastructure (power and cooling) units and has a fleet of mobile network hubs that can be deployed when an existing hub is overcome by a disaster. When these resources and the wireless resources of Cingular are combined with BellSouth's experience under unified management, our company will be a better responder when future disasters occur. These enhanced capabilities benefit both our retail and wholesale customers, and the customers they serve in turn.

[2] At the market's close on Friday, September 15, 2006, AT&T's share price was $31.86, which multiplied by the deal's exchange ratio of 1.325 equals $42.21. BellSouth's share price closed at $41.90, meaning there is a trading gap of 31 cents ($42.21-$41.90). Multiplying the 1.8 billion BellSouth shares by 31 cents equals $558 million.

I affirm under the penalties of perjury that the contents of the foregoing Affidavit are true to the best of my knowledge, information, and belief and that this Affidavit was executed on September 18, 2006, in Miami, Florida.

Marshall M. Criser III

Sworn to and signed before me

this 18TH day of September, 2006.

Victoria Fatool

Notary Public

Personally known to me.

My commission expires:

VICTORIA FATOOL
MY COMMISSION # DD 562587
EXPIRES: August 30, 2010
Bonded Thru Notary Public Underwriters