Supreme Court of Florida

ORIGINAL

THURSDAY, SEPTEMBER 28, 2006

CASE NO.: SC06-1828
Lower Tribunal No.: 060308-TP

NUVOX COMMUNICATIONS, INC., ET AL.	vs.	LISA POLAK EDGAR, ETC., ET AL.
Appellant(s)		Appellee(s)

Upon consideration of appellants' Emergency Motion to Stay Florida Public Service Commission Order No. PSC-06-0711-FOF-TP and to Expedite Appeal, and responses thereto, it is ordered that the Motion to Expedit Appeal is denied.

It is further ordered that the Emergency Motion to Stay Florida Public Service Commission Order No. PSC-06-0711-FOF-TP is hereby forwarded to the Florida Public Service Commission for its consideration and determination. This action should not be construed as a comment on the merits of the motion. The Florida Public Service Commission shall treat the motion as if it had been originally filed there on the date it was filed in this Court.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.

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Thomas D. Hall
Clerk, Supreme Court

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D. BRUCE MAY
STEPHEN H. GRIMES
BLANCA S. BAYO, DIRECTOR
VICKI GORDON KAUFMAN
DAVID E. SMITH
PATRICK K. WIGGINS
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JAMES MEZA, III
JOHN R. BERANEK

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NUVOX COMMUNICATIONS, INC., ET AL.	vs.	LISA POLAK EDGAR, ETC., ET AL.
Appellant(s)		Appellee(s)

Joint CLECS' Motion for Leave to File Reply is hereby denied.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.

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BEFORE THE SUPREME COURT
STATE OF FLORIDA

NuVox Communications, Inc., Time Warner Telecom of Florida, L.P., XO Communications Services, Inc., Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC

Appellants,

v.

The Florida Public Service Commission, Lisa Polak Edgar, in her official capacity as Chairman of the Florida Public Service Commission; and J. Terry Deason, Isilio Arriaga, Matthew M. Carter II and Katrina J. Tew in their official capacities as Commissioners of the Florida Public Service Commission

and

BellSouth Telecommunications, Inc.,

Appellees.
_____/

Case No.: SC06- 1828
Lower Case No.: Docket No. 060308-TP

Filed: September 13, 2006

EMERGENCY MOTION TO STAY FLORIDA PUBLIC SERVICE COMMISSION ORDER NO. PSC-06-0711-FOF-TP AND TO EXPEDITE APPEAL

COME NOW NuVox Communications, Inc. (NuVox), Time Warner Telecom of Florida, LP (TWTC), XO Communications Services, Inc. (XO), Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC (Xspedius), Appellants (collectively, Joint CLECs), pursuant to Rule 9.190(e) and 9.300, Florida Rules of Appellate Procedure and Section 120.68(3), Florida Statutes, and file this Emergency Motion to Stay Order No. PSC-06-711-FOF-TP of the Florida Public Service Commission (Commission) and further

request that this appeal be processed on an expedited basis. As grounds therefore, Joint CLECs state:

I.

INTRODUCTION

1. In early March 2006, AT&T Inc. (AT&T) and several BellSouth entities (BellSouth) (collectively, AT&T/BellSouth) announced plans to merge. This $67 billion merger is one of the largest transactions ever contemplated in the United States. The Wall Street Journal, in a March 6, 2006 article, described the merger as "the fifth largest U.S. deal ever, based on equity values...."

2. Despite the fact that this case involves one of the largest merger transactions in the history of this country, and despite the fact that numerous entities sought to participate before the Commission, the Commission granted the requisite state approval for the combination of the telecommunications giants without an evidentiary hearing. It based its approval on AT&T's and BellSouth's unsworn allegations, despite the fact that Joint CLECs sought to test such allegations. The Commission denied Joint CLECs' due process rights to participate in the proceeding, and failed to conduct any evidentiary proceeding on the transfer.

3. The Commission's clear error in this case is based on its misinterpretation of section 364.01 (3), (4), Florida Statutes. The statutory provisions of section 364.01 require the Commission to ensure that transactions such as this are in the public interest, as that criteria is defined in the Commission's enabling statute. The public interest criteria include, among other matters, a review of the impact of such transactions on competition and the competitive market place.

4. Not only did the Commission fail to make such an inquiry, it further erred in finding that Joint CLECs, as competitors in the local telecommunications market in Florida, lacked standing to raise and try such issues. Clearly, Joint CLECs are substantially affected by the merger, and further such merger affects the competitive telecommunications market in Florida.

5. This Motion for Stay and its filing in this Court are necessitated by the fact the merger at issue is scheduled to close very soon, as soon as next month. Therefore, time is of the essence in conducting this review of the Commission's action. It is critical that the status quo be maintained until appellate review is complete and the appropriate proceedings are conducted below. Thus, as explained more fully below, Appellants request that this Court issue a stay of the Commission's order, process this case on an expedited schedule, and at its conclusion, remand this matter to the Commission with directions to conduct an evidentiary hearing on whether this transaction is in the public interest pursuant to Florida law.

II.

PROCEEDINGS BELOW

6. The case before the Court was initiated at the Commission when AT&T/BellSouth filed a 26-page long "Joint Application" with 79 pages of exhibits[1] seeking approval of the transfer of control of facilities from BellSouth to AT&T due to the proposed merger between the two companies.

7. In the Joint Application, AT&T/BellSouth asserted that: "[t]his indirect transfer of control of facilities and operations will *further the public interest* and benefit consumers in Florida in multiple ways."[2] Joint Applicants spent much of the remainder of the Joint

[1] Appendix, pp. 1-114.
[2] Appendix, p. 2, ¶ 4, emphasis supplied.

Application describing the "significant benefits" they alleged the merger would provide and why they asserted that the merger was in the public interest.[3] Joint Applicants alleged that it was *irrefutable* that the merger would not adversely affect competition in Florida.[4]

8. As a result of the size and significance of the proposed merger, numerous parties sought to intervene in the Commission proceeding to address the unsworn allegations in the Joint Application, including NuVox[5], TWTC[6], and US LEC of Florida, Inc.[7] AT&T/BellSouth opposed each petition to intervene.[8] These entities, as well as other discussed below, are Competitive Local Exchange Carriers (CLECs) who are participants and competitors in the local telecommunications market in Florida. In addition, CLECs are purchasers of critical services and inputs to their own offerings from BellSouth in the wholesale market pursuant to the Telecommunications Act of 1996.[9]

9. On June 12, 2006, the Commission Staff filed its Staff Recommendation[10], in which it recommended to the Commission the action it should take on the Joint Application. Commission Staff recommended that the Joint Application be approved based on its review of the financial, management, and technical capabilities of AT&T and BellSouth.

10. On June 19, 2006, Attorney General Charlie Crist wrote to the Commission urging it to evaluate "the maintenance of competitive markets" and to prevent the merged company from squeezing out real competition.[11] The Attorney General further stated: "The

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[3] Appendix, pp.12-20, ¶¶27-49.
[4] Appendix, p. 20, ¶ 50, emphasis supplied.
[5] Appendix, pp. 115-123.
[6] Appendix, pp. 124-127.
[7] Appendix, pp. 128-139.
[8] Appendix, pp. 140-207.
[9] 47 USC §§ 151 et seq. (the Act). The Act imposes numerous duties upon incumbent carriers, such as BellSouth, in order to foster local telecommunications competition. For example, incumbents must lease certain parts of their networks to CLECs. *See, i.e.*, 47 USC § 251(c)(3).
[10] Appendix, pp. 208-218.
[11] Appendix, p. 219.

combined entity will no doubt dominate the telecommunications markets in which it competes, particularly the wireline markets."[12] Attorney General Crist also noted that: "By statute, the Commission is charged with ensuring the availability of service at reasonable prices, and encouraging competition in the wireline market so that consumers will have the widest possible range of choices among services and providers."[13]

11. The Commission considered its Staff's recommendation at its June 20, 2006 Agenda Conference. The Commission heard argument from counsel for interested parties and proceeded to approve the Joint Application.[14] The Commission made no mention of Attorney General Crist's letter or his concerns. The Commission issued Order No. PSC-06-0531-PAA-TP, Notice of Proposed Agency Action Order Approving Indirect Transfer of Control (*PAA Order*) [15], memorializing its preliminary decision on June 23, 2006. The *PAA Order* noted the Commission's jurisdiction under section 364.33, Florida Statutes, commenting that while this statute has no delineated standards, the Commission would look to section 364.01, which provides a public interest standard to be followed in reviewing ATT/BellSouth's request. The Commission misinterpreted the public interest standard in section 364.01 to encompass only a review of the merged company's management, technical, and financial capability. Based on those criteria only, the Commission found the transaction to be in the public interest.

12. As discussed at further length below, the capabilities of the merged company's management is a relevant inquiry, but not the complete inquiry under the statute and not a substitute for an examination of whether the transaction is in the public interest. If GM, Ford, Honda, Daimler Chrysler and Toyota were to merge, they would pass the management, technical

[12] Appendix, p. 219.
[13] Appendix, p. 220.
[14] Appendix, pp. 221-273.
[15] Appendix, pp. 274-280.

and financial capability test with flying colors. But few would argue that such a merger would be in the public interest. The portion of the test the Commission selected reads the public interest test out of the statute and opens the door to almost any merger of competently run companies.

13. The *PAA Order* was preliminary action as no hearing had been held regarding the Commission's findings. On July 14, 2006, CLECs, ITC^DeltaCom, NuVox, XO, and Xspedius filed a Protest of Proposed Agency Action (Protest).[16] In the Protest, the CLECs stated that the Commission had selectively applied only some of the public interest criteria of section 364.01 and had failed to apply other stated statutory criteria, including the impact of the transaction on competition. In addition, the Protest alleged that the Commission had failed to conduct an evidentiary hearing on the numerous unsworn allegations in the Joint Application. Finally, the CLECs alleged that their substantial interests were affected by the approval without a hearing.

14. TWTC filed a separate protest and alleged that the Commission had incorrectly limited its public interest review to only certain factors and not others and had simply accepted the assertions of AT&T/BellSouth.[17] TWTC also noted the ability of AT&T/BellSouth to deny it access to the "last mile" in order to compromise TWTC's ability to reach its customer base as well as its impact on internet interconnection.

15. Joint CLECs also brought to the Commission's attention the proceedings in federal district court in the District of Columbia in which Judge Emmet Sullivan announced his intent to conduct proceedings to determine whether SBC Communications, Inc.'s take over of AT&T had actually served the public interest.[18]

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[16] Appendix, pp. 281-312.
[17] Appendix, pp. 313-333.
[18] *United States of America v. SBC Communications, Inc. and AT&T Corp*, Civil Action No. 03-2512 (EGS); *United States of America v. Verizon Communications, Inc. and MCI, Inc.*, Civil Action No. 03-2513 (EGS).

16. AT&T/BellSouth filed in opposition to both Protests[19] and Joint CLECs responded.[20]

17. Commission Staff filed a Staff Recommendation addressing the Protest.[21] Staff opined that Joint CLECs had failed to meet the requirements for standing because their allegations were simply "speculation." Staff also recommended that the Commission find that the proceeding was not of the type designed to protect the interests Joint CLECs had raised.[22]

18. The Commission considered the Staff Recommendation on August 15, 2006 at its Agenda Conference. It heard argument from counsel for the parties.[23] The Commission asked no substantive questions and approved the Staff Recommendation in its entirety.

19. The Commission's decision is memorialized in Order No. PSC-06-0711-FOF-TP, Order Denying Protests (*Order Denying Protests*).[24] The Commission found that Joint CLECs failed to demonstrate that they had standing to challenge the Commission's decision approving the transfer of control because they had not alleged injury of sufficient immediacy to warrant a hearing and that the injuries Joint CLECs alleged were not the type the proceeding was designed to protect.

20. The Commission further denied Joint CLECs the opportunity to amend their pleading pursuant to section 120.68(7), Florida Statutes.

21. On September 13, 2006, Joint CLECs filed a Notice of Appeal of the *Order Denying Protests* with this Court.

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[19] Appendix, pp. 334-353.
[20] Appendix, pp. 354-378.
[21] Appendix, pp. 379-388.
[22] Many of the issues raised in the Protests, such as Attorney General Crist's concerns and the federal court proceeding, were simply ignored.
[23] Appendix, pp. 389-408.
[24] Appendix, pp. 409-418.

III.

A STAY IS APPROPRIATE IN THE CIRCUMSTANCES OF THIS CASE

A.

Joint CLECs Have Properly Sought a Stay from this Court

22. Joint CLECs' Motion for Stay to this Court is appropriate under the circumstances of this case. It is not a prerequisite for a stay of administrative action that the stay request be made first to the lower tribunal. The appellate courts have the constitutional power to issue a stay pending review.[25]

23. In the case of administrative action, the Administrative Procedure Act also provides that an aggrieved party may seek a stay from the Court. Section 120.68(3), Florida Statutes, provides: ". . .a petition to the agency for a stay is *not* a prerequisite to a petition to the court for supersedeas. . . ."

24. In addition, rule 9.190(e)(2), Florida Rules of Appellate Procedure, which governs stay requests pending review of action taken under the Administrative Procedure Act, provides:

> A party seeking to stay and administrative action may file a motion either with the lower tribunal *or*, for good cause shown, with the court in which the notice or petition has been filed.[26]

As the Committee Notes indicate, subsection (e) was added to the Appellate Rules in 2000 to address stays pending judicial review of administrative action. The notes state that while ordinarily a stay should first be addressed to the lower tribunal, this rule is intended to address situations where good cause can be shown for seeking a stay directly from the court, particularly in the case of collegial bodies.

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[25] 2 FLPRAC § 1.7 (2006 ed.), *citing*, *Offerman v. Offerman*, 643 So.2d 1184 (Fl. 5th DCA 1994), *Perez v. Perez*, 769 So.2d 389 (Fl. 3d DCA 1999).

[26] Rule 1.190(e)(2)(A), emphasis supplied.

25. As described above, time is of the essence in this case. This is not the more typical appellate case where an appropriate remedy (such as damages, for instance) can be awarded to the prevailing party at the conclusion of the matter. Upon information and belief, the merger between AT&T and BellSouth is due to close on or about mid-October.[27] Once that transaction closes, the harm to Joint CLECs will have occurred and the remedy Joint CLECs seek (an evidentiary hearing) will be of little use. If Joint CLECs were to first seek a stay in the lower tribunal, precious time would be expended due to the decision making process the Commission must employ as a collegial body.

26. Even expedited Commission consideration (when granted), can take more than 45 days. The proceedings at the Commission described by Joint CLECs above in regard to this matter are illustrative of how the Commission takes action as a collegial body whose proceedings must occur in the sunshine. When action is requested of the Commission, the Commission Staff prepares a written recommendation for the Commission's consideration. Such recommendations generally must be filed ten (10) days before the duly noticed Agenda Conference, though sometimes permission to late file a recommendation is granted to Staff. Agenda Conferences are generally held twice a month, but sometimes are held only once a month.[28] Given the Commission's calendar and work load, it can take several months for the Commission to take action.

27. If Commission action on the stay motion necessitated appellate review, additional time would be added to the stay process; time during which the transaction at issue may well have already occurred. Joint CLECs simply cannot take a chance that by the time the

[27] Appendix, pp. 419-425. As the Wachovia analysis indicates, the Federal Communications Commission (FCC) is expected to act on the merger at its October 12th meeting. Generally, Department of Justice action precedes FCC action, not follows it. Thus, closing is expected when the FCC acts.

[28] For example, there is only one Agenda Conference scheduled for September and only one scheduled for November.

Commission processes a stay request (and this Court reviews it, if necessary), the transaction which is at the heart of this case will have already occurred.

28. Joint CLECs seek an evidentiary hearing on the public interest criteria which must be applied to this transaction pursuant to Florida law. Were the merger to close before this Court rules and were the Court to find Joint CLECs entitled to a hearing, such hearing could well be a futile exercise because the action the hearing would be held to address would have already occurred. Timing considerations not only permit but necessitate that Joint CLECs file this motion with the Court to preserve the status quo. This Court has inherent authority to grant the stay without the need for Joint CLECs to first seek a stay from the Commission and should do so in this case.

B.

Joint CLECs Have Met the Requirements for Entry of a Stay

29. The purpose of a stay is to preserve the status quo during review.[29] This Court has broad discretion to grant a motion for stay.[30]

30. Factors which are generally considered in deciding whether to grant a stay are the likelihood of success on the merits and the likelihood of harm if a stay is not granted.[31] In this case, both factors indicate that a stay of the Commission's order should be imposed until the conclusion of appellate review.

31. The merger of these two companies will have a dramatic impact on retail and wholesale consumers as well as telecommunications competition in Florida. Through this merger, one of the most vigorous competitors to BellSouth's monopoly power in Florida will be

[29] *Hirsch v. Hirsch*, 309 So.2d 47 (Fl. 3d DCA 1975).
[30] *Shoemaker v. State Farm Mutual Automobile Ins. Co.*, 890 So.2d 1195, 1197 (Fl. 5th DCA 2005). *Shoemaker* involved the discretion of a trial court, but clearly an appellate court has such broad discretion as well.
[31] *Perez v. Perez*, 769 So.2d 389, 391 (Fl. 3d DCA 1999), *citing*, *State ex rel. Price v. McCord*, 380 So.2d 1037 (Fl. 1980).

removed from the marketplace and reincarnated as a regional Bell operation company. Not only will one of BellSouth's strongest competitors be neutralized, AT&T's market share will be combined with BellSouth's. This transaction, which consolidates two of the largest providers in the Florida market, will immediately and negatively impact the competitive telecommunications market in Florida. This market consolidation will reduce consumer choice, on both a retail and wholesale level. Despite the dramatic and far-reaching impact of the transaction at issue, Joint CLECs were denied the opportunity to test the many allegations of public interest AT&T/BellSouth made and that the Commission accepted as true because the Commission misinterpreted the applicable statute and declared that Joint CLECs had no standing in this case.

1.

Likelihood of Success on the Merits

32. Joint CLECs have a high likelihood of success on the merits because the Commission's *Order Denying Protests* makes a fundamental error of law and misinterprets the Commission's statutory obligations in reviewing the proposed transaction.

33. First, the Commission claims in its *Order Denying Protests* that Joint CLECs have failed to demonstrate that their allegations are of sufficient immediacy to warrant a hearing. The Commission claims that Joint CLECs have engaged in "mere speculation." Through this reasoning, the Commission puts Joint CLECs in a wholly untenable "catch 22" position – that is, it is the Commission's position that the *only way* Joint CLECs could ever allege standing would be *after* they have incurred injury at the hand of the enormous consolidated company whose transfer of control request is before the Commission in *this* docket. However, such injury can't occur until *after* the merger, the subject of this docket, occurs. Thus, it appears to be the Commission's reasoning that once Joint CLECs can no longer get wholesale services or once the

merged company discriminates against Joint CLECs or once the merged company engages in anticompetitive activity to gain Joint CLECs' customers, then and only then might Joint CLECs have the opportunity to be heard on one of the largest telecommunications mergers ever to come before the Commission. Such a posture is simply untenable – by the time such complaints are heard and resolved, irreparable damage will have been done.[32] This is why the transaction is reviewed *prior* to approval – so that the public interest may be gauged. The fallacy of the Commission's view is reinforced by its finding that, despite Joint CLECs'request to be given leave to amend their Protest pursuant to section 120.569(2)(c), Florida Statutes, Joint CLECs could allege *no circumstances* that would give them standing.[33]

34. Approval of the transfer of control results in the removal from the marketplace of one of the most vigorous competitors to BellSouth's monopoly power in Florida – AT&T. This competitor will not only be effectively and permanently removed from the marketplace, but it will be reincarnated as and combined with a regional Bell operating company. Not only will this loss affect Florida consumers, but it will also further exacerbate the lack of competitive network facilities available to CLECs in Florida. AT&T competes today with BellSouth to provide special access services to CLECs in some areas of Florida. These competitive options will disappear after the merger. The combined resources of AT&T and BellSouth will surpass by many magnitudes all other telecommunications competitors, resulting in even less competition in

[32] The cases the Commission attempts to rely on are simple inapposite in this situation. Order No. PSC-98-0702-FOF-TP (*MCI 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 approaching the market power and scope that the merged AT&T/BellSouth company will have in the State of Florida. But most importantly, the Commission's findings in that order were not reviewed by an appellate court. Nor are the other cases the Commission cites on point. *Ameristeel Corp. v. Clark*, 691 So.2d 473 (Fl. 1997), involved the Commission's approval of an electrical territorial agreement over a customer's objection. The retail electric market is the exact opposite of the local telecommunications market. Service territories are divided among the electric utilities and no retail competition is permitted. In contrast, local telecommunication competition is an explicit goal of state and federal law. *Florida Society of Ophthalmology v. State Bd. Of Optometry*, 532 So.2d 1279 (Fla. 1st DCA 1988), involved a rule challenge by physicians to a rule permitting optometrists to prescribe medicine.

[33] *Order Denying Protests* at 8 ("... the defects in these pleadings cannot be cured."), Appendix, p. 416.

this state – despite the fact that the Florida Legislature has clearly made the competitive market place an important goal of Chapter 364, Florida Statutes. The proposed transfer will immediately and negatively impact Joint CLECs' ability to compete in the Florida market. It will result in a huge market consolidation that will reduce consumer choice, on both a retail and wholesale level and harm Joint CLECs' ability to compete in the consolidated market. This is not "mere speculation," this is market reality.

35. The argument that Joint CLECs' position is "mere speculation" about the future impact of the transaction proves too much: any review of a future merger involves, to some extent, an extrapolation from current facts. But, this "speculation," as the Commission terms it, must include an analysis of the public interest and should be conducted in evidentiary hearings. Indeed, what the Joint CLECs seek is a rigorous analysis based on an evidentiary record, with sworn testimony, subject to cross examination, from all affected parties as to the current facts and what they suggest about the impact of the transaction. If there has been "speculation," it is the Commission's assumption that the AT&T/BellSouth filings are accurate, and that there can be no controverting evidence.

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

37. The combined resources of the new merged 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.

38. 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.

39. 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.

40. Joint CLECs are wholesale customers of BellSouth and as such will be substantially affected by the transaction because 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.

41. Second, the Commission opines that the injuries alleged are not the type the proceeding before the Commission is designed to protect. The Commission previously has noted that when it reviews requests for transfer of control, it must examine the public interest. In Order No. PSC-06-0033-FOF-TP (*Sprint Nextel Order*), 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.[34]

42. Despite the Commission's articulation of a public interest standard as imbued in section 364.01, it impermissibly limited its application of the public interest test to just one subsection of 364.01. While the Commission contends in its *Order Denying Protests* that Joint CLECs seek to "expand" the proceeding beyond its scope, the Commission's characterization is inaccurate. Joint CLECs simply want the Commission to apply *all* the public interest criteria, not just selective portions.

43. 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. . . .*[35]

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[34] Appendix, pp. 426-437, *Sprint Nextel Order* at 6, emphasis supplied. In the *Sprint Nextel Order*, the Commission again incorrectly confined its review to only a subset of the applicable criteria; however, as with the other orders the Commission relied upon, the *Sprint Nextel Order* was not reviewed by an appellate court.

[35] Section 364.01(3). Emphasis supplied.

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

44. 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;
- Protect the public health, safety, and welfare by ensuring that monopoly services provided by telecommunications companies continue to be subject to effective price, rate, and service regulation;
- *Promote competition* by encouraging innovation and investment in telecommunications markets;
- Encourage all providers of telecommunications services to introduce new or experimental telecommunications services;
- Ensure that all providers of telecommunications services are treated fairly, by *preventing anticompetitive behavior*.[36]

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.

45. The Commission cites *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 478 (Fl. 1st DCA 1981), for its zone of interest position. Joint CLECs do not dispute that this is one of the seminal standing cases; however, it is the Commission's "application" of *Agrico's* principles that constitute error. In relying on *Agrico*, the Commission opines that "the standing requirements in permitting proceedings . . . are analogous to the merger

[36] Emphasis supplied.

at issue in this proceeding."[37] However, the environmental permitting statute at issue in *Agrico*, did not direct the agency to consider competitive issues as does Chapter 364. Thus, the two cases are not at all analogous.

46. In a tortured argument, the Commission claims that its citation to section 364.01 and its duty to review the public interest is "examined within the framework of sections 364.33 and 364.335, Florida Statutes."[38] The Commission states:

> In this proceeding, we are operating under sections 364.33 and 364.335, Florida statutes, which governs whether the transfer of majority organization control is in the public interest *in light of the criteria enumerated therein.*[39]

However, section 364.33, the section under which the request for transfer of control was filed, has *no* standards; that is why the Commission looks to the public interest criteria of section 364.01, its enabling statute. Section 364.335 is the statute governing new certificate applications. That section also requires a public interest review.[40] The Commission's comment that a "more specific statute controls over a more general,"[41] is certainly true, but section 364.01 contains the specific standard.

48. The Commission also states that neither section 364.33 or 364.335 was designed to protect competitors' interests. Again, the Commission errs. It must look to the public interest criteria of section 364.01, which inextricably tie the existence of a competitive market place (which after all must have participants), to the public interest. And the fact that there may be other sections of Chapter 364 which provide a basis for a complaint proceeding after the transaction has closed does not relieve the Commission of its duty to conduct a public interest

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[37] *Order Denying Protests* at 7, Appendix, p. 415.
[38] *Order Denying Protests* at 7; Appendix, p. 415.
[39] *Order Denying Protests* at 8, emphasis supplied, Appendix, p. 416.
[40] *See*, §364.335(2)("The commission may, on its own motion, institute a proceeding . . . to determine whether the grant of such certificate is in the public interest"; §364.335(3) ("The commission may grant a certificate, in whole or in part with modifications in the public interest....")
[41] *Order Denying Protests* at 7, Appendix, p. 415.

review *prior* to taking action with appropriate participation by those affected by the requested relief.

2.

Likelihood of Harm

49. The transaction at issue has been described in some detail above. It will result in the combination of AT&T and BellSouth – two tremendous telecommunications companies with tremendous market power that far outweighs all competitors combined. If Joint CLECs are correct and the Commission has erred in refusing to hear from them regarding this transaction, they will be irreparably harmed if the Commission *Order Denying Protests* is not stayed while this appeal is considered.

50. If the transaction closes and *then* the Court requires the Commission to conduct an evidentiary hearing, little will have been accomplished. The hearing must occur, and the Commission must consider the relevant issues, *before* the transaction for which approval is sought occurs.

51. Any harm to Appellees is outweighed in light of Joint CLECs' denial of due process and right to a hearing. The Commission will simply be required to follow appropriate procedure and conduct an evidentiary hearing with participation by affected parties prior to making its final decision – the action it should have followed in the first instance. Similarly, harm to AT&T/BellSouth is outweighed in light of the denial of Joint CLECS' right to a hearing. Further, the expedited review requested below will minimize any delay.

IV.

JOINT CLECS' REQUEST THAT THIS APPEAL BE EXPEDITED

52. Because, as explained above, the closing of the transaction at issue is imminent, Joint CLECs request that this appeal be expedited. Joint CLECs suggest the following schedule:

Record preparation:	September 22, 2006
Record transmittal:	September 25, 2006
Initial brief:	September 25, 2006
Answer brief:	October 2, 2006
Reply brief:	October 9, 2006
Oral Argument:	at the Court's earliest convenience.

WHEREFORE, Joint CLECs request that the Court:

1. Stay the Commission *Order Denying Protests*; and

2. Process this appeal on an expedited basis.

Vicki Gordon Kaufman
Florida Bar No. 286672
vkaufman@moylelaw.com
Jon C. Moyle, Jr.
Florida Bar No. 727016
jmoylejr.@moylelaw.com
Moyle, Flanigan, Katz, Raymond,
White & Krasker, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
Telephone: 850.681.3828
Fax: 850.681.8788

Attorneys for Joint CLECs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Emergency Motion to Stay PSC Order No. PSC-06-0711-FOF-TP and to Expedite Appeal was served via (*) hand delivery this 13th day of September, 2006, to the following:

(*) Patrick Wiggins
Jason Fudge
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0850
pwiggins@psc.state.fl.us
jfudge@psc.state.fl.us

(*) James Meza
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301-1556
Nancy.sims@bellsouth.com
james.meza@bellsouth.com

(*) Tracy Hatch
AT&T Communications of the Southern States, LLC
315 S. Calhoun Street, Suite 750
Tallahassee, FL 32301
thatch@att.com

Vicki Gordon Kaufman

BEFORE THE SUPREME COURT
STATE OF FLORIDA

NuVox Communications, Inc., Time Warner Telecom of Florida, L.P., XO Communications Services, Inc., Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC

Appellants,

v.

The Florida Public Service Commission, Lisa Polak Edgar, in her official capacity as Chairman of the Florida Public Service Commission; and J. Terry Deason, Isilio Arriaga, Matthew M. Carter II and Katrina J. Tew in their official capacities as Commissioners of the Florida Public Service Commission

and

BellSouth Telecommunications, Inc.,

Appellees.
_____/

Case No.: SC06- 1828
Lower Case No.: Docket No. 060308-TP

APPENDIX TO

EMERGENCY MOTION TO STAY FLORIDA PUBLIC SERVICE COMMISSION ORDER NO. PSC-06-0711-FOF-TP AND TO EXPEDITE APPEAL

VOLUME I of II
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Large Appendix
Please See Court File

BEFORE THE SUPREME COURT
STATE OF FLORIDA

NuVox Communications, Inc., Time Warner Telecom of Florida, L.P., XO Communications Services, Inc., Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC

Appellants,

v.

The Florida Public Service Commission, Lisa Polak Edgar, in her official capacity as Chairman of the Florida Public Service Commission; and J. Terry Deason, Isilio Arriaga, Matthew M. Carter II and Katrina J. Tew in their official capacities as Commissioners of the Florida Public Service Commission

and

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Appellees.
_____/

Case No.: SC06- 1828
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APPENDIX TO

EMERGENCY MOTION TO STAY FLORIDA PUBLIC SERVICE COMMISSION ORDER NO. PSC-06-0711-FOF-TP AND TO EXPEDITE APPEAL

VOLUME II of II
Pages 208 - 437

BEFORE THE SUPREME COURT
STATE OF FLORIDA

NuVox Communications, Inc., et al.,

Appellants,

CASE NO. SC 06- 1828
Lower Case No.: Docket No. 060308-TP

v.

The Florida Public Service Commission, AT&T Inc., BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc.,

Appellees.

_____/

THE FLORIDA PUBLIC SERVICE COMMISSION'S RESPONSE IN OPPOSITION TO EMERGENCY MOTION TO STAY FLORIDA PUBLIC SERVICE COMMISSION ORDER NO. PSC-06-0711-FOF-TP AND TO EXPEDITE APPEAL

The Florida Public Service Commission (Commission) hereby files its Response in Opposition to Emergency Motion to Stay Commission Order No. PSC-06-0711-FOF-TP and to Expedite Appeal[1] and states:

BACKGROUND

On March 31, 2006, BellSouth Telecommunications, Inc., BellSouth Long Distance, Inc., BellSouth Corporation and AT&T, Inc. (BellSouth/AT&T) filed a joint application at the Commission, requesting approval of indirect transfer of control of telecommunications facilities from BellSouth to AT&T. On June 23, 2006, by Proposed Agency Action Order (PAA) PSC-06-0531-PAA-TP, the Commission approved the indirect transfer of control.

[1] The Commission is also in agreement with the arguments made in the Joint Opposition of AT&T and BellSouth to Emergency Stay filed on September 18, 2006.

On July 14, 2006, ITC^DeltaCom Communications, Inc. (ITC^DeltaCom), NuVox Communications, Inc. (NuVox), XO Communications Services, Inc. (XO), and Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC (Xspedius), and Time Warner Telecom of Florida, LP (collectively referred to herein as the "Movants"), filed a protest to PAA Order PSC-06-0531-PAA-TP and requested a hearing in the matter. By Order No. PSC-06-0711-FOF-TP, issued August 24, 2006, the Commission found that the Movants lacked standing to protest PAA Order PSC-06-0531-PAA-TP, denied the request for hearing, and made Order No. PSC-06-0531-PAA-TP final and effective as of August 15, 2006.

On September 13, 2006, the Movants filed their Notice of Appeal. Also, on September 13, 2006, the Movants filed this Emergency Motion to Stay Commission Order No. PSC-06-0711-FOF-TP and to Expedite Appeal.

STANDARD OF REVIEW

A party seeking to stay administrative action may file a motion either with the lower tribunal or, for good cause shown, with the court in which the notice or petition has been filed. Rule 9.190(e)(2)(A), Florida Rules of Appellate Procedure. The filing of a motion does not operate as a stay. Rule 9.190(e)(2)(A), Florida Rules of Appellate Procedure. To obtain a stay pending appellate review, the Movants must show: 1) the likelihood of prevailing in the appellate proceeding; and 2) irreparable harm if the stay is not granted. *White Construction Co. v. Florida Department of Transportation,* 526 So. 2d 998, 999 (Fla. 1st DCA 1988).

ANALYSIS

I. THE MOVANTS HAVE FAILED TO SHOW GOOD CAUSE TO APPLY TO THIS COURT FOR A STAY OF ORDER NO. PSC-06-0711-FOF-TP.

As stated above, to obtain a stay from the Court, the Movants must show good cause. Rule 9.190(e)(2)(A), Florida Rules of Appellate Procedure. The Committee Notes[2] to Rule 9.190(e) state:

> Ordinarily, application for a stay must first be made to the lower tribunal, but some agencies have collegial heads who meet only occasionally. If a party can show good cause for applying initially to the court for a stay, it may do so. When an appeal has been taken from a license suspension or revocation under the Administrative Procedure Act, good cause for not applying first to the lower tribunal is presumed.

This is not an appeal from any license suspension or revocation. The sole basis the Movants provide for applying directly to this Court for a stay is that the Commission is a collegial body. Motion at 8-10.

The order on appeal, Order No. PSC-06-0711-FOF-TP, was issued on August 24, 2006. Movants, however, did not file their Notice of Appeal and Motion for Stay until September 13, 2006. Thus, despite the fact that the Movants claim this matter is an "emergency," they inexplicably waited 20 days to bring this matter to the Court's attention.

During that time, the Commission met at an agenda conference on August 29, 2006. Furthermore, the Commission has agenda conferences scheduled for September 19, 2006, and October 3, 2006. The Commission may have considered any motion for stay submitted by the Movants at any of these agenda conferences. Thus, the Movants have failed to show good cause why it was necessary to bypass the Commission and,

[2] 2000 Amendment.

instead, ask this Court to take the extraordinary measure of considering the Motion for Stay.

II. THE MOVANTS HAVE FAILED TO SHOW A LIKELIHOOD OF PREVAILING ON APPEAL.

To demonstrate the "substantial interest" necessary to entitle a petitioner to a hearing under Chapter 120, the petitioner must show 1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing; and 2) that this injury is of a type or nature which the proceeding is designed to protect. *Agrico Chemical Co. v. Dept. of Environmental Reg.*, 406 So. 2d 478, 482 (Fla. 1st DCA 1981). The injury in fact must be both real and immediate and not speculative or conjectural. *International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225-1226 (Fla. 3rd DCA 1990). The Movants failed to meet both prongs of the *Agrico* test.

First, the Movants failed to demonstrate that they will suffer an injury in fact of sufficient immediacy to warrant a section 120.57 hearing. *Agrico*, 406 So. 2d at 482. The only basis the Movants provided in their petitions for a section 120.57 hearing was that granting the transfer of control may result in a reduction in competition. However, case law is clear that mere speculation as to perceived future economic harm is not enough to confer standing in a section 120.57 proceeding. *See Ameristeel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997)(stating that threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a section 120.57 hearing); *Florida Society of Ophthalmology v. State Board of Optometry*, 532 So. 2d 1279, 1285 (Fl. 1st DCA 1988)(finding that some degree of loss due to economic competition is not of sufficient immediacy to establish standing).

Second, the Movants failed to demonstrate that their injury was of the type the proceeding was designed to protect. *Agrico*, 406 So. 2d at 482. Section 364.33 states that a person may not operate any telecommunications facility without prior approval from the Commission. Section 364.335(3) states that an application may be granted in the public interest. Nowhere in either section 364.33 or section 364.335 does it state that the Commission must consider the potential impact on competition in its consideration of a transfer of control of telecommunications facilities.

The Commission has consistently held that sections 364.33 and 364.335 do not require the Commission to consider the speculative impact on competition resulting from transfers of control of telecommunications facilities. *See, e.g.,* Order No. PSC-03-0298-PAA-TP, 2003 Fla. PUC LEXIS 161 (2003)(stating that the Commission's public interest analysis consists of a review of whether the company will continue to provide efficient and reliable telecommunications service); Order No. PSC-02-1709-PAA-TP, 2002 Fla. PUC LEXIS 1087 (2002)(stating that the Commission based its review upon an analysis of the public's interest in efficient and reliable telecommunications service when considering an application for transfer of control of telecommunications facilities). Furthermore, the Commission has consistently held that transfer of control proceedings, pursuant to section 364.33, are designed to protect service to consumers, not the interests of competitors. *See., e.g.,* Order No. PSC-98-0702-FOF-TP, 1998 Fla. PUC LEXIS 1106 (1998)(denying petition for intervention in proceeding and finding that the jurisdiction provided under section 364.33 allows the Commission to protect Florida consumers, not to consider allegations about the future economic impact the merger may have on competition); Order No. PSC-00-0421-

PAA-TP, 2000 Fla. PUC LEXIS 253 (2000)(denying petition for intervention in proceeding and stating that the purpose of section 364.33 is to approve the transfer of control of telecommunications facilities for the purpose of providing service to Florida consumers).

As the Commission stated in Order No. PSC-06-0711-FOF-TP, the Legislature has designated other means under Chapter 364 for the Commission to implement the goals of encouraging and promoting competition under section 364.01. *Id.* at 8. Section 364.09, Florida Statutes, authorizes the Commission to review potentially discriminatory pricing practices. Section 364.16, Florida Statutes, authorizes the Commission to review the terms of local interconnection agreements. Sections 364.161 and 364.162 provide the Commission with the authority to arbitrate disputes over the terms and conditions of interconnection agreements between incumbent local exchange carriers and competitive local exchange carriers. Thus, if the fears expressed by the Movants do come to fruition, the Movants may bring an action before the Commission under these statutory provisions for the Commission's review.

"[O]rders of the Commission come before the 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). Moreover, the Court gives great deference to the Commission's interpretation of a statute it is charged with enforcing and will approve the Commission's interpretation unless it is clearly erroneous. *BellSouth Telecomms., Inc. v. Johnson*, 708 So. 2d 594, 596 (Fla. 1998). The party challenging the Commission's action bears the burden of overcoming these

presumptions by showing a departure from the essential requirements of law. *Id.* at 597.

The Movants have failed to provide any basis for the Court to find that the Commission's interpretation of sections 364.33 and 364.335 is clearly erroneous and a departure from the essential requirements of law. Accordingly, the Movants have failed to show a likelihood of prevailing on appeal. Thus, the Movants' Motion for Stay should be denied.

III. THE MOVANTS HAVE FAILED TO SHOW IRREPARABLE HARM IF THE STAY IS NOT GRANTED.

The Movants only state that if a stay is not granted, "they will be irreparably harmed." The Movants fail, just as in the proceeding below, to provide any concrete facts as to how exactly they will be irreparably harmed. Their likely reason for failing to provide such proof of harm is that no immediate harm exists. All interconnection agreements between the Movants and BellSouth/AT&T will remain in effect, and the Commission will still have the authority under Chapter 364 to review any specific complaints against BellSouth/AT&T involving allegations of anti-competitive behavior.

Moreover, although the Commission denied the Movants a hearing in the matter below, the Commission did allow the Movants to address the Commission at its June 20, 2006, agenda conference, prior to approving the transfer of control. *See* Attachment A. Thus, contrary to the Movants' assertions, the Commission considered the issues raised by the Movants prior to its approval of the transfer of control, and the Movants are not "irreparably harmed" in this respect.

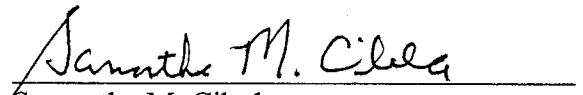
IV. THE COMMISSION OPPOSES THE MOVANTS' EXPEDITED BRIEFING SCHEDULE.

The Movants request an expedited briefing schedule for this appeal. Motion at 19. The Commission opposes this constrictively short briefing schedule and believes the Court should adhere to the briefing schedule set forth in Rules 9.110 and 9.210, Florida Rules of Appellate Procedure, or adopt a schedule that would ensure that all parties are given adequate time to present their arguments.

CONCLUSION

The Commission requests this Court deny the Emergency Motion for Stay and to Expedite Appeal.

Respectfully submitted,



Samantha M. Cibula
Florida Bar No. 0116599
David E. Smith
Florida Bar No. 309011

Florida Public Service Commission
1540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850)413-6199

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 19th day of September 2006, to the following:

Stephen H. Grimes
D. Bruce May, Jr.
Holland & Knight
315 South Calhoun Street
Suite 600
Tallahassee, FL 32301

Major B. Harding
John Beranek
Ausley & McMullen
P. O. Box 391
Tallahassee, FL 32302

Vicki G. Kaufman, Esquire
Jon C. Moyle, Jr., Esquire
Moyle, Flanigan, Katz, Raymond,
White & Krasker, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

Samantha M. Cibula

SAMANTHA M. CIBULA

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 060308-TP

IN the Matter of:

JOINT APPLICATION FOR APPROVAL OF INDIRECT TRANSFER OF CONTROL OF TELECOMMUNICATIONS FACILITIES RESULTING FROM AGREEMENT AND PLAN OF MERGER BETWEEN AT&T INC. (PARENT COMPANY OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC, CLEC CERT. NO. 4037, IXC REGISTRATION NO. TJ615, AND PATS CERT. NO. 8019; TCG SOUTH FLORIDA, IXC REGISTRATION NO. TI327 AND CLEC CERT. NO. 3519; SBC LONG DISTANCE, LLC, CLEC CERT. NO. 8452, AND IXC REGISTRATION NO. TI684; AND SNET AMERICA, INC., IXC REGISTRATION NO. TI389) AND BELLSOUTH CORPORATION (PARENT COMPANY OF BELLSOUTH TELECOMMUNICATIONS, INC., ILEC CERT. NO. 8 AND CLEC CERT. NO. 4455); AND BELLSOUTH LONG DISTANCE, INC. (CLEC CERT. NO. 5261 AND IXC REGISTRATION NO. TI554).
_____/

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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 5

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

DATE: Tuesday, June 20, 2006

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
Chief, Hearing Reporter Services Section
FPSC Division of Commission Clerk and
Administrative Services
(850) 413-6732

PARTICIPATING:

MARSHALL CRISER and JIM MEZA, ESQUIRE, and LISA FOSHEE, ESQUIRE, representing BellSouth Telecommunications, Inc.

WAYNE WATTS, ESQUIRE, and TRACY HATCH, ESQUIRE, representing AT&T Communications of the Southern States, LLC.

VICKI GORDON KAUFMAN, ESQUIRE, representing NuVox Communications, Expedia, and ITT DeltaCom.

MATTHEW FEIL, ESQUIRE, representing FDN Communications.

BETH KEATING, ESQUIRE, representing XO Communications.

ALAN GOLD and MARK AMARANT, representing Saturn Telecommunications Services.

GENE ADAMS, ESQUIRE, representing Time Warner Telecommunications.

DALE BUYS, RAY KENNEDY, MICHAEL COOKE, ESQUIRE, JASON FUDGE, ESQUIRE, and PAT WIGGINGS, ESQUIRE, representing the Florida Public Service Commission Staff.

P R O C E E D I N G S

CHAIRMAN EDGAR: And now it looks like during that discussion we did get everybody settled, so I'll look to staff to go ahead and introduce Item 5.

MR. BUYS: Dale Buys with Commission staff.

Item 5 is staff's recommendation in Docket Number 060308-TP, on the joint application of BellSouth Corporation and AT&T, Inc., for approval of the indirect transfer of control of telecommunications facilities from BellSouth to AT&T as a result of the planned merger between the two companies.

Additionally, staff would like to make an oral modification to the case background in its recommendation. On Page 3, staff would like to omit the first sentence in the second paragraph which reads, "The control of BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., will be transferred to AT&T, Inc., and hence BellSouth Corporation will cease to exist upon the conversion of BellSouth Corporation's stock to AT&T, Inc.'s stock." That sentence should be stricken.

In addition, we would like to clarify in Issue 2 where staff is recommending that the Commission file comments with the FCC, that that issue is not a PAA and the language in the recommendation should not be contained in the subsequent order.

With that said, staff is available to answer any

questions that the Commissioners may have. And, also, I believe there are a number of interested parties that are here today to address the Commission.

CHAIRMAN EDGAR: Thank you.

Commissioner Arriaga.

COMMISSIONER ARRIAGA: I didn't understand the second clarification. Would you repeat that for me, please?

MR. BUYS: Yes. Issue 2 is staff's recommendation for the Commissioners to file comments with the FCC regarding the merger, and that issue is not a PAA, and the language contained in the recommendation, should there be an order issued, would not be included in that order.

COMMISSIONER ARRIAGA: I understand now. Thank you.

CHAIRMAN EDGAR: Mr. Meza.

MR. MEZA: Thank you, Madam Chairman. Jim Meza on behalf of BellSouth. With me today is Lisa Foshee, she also represents BellSouth.

BellSouth supports staff's recommendation and we would like to reserve the majority of our time to answer any of your questions or any comments raised by our wholesale customers.

But to begin with, Mr. Criser, the president of BellSouth Operations in Florida, would like to make a few opening comments.

CHAIRMAN EDGAR: Mr. Criser.

MR. CRISER: I'm getting the point on the corner here. Commissioners, good afternoon. I'm Marshall Criser, President of BellSouth Florida. I'm here to support the joint application filed with this Commission by BellSouth and AT&T. This merger will make BellSouth a better and more efficient competitor creating more choices for voice, data, and video communications consumers in Florida.

This merger is simple with respect to the effect on Florida. The merger is a holding-company transactions between BellSouth and AT&T. After the merger BellSouth Corporation will being a wholly-owned subsidiary of AT&T. BellSouth Telecommunications, the operating subsidiary, will continue to operate in Florida. We will be the company you are familiar with in Florida.

We will continue to provide high quality service and meet our customers and this Commission's service standards, both retail and wholesale. We will continue to invest in Florida to meet the communications needs of our customers. We will continue our current customer relationships, both retail and wholesale. We will continue to have meaningful high quality jobs. We will continue to be an active corporate citizen.

Commissioners, I have had the pleasure of working with this agency since the time when the gentleman you honored earlier today was seated at that bench. And during that time I

believe I have learned time and time again that the best way to do it is to say it and play it straight. So I just want to close by telling you I believe this merger is good for BellSouth's customers. I believe that this merger is good for BellSouth's employees. I believe that this merger is good for our state. And I believe that your approval of the staff recommendation in front of you today meets those same standards.

I want to thank you for the time to be in front of you today and I would like to pass to Mr. Wayne Watts of AT&T to make a couple of additional comments. Thank you.

MR. HATCH: Madam Chair, Tracy Hatch appearing on behalf of AT&T. Also with me is Wayne Watts, Senior Vice-President and Assistant General Counsel for AT&T.

MR. WATTS: Good afternoon. I find it quite a privilege to have an opportunity to address you here. I am also mindful that you have had a long time and I will keep my remarks appropriately brief.

I do want to echo the comments that Marshall made about the impact of this transaction on the customers, the employees, and the shareholders of BellSouth and for AT&T. To do that, I want to step back for just a moment and describe the industry in which we find ourselves operating today. It is a highly competitive industry. You cannot ignore the results of the changes in our industry, be they regulatory changes,

technological changes, or a combination of the two that have resulted in the creation of extensive competition.

ILECs as an industry lost 8 million access lines in 2005. They are projected to lose 7,000 access lines in 2006. Those are facts that cannot be ignored. Comcast projects it will have one million VoIP customers by the end of '06. Comcast is a very significant aggressive competitor in Florida and other places. Vonage began the year with half a million customers and it projects that it will end the year with 1-1/2 million customers. Those are all facts that cannot be ignored.

That competition is real and exists, this transaction will do nothing to harm it. And why is that the case, because our two companies are highly complementary. BellSouth has a tremendous resource in terms of local access. Their focus is on residential customers, small and mid-sized business customers. Frankly, if you talked to large business customers, particularly those that have locations across the country and around the globe, they would tell you BellSouth is not an alternative for them.

We filed pleadings at the FCC just this morning. We attached numerous customer statements indicating exactly that. They simply do not view BellSouth as a competitor with AT&T. You know as well as I that AT&T, legacy AT&T withdrew from the consumer business before the SBC/AT&T transaction even occurred. They are therefore not a competitor in the consumer

business; they are not a price constraint on BellSouth's activities; and they are not an entity that provides competition to BellSouth today. So you get this transaction without any harm to competition.

Now, let's turn to what is really important to the five of you and to our customers, and that's what are the benefits of this transaction. First, let's talk about how this transaction will benefit residential and small business customers. You know, I mentioned that AT&T doesn't compete for those customers in Florida, but what AT&T has is a unique resource and asset called AT&T Labs.

AT&T Labs has spent the last many years focussing on developing new products, new services, new capability for the enterprise customer, the very customers that AT&T chose to focus on as they withdrew from the consumer space. They did not have the incentive or, frankly, the economic resources to try to take those benefits down to small business customers, consumers, and that sort of thing. Our combined company, just as the combination of AT&T and SBC had this benefit in our 13 states, this newly combined company will have both the incentive and the economic resources to take those benefits down to the customers that are the focus of BellSouth in Florida and their other eight states. SBC's customers have already begun to receive the benefit of those new services and features just in a few months since we closed that transaction

in November of last year.

I will just give you one example because of the interest of time. But by integrating the AT&T backbone network with the SBC backbone network we have been able to eliminate hops and connections between the multiple backbone networks, decreasing the number of handoffs that have to occur, or hops that have to occur, decreasing latency, improving the quality of service, improving the speed of the service. That has already begun to be realized in the SBC states. That will quickly begin to be realized in Florida and in other BellSouth states. That's just one example. But there are other benefits.

The second benefit is in relation to video competition. BellSouth has done a phenomenal job of investing in fiber for broadband services, but they are investing in fiber for broadband services. Higher speed, broader bandwidth for DSL and that sort of thing. They have not made a decision to enter the video market. It's a perfectly valid thing to think about a whole lot because it's tough. It's a hard business to enter.

AT&T, on the other hand, is absolutely committed to making that entry. We have begun to spend over $4 billion to expand our fiber footprint. But more importantly, and here is where we are different from BellSouth, we have begun to develop the back office systems and capabilities to deliver, order,

provision video services. We have also begun the very, very difficult negotiations with content providers, and that is something that has put us in a position where the combined company will be able to do something that BellSouth cannot do alone, and that is quickly roll out and deploy a video offering in competition with cable over the fiber that BellSouth has put in place. A tremendous benefit that would not occur but for this merger.

There is another benefit, and you will be happy to know I'm getting close to the end here. I have heard many times during the course of this day a reference to the hurricane season, the difficulties that all customers face in Florida. I cannot say enough about what I see as being a tremendous capability that BellSouth has to respond to those kind of difficult situations, to restore service in time of disaster. But I can also tell you, and I could not say enough, about how the combined company will be able to do so even better.

We will take the resources and capabilities that BellSouth has, hard learned lessons, and we will take the resources and capabilities that AT&T has, hard learned lessons, substantial investments by AT&T. We have 300-plus mobile central offices that could be dispatched to a disaster, site of disaster. Those can be put to use faster by the combined business than they could by two separate companies.

We have capabilities for fixed wireless. BellSouth has capabilities for fixed wireless. By combining those resources and capabilities the combined company will be able to respond to and restore service following natural disasters faster, better, and more effectively. And that's before you even take into account it is a real expensive proposition, and the combined company will simply have stronger financial resources, as well. So there are a number of benefits for this transaction.

Now, let me talk about employees for just a second and then I'll stop. One of the things that we are very proud of at AT&T, we are very proud of at SBC before we combined with AT&T, and I know that BellSouth is very proud of, is how we treat our customers, but also how we treat our employees.

One of the commitments that the Chairman of BellSouth asked us to make and one of the commitments we were happy to give is that we will recognize the value of the employees that BellSouth has. That we will work hard to try to make sure that we maintain the good jobs that BellSouth has. And we have a letter that is attached, I believe it was attached to the documents that have been filed with this Commission where we made it clear that we will maintain state headquarters in each of the states, including Florida, which I know is very important to this Commission and to this staff. That we will maintain positions like Marshall's position here because we

know as a matter of business you need to have the ability to reach out to somebody here in Florida, not have to find somebody in San Antonio to talk to if you have an issue or something like this that comes up.

And our commitment to the employees of BellSouth and our commitment to the employees across our company are further evidenced by the steps we're taking to make sure that we can minimize any impact on employees. For example, BellSouth has put in place a hiring freeze. We have, too. AT&T, alone, loses 1,200 customers -- employees. We lose a hell of a lot more than 1,200 customers, I will say that -- but we lose 1,200 employees a month just natural attrition. People who retire, leave, go to work somewhere else. And we are doing everything we can to take advantage of that attrition to minimize the impact on employees after we close.

So what I would sum up is this: Competition is real, this merger does not affect it. The benefits that I just mentioned are very real, are very tangible. They will be realized in Florida, they will be realized quickly. And so I would join in Marshall's observation that this transaction is very good for the customers and employees of BellSouth and AT&T and for the state of Florida. Thank you.

MR. HATCH: We reserve the rest of our time, Madam Chair.

CHAIRMAN EDGAR: Thank you, Mr. Hatch. Mr. Feil?

Ms. Kaufman.

MS. KAUFMAN: Thank you, Madam Chairman, Commissioners, and I do sympathize with you as well as having had a long day, so I hope you will bear with me for just a few moments. I'm Vicki Gordon Kaufman and on this item I am here before you on behalf of NuVox Communications, Expedia, and ITT Deltacom.

Commissioners, I think that we can all agree, and I know you probably all read the press the way I have that the proposed merger of these two companies will create the largest telecommunications company in the country, and that this transaction is probably the largest or one of the largest that has ever occurred in the history of our country. It's interesting to us because this transaction is going to have a direct and immediate impact here in Florida. So that being said, it's our view that it behooves the Commission here, the Florida Public Service Commission, to take a very close look at this request and to fully investigate what impact the transfer, if you will, will have on the provision of telecommunications services here in Florida.

If the Commission doesn't look at this, if the Florida Public Service Commission doesn't look at this and assess it, my question to you would be, well, who will. And we suggest that you do this investigation through an evidentiary hearing. Not on the basis of a written application, not on the

basis of the eloquent statements that have been made to you today by some of the representatives of the companies, but through your usual process, which is an evidentiary hearing where there is sworn testimony and cross-examination.

We suggest to you that this transaction is just too important not to take that step. You have heard a lot of comments from the two representatives here today as to all the benefits that this transaction will have as well as the fact that they assure you that this won't have any adverse impact on competitive markets in Florida. We think you need to put those comments to the test.

Now, your staff has told you in their recommendation as I understand it that the standard that you need to apply here is one of the public interest under Section 364.01. We agree. That's the standard that you should apply. But it seems to us that your staff took a pretty narrow view of what that standard was and suggests that it related to the managerial, technical, and financial capabilities of the new company.

That's the usual standard that is applied to a new certificate, but I think if you also look at that new certificate section, which is 364.335, it also has a separate public interest criteria, and it also says that you may and you should investigate and determine whether that public interest standard has been met.

I would respectfully suggest to you that 364.01, which I know you are all familiar with, gives you ample authority to take a close look at this request because it has a number of provisions that charge you with, for example, ensuring the competitive provision of telecommunications services, encouraging competition to ensure availability of the widest possible range of consumer choice, promoting competition by encouraging innovation and investment and encouraging the introduction of new services. All of these matters are going to be impacted by this transaction, and we suggest you conduct an evidentiary hearing to find out what that impact will be.

I also read the staff recommendation to say to you that these are important issues, Commissioners, these are important issues. But, we think they are issues that the FCC ought to be looking at, not you. And, in fact, they've suggested some comments for you to file with the FCC. And we don't take -- we don't disagree that you should inform the FCC of your view. However, we also think that just like you have heard the old saw that all politics are local, you are in the best position here to look at this transaction in Florida and figure out how it is going to impact telecommunications services in Florida, which, of course, is going to ultimately at the end of the day impact end users.

Some questions I think that you might want to find out the answers to before or if you were to approve the

company's request would be, for example, will this transaction increase or decrease the availability of services. Will this transaction increase or decrease prices to wholesale customers and to end use customers. Will this transaction encourage or discourage innovative services and packages that consumers are interested in. Will this transaction unreasonably tilt the playing field back to monopolistic conditions.

Now, as I've said, you have heard the gentlemen from BellSouth and AT&T assure you there won't be any competitive impact and it will all be business as usual. But at the end of the day, regardless of the corporate structure, you're going to have two incredibly large companies combining into one. One goal, one company, regardless of how the operating subsidiaries are set up.

We think that your staff's comment that you are not in a position to focus on the competitive interests of CLECs misses the point entirely. Because, in our view, the competitive interests of CLECs are just inextricably tied to your public interest review and to the interests of all consumers here in Florida in having a competitive telecommunications market and all of the benefits that such a market can bring.

The applicants, the joint applicants spent -- and I should have counted the pages -- many pages in their application attempting to assure you that competition would not

be impacted by this transaction, so we suggest that perhaps you want to hold their feet to the fire and investigate that to see if that is the case or not the case. And also, perhaps after your investigation, decide maybe there are some conditions that might need to be attached to this transaction to ensure that the competitive market continues to flourish.

So to sum up, Commissioners, these are issues that the Florida Commission should be concerned about and that you should review here in Florida. And so our position is that you should conduct a full evidentiary hearing on this requested transfer and make an evidentiary determination here in Florida as to whether or not this transaction will be or will not benefit the people in Florida. Thank you.

CHAIRMAN EDGAR: Mr. Feil.

MR. FEIL: I will be brief, Madam Chair. Matthew Feil with FDN Communications. This is a reconstitution of the Bell monopoly. You are only going to have one chance to address this issue from now probably through the rest of the history in the State of Florida for communications services.

I really only wanted to address Issue 2. And one of the things that the -- Mr. Watts, was it -- referred to is very interesting, which is IP video competition. He talked about that, and the interesting thing about all the advocacy that AT&T and BellSouth and the other ILECs have made in the course of discussing video services is this: You have to have

competitors to have competition. And our concern is that we want to be in the situation where we are one of those competitors. And if you have such a dominant carrier, a reconstituted monopoly out there to compete with, it is going to make competition that much more difficult for carriers such as my client.

I submit to you that you don't want to be here two years from now and looking at the competition report and see that the progress you've made in the state of Florida is slowly being eroded. There are markets out there that the cable companies do not compete for. There are millions of residential customers in the state of Florida that don't have broadband, don't want broadband, all they want is a phone line. You are going to want wireline competition to serve those customers.

Those customers also aren't necessarily turning to wireless. If you look at the last competition report, the number of access lines for BellSouth in the state of Florida have actually increased, not decreased. The same thing on the business side. You're going to want wireline competition for business customers because the cable companies are not competing for those customers. You have to have CLECs in order to have price competition.

We would urge you to modify the staff recommendation on Issue 2, and in particular the draft comments to the FCC,

and recommend to you that you draft comments that would suggest conditions that are at least as stringent as those as the CLECs are advocating to the FCC in that proceeding.

If that is not to your liking, I would suggest that you would at least recommend conditions similar to those that the FCC has approved in prior mergers, including examining the merger between SBC and Ameritech, which was the last merger the FCC addressed where it wasn't a combination of ILECs such as is the case here. That's all I had, and I will have to give up my jump seat. Excuse me.

CHAIRMAN EDGAR: Thank you. Are there others who would like to address the Commission at this time on this item?

Ms. Keating.

MS. KEATING: Thank you, Madam Chair and Commissioners. Beth Keating, Akerman Senterfitt, again, here on behalf of XO Communications. And I also thank you for your time today and will try to be brief.

As Mr. Feil has pointed out, this is not just your everyday big merger. This is a merger of two large RBHCs. And as with the recent mergers of other large telecommunications companies, XO wants to be clear that we do oppose this merger.

That being said, like FDN, XO strongly supports the Florida Commission moving forward and filing comments with the FCC recommending very strong merger conditions in this instance. In a truly competitive market, Commissioners, the

availability of equivalent services from other competitors will police the actions, service quality, and pricing of those that are in that market. If this merger proceeds without the application of stringent merger conditions which are tailored to enable the competitive market to survive and thrive, that policing power is simply not going to exist.

With last year's large telecom mergers and the recent significant changes in federal telecommunications regulatory policies just having taken effect, there just really hasn't been enough time or regulatory stability for the market to develop to that level where there really is competition sufficient to police the actions of those that are in the market. This merger will substantially reduce competition in Florida. AT&T will no longer compete with BellSouth or the other CLECs. Competitive LECs do not account for enough competitive activity to counterbalance the proposed removal of AT&T from the Florida market. Intermodal competition, competition from wireless, VoIP, and cable isn't the answer for business end users because those services just haven't developed enough to serve any real check on the new entity's market power.

Besides the fact that Cingular, the largest wireless provider, is owned by AT&T and BellSouth, the proposed merger partners. For instance, your own 2005 competition report indicates that while wireless service is on the rise, a full

93.4 percent of customers still subscribe to wireline service. Of the meager 6.1 percent of customers that have decided to go completely wireless, your report indicates that many of them are actually considering reconnecting to the network. As for cable, while service to residential customers is certainly on the rise, the market penetration isn't yet significant and likely never will be in the small business market.

That being said, again, XO understands that the Commission's authority is what it is in this area and that ultimately it is the FCC that will make the final call on this. But you really should not discount your ability to affect the process and to provide input at the FCC. In addition to your state authority to provide telecommunications competition generally and your ongoing responsibility to provide oversight and protect consumers, the Florida Commission is very well respected at the federal level. And your perspective and insight regarding the impacts of this merger will definitely carry great weight.

As such, XO appreciates and supports staff's suggestion that you file comments regarding the merger, but we request that you consider strengthening those comments to a great degree and actually recommending specific more stringent merger conditions be applied. We appreciate the time and we hope that you will give us consideration.

CHAIRMAN EDGAR: Thank you, Ms. Keating.

MR. GOLD: Good afternoon. First, I would like to thank you all for the opportunity to speak today. My name is Alan Gold. I represent Saturn Telecommunications Services, Inc., who I will call STS. Sitting beside me is Mark Amarant, the Chairman of the Board and CEO of STS.

We have come here to voice our concern and request the Commission further investigate BellSouth and AT&T's request for approval of indirect transfer of control. We're not here to voice a generalized objection, we are here to bring before you specific instances of misconduct on behalf of BellSouth. We are here to point out to you instances in which BellSouth has failed to follow the law, has failed to follow the directives of the FCC and of this Commission. We are here to demonstrate that BellSouth has failed to follow the directives of the TRO regarding commingling rules and failed to follow the directives of the TRRO regarding the transfer of the embedded base.

In the staff's recommendations they discuss the technical capabilities of BellSouth. Through BellSouth's treatment of STS we can demonstrate that BellSouth does not have or refuses to implement the migration of STS's embedded base of customers to a network that STS paid for, a network that was designed, built, and supposedly implemented by BellSouth. We can demonstrate through their treatment of STS that BellSouth has refused or failed to implement the

commingling requirements of the TRO.

Mr. Amarant will explain to you that beginning in January of '05, nearly a year and a half ago, that they approached BellSouth to design a network in order to comply with the directives of the FCC and of this Commission. They followed every requirement of BellSouth. And today that network is not operating as designed through no fault of BellSouth -- of STS, but through complete fault of BellSouth. Those allegations are presently before this Commission in Docket Number 60435-TT.

Now, at BellSouth's request, we are commencing settlement negotiations. But we are coming before you today and requesting that this Commission further investigate what we know to be a complete disregard for the various rules and regulations. We're asking you to investigate this for the public health, safety, and welfare as it relates to the telecommunications industry in Florida.

We believe that rewarding BellSouth's conduct with approval is only going to create an unwieldy giant who will only further disregard the rules. Again, at this point in time, as Mr. Amarant will demonstrate, we are just requesting that you not abdicate a responsibility to the FCC, but companies and citizens of the state of Florida are involved and that you take a good hard look before approving the transfer of control. Thank you.

Mark.

MR. AMARANT: Good afternoon. Sorry. I lost my voice at the Heat game the other night, so I will try to get it out as best I can. STS Telecom is a South Florida based local exchange and voice over IP company with about 10,000 customers in the Dade, Broward, and Palm Beach area. We were founded in 1994 and our focus is in Florida. We previously were a switchless carrier until 2002 when we became a CLEC, and then in 2005 we started making plans to become a managed services provider offering voice over IP to our customers.

STS started to comply with the FCC and the Florida Public Service Commission rules in January 2005 by planning to offer services as a facilities-based carrier. We flew a team of our own people up to Birmingham where BellSouth had proposed an OC48 fiber ring to our company in order to take our existing base of UNE-P clients and move it over onto the ring and the network that they were going to build for us.

In anticipation of this, we had hired approximately 30 additional people to work in our company full-time. We tripled the amount of office space that we had, and we moved our core network operations center from Brickell to the Knap of the Americas in downtown Miami. So we made a lot of commitments based on the completion of the network that BellSouth had promised us.

We have followed BellSouth's recommendation to comply

with all federal and state mandates. We signed a multi-million dollar fiber ring agreement with BellSouth in March of 2005 for the migration of our UNE-P base so that we could have it completed by the March 10th, 2006 deadline. We moved our facilities and we signed the long-term deal committing significant dollars at the Knap of the Americas so that we could withstand a Category 5 hurricane and make sure that we could provide service to our customers at all times.

STS spent substantial dollars to populate the nodes on this fiber ring and use the vendors that BellSouth itself recommended to us to complete this project. All in all our company spent millions of dollars to become fully compliant with the rules from March 2005 until today. Just to be perfectly clear, we have done every single thing that BellSouth has recommended we do to build-out this network.

While this was going on, Hurricane Wilma hit south Florida. While STS were told that it would take 35 to 45 days to restore their service, BellSouth directly offered clients service in three to five business days if they could sign an agreement with BellSouth and leave STS. This happened with multiple customers.

The most frustrating part is that our ring was designed, implemented, and then billed to us for a full nine months at greater than $50,000 a month before BellSouth ever told us that they couldn't do the commingling as they promised

us in the agreements that we had with them. Because of this, we have been saddled with commercial rates despite the fact that we built out this network to take advantage of services at wholesale rates. It seems that BellSouth was too busy making sure that all of the CLECs were complying with the rules when they themselves had no idea how to do commingling. To this day, they still cannot do commingling as mandated by the FCC's TRO ruling of 2004.

Who was watching BellSouth? Are we just taking their word for it when they say they can do something as required by law? This is the exact reason that this Commission should not grant the petition of BellSouth and AT&T to merge. The way that they have and are presently handling STS Telecom and our customers that use our service is intentionally deceiving and I, for one, would not treat our toughest competitor that way. What's to stop them from doing this to others? If BellSouth can ignore the laws and the agreements that they signed, who is looking out for the public to enforce those contracts?

Until this Commission has investigated our claims to which we can substantiate 100 percent, then the public health, safety and welfare of all the customers in the state of Florida continue to remain at risk. I ask you, as a telecommunications provider, as a citizen of the state of Florida, and as a business that has been wronged by BellSouth under your watch, to reject the proposed merger until all allegations we are

making today have been fully investigated and until this Commission is 100 percent sure that a repeat of what happened to STS Telecom cannot happen to others by a bigger merged Goliath. Thank you for the opportunity to speak with you today.

CHAIRMAN EDGAR: Mr. Adams.

MR. ADAMS: Thank you, Madam Chairman and members of the Commission. I'm Gene Adams of the law firm of Pennington, Moore, Wilkinson, Bell, and Dunbar. And, again, I'm representing Time Warner Telecom here today.

Time Warner Telecom is a competitive local exchange carrier, and we are both a customer and a competitor of BellSouth. We are here today to ask the Commission to exercise its broad authority under Section 364.33, Florida Statutes, and Section 364.01, Florida Statutes, to protect the public health, safety, and welfare in reviewing this application for transfer of control.

The merger of AT&T and BellSouth is the most significant event in the telecommunications industry since the local exchange was opened to competition, and also, ironically, since the divestiture of the Bell companies. Time Warner Telecom believes that there are matters of sufficient public interest that stem from this merger and that the Commission should exercise its jurisdiction to hold hearings in this matter and determine and assure that this transfer of control

is in the public's best interest.

We believe that the public interest concerns require the Commission to review this transaction as has been done or as is being done currently in Kentucky, Mississippi, and in Tennessee. As was earlier stated, the Commission's jurisdiction ensures -- and the Commission has the ability to ensure that basic telecommunication services are available to all consumers in the state. The Commission can encourage competition in order to ensure the availability of the widest range of consumer choice in communication services, and the Commission also has the ability to ensure that monopoly services provided by telecommunications companies continue to be subjected to effective price, rate, and service regulation. And we ask that you exercise that jurisdiction to help preserve competition and the benefits of competition for consumers in the state of Florida.

This merger, one of the very largest in our nation's history, will result in a return to a monopolistic control of the marketplace. Here an incumbent local exchange company is being merged into a competitive exchange company. The combined merger possesses a phenomenal amount of market power, incumbent local exchange services, long distance services, competitive joint ventures, and wireless communications services make this a powerhouse with the ability to harm competitive interests in the marketplace.

We believe that this combination of companies also has a tremendous potential to limit competitor access to underlying ILEC facilities. We believe they have an ability to effect the service quality of those facilities and to even deny interconnection or piering of IP networks.

With the enactment of recent legislation in the state of Florida which deregulated broadband and voice over Internet protocol services, genuine questions may also arise as to whether or not the Commission may continue to have jurisdiction concerning the provision of competitive services. Time Warner Telecom currently buys special access services from BellSouth. With the current deregulated environment of broadband, the question will arise as to whether or not services are broadband or special access.

BellSouth and AT&T have stated on the record that they intend to spend billions of dollars to transition their network to an IP network. Once that transition is complete, BellSouth can potentially deny access to those underlying facilities and could deny piering or interconnection requests. With broadband exempt from regulation at this Commission, Time Warner could be without access to the competitive environment and indeed without an effective remedy at this Commission. The staff has stated in its recommendation that it will need to continue to monitor the market to ensure AT&T and BellSouth remain in compliance with Florida Statutes. We believe the

time is now to make those determinations, and while the Commission has the jurisdiction to hold a hearing and to set appropriate conditions for the merger as it occurs.

The staff also states that a more global approach is required and the approach is ultimately resting with the FCC. We would submit that the Florida Public Service Commission has broad authority to protect local exchange competition and to ensure connection of all networks as was contemplated by the Telecommunications Act of 1996. We believe this matter is important and should not be delegated to the FCC when this Commission, we believe, can also impose needed merger conditions.

AT&T and BellSouth assert and insist that no merger conditions are required and have not, so far, agreed to any merger conditions. We believe that that in itself should require the attention of the Commission to bring this to a full hearing. A significant competitor here is being eliminated, and this combined entity will be the largest ILEC in the country. They will have the largest IP network in the country and the second largest wireless network in the country. We believe that merger conditions are necessary to protect the competition that will remain.

We believe that those assurances should be in writing through merger conditions and that some targeted merger conditions are appropriate and that this Commission has the

ability to review and impose those necessary protections regardless of what the FCC may do.

We believe that the Commission should require a full evidentiary hearing and help ensure that all customers in Florida will have access to competitive services not only now but also in the future. We do not disagree with staff's recommendation that comments should be forwarded to the FCC for exercise of review of the merger, but we believe this Commission has the ability and has the need to address these issues through the exercise of its jurisdiction under Chapter 364, and we would strongly urge the Commission to do so. Thank you.

CHAIRMAN EDGAR: Thank you, Mr. Adams. Is there anybody that I have missed that wanted to address the Commission on this item? Seeing none.

Commissioner Carter.

COMMISSIONER CARTER: Thank you, Madam Chair, for a couple of questions.

CHAIRMAN EDGAR: Yes, sir.

COMMISSIONER CARTER: Staff, did I understand you guys -- is it okay if I jump around from Issue 1 to 2? Is that all right?

CHAIRMAN EDGAR: It is.

COMMISSIONER CARTER: Thank you. On Issue 2, did I understand you guys to say that you would recommend we not file

the comments as Attachment A? Did I hear you guys to say that?

MR. KENNEDY: We are recommending that you do.

COMMISSIONER CARTER: Okay. Good. That's what I thought you said. I was just making sure. Thank you.

Commissioners, questions or discussion? Commissioner Tew.

COMMISSIONER TEW: My question also goes to Issue 2. I think that the way staff has drafted the comments, that they are fairly neutral for the most part. But I had concerns about one sentence in the comments, and I will direct everyone to it. It is in the first paragraph, the very last sentence. And it reads, "If competition were to be negatively impacted by the merging of AT&T and BellSouth, choices for Florida's consumers as well as those in other states could also be negatively impacted."

In my opinion if you have a sentence like that, if we are indeed intending to be neutral and leaving it up to the FCC and the authority they have in this area, then you either don't have that sentence or you have a sentence, perhaps, that also points out that there could be positive impacts as a result of the merger.

And I wrote something, and it is just to throw out for discussion. I don't know how the Commissioners feel. Something like, "Conversely, if the merger of these entities results in increased investment in advanced technologies and

competitive offerings, we expect that Florida's consumers may be positively impacted." And I think that just makes the comments more neutral, at least in the vein that I believe they are written currently. I know that's subject to Commission discussion of where we go with the comments overall, but that is my input.

CHAIRMAN EDGAR: Commissioner Tew, could you read your draft sentence for discussion one more time.

COMMISSIONER TEW: Okay. It would follow the last sentence of the first paragraph which talks about the negative impacts, and it would read, "Conversely, if the merger of these entities results in increased investment in advanced technologies and competitive offerings, we expect that Florida's consumers may be positively impacted."

And, again, I don't know which way that turns out, I just believe that that makes it more neutral, which I think is consistent with the following sentence which reads, "The FPSC is not filing these comments in support of or in opposition to any filing made by any stakeholder," and it goes on.

CHAIRMAN EDGAR: Thank you.

Commissioner Carter.

COMMISSIONER CARTER: Have you guys got that language?

MR. KENNEDY: I missed about three words in the middle of it. I'm sorry.

COMMISSIONER CARTER: The reason I asked that -- with your permission to address you, Madam Chair.

CHAIRMAN EDGAR: Yes.

COMMISSIONER CARTER: The reason I asked that is because, I mean, when we get to that Issue 2 I wanted to make sure that we have that incorporated, because that pretty much reflects the sense of the Commission on this issue. And I think it is a fairly reasonable perspective to have, so I wanted to make sure that staff had that language.

I know that most of the day Commissioner Deason and I have been asking what other exceptions do you guys have. So I wanted to make sure we have that so when we get to this point you guys will have the verbiage necessary in the document. So you guys got it, right?

CHAIRMAN EDGAR: Well, if we are going to get to that point we can go over it one more time. And I know that the court reporter will have it accurately, which is always a resource to all of us. Thank you.

COMMISSIONER CARTER: Thank you, Madam Chair.

CHAIRMAN EDGAR: You know, I do expect that we will jump around between the two to three issues that we have before us, but let's maybe go back and see before we get into specific wordsmithing perhaps on potential comments to perhaps be filed, let's see if there are further questions or discussion on Issue 1.

I know, Mr. Watts, that you shared from your perspective potential benefits to Florida customers. But after your comments we did hear concerns from some of the other companies here? And so, I guess, Mr. Criser, I would like to kind of throw it back to you. If you could briefly -- because quite frankly we are all getting tired, but from your perspective, from your seat, if you could briefly share with us what you see as benefits to Florida customers.

MR. CRISER: Commissioners, a couple of things I would like to address. I think that what you have already heard a little bit about today, but it is important to understand is that the one area in this where bigger is better is your ability to, one, respond to natural disasters, and, two, your ability to get into new technologies. Essentially we are in a marketplace today where we are competing against other players. And we need to have the resources and the facilities to be able to enter into those marketplaces and to be able to negotiate and enter into those businesses on a level footing with others.

I think the other side of that is our ability to recover is one where essentially at the end of the day you come down to how people do I am have, what resource do I have, and how many jobs can I do a day. And, therefore, it's important to look at not only the lessons we have learned, but the lessons we can learn, and to combine resources in that kind of

reaction.

I think the other thing, I have heard sort of a tone here that says, well, at some point they are going to be too big to listen to you. I recall when I was 13 years old I got to a point where I thought at some point that I was too old to listen to my mother anymore until my father came home that night and corrected that impression for me. Essentially, what we have heard discussion about today is the job that you do each and every day. We have seen other examples at this agenda today where there are issues that have been brought before you by some different parties and you listened to those arguments, you listened to complaints, you listened to solutions.

There is nothing about this merger that takes away from your ability to do your job. And there is absolutely nothing about this merger that takes away from our respect for this agency in doing its job. That's the commitment that I am here to make to you today and I believe you will see made to you each and every day going forward.

But that is your normal business. That is what this Commission does is protects the best interests of the citizens of the state of Florida. And there is a normal process for bringing those things before you and there is a normal process for resolving those.

I take every one of our customer's complaints or concerns very seriously. I hope that we are able to resolve

each and every one of them to our mutual satisfaction. And if we can't, I know we will be back in front of you in the proper process for dealing with that. But I believe that what is happening today is an attempt to sort of bring those into another venue, and that is not necessary. Because nothing here takes away from your ability to do the job that you do each and every day. Thank you.

CHAIRMAN EDGAR: Thank you.

Commissioners, any additional comments, questions, discussion, follow-up? Commissioner Deason.

COMMISSIONER DEASON: I have a question for staff. Issue 1 is a PAA, is that correct?

MR. FUDGE: Yes, Commissioner.

COMMISSIONER DEASON: And if the Commission agrees with staff's recommendation and that order is protested, do we find ourselves in a hearing mode?

MR. FUDGE: Yes, sir. Technically we would find ourselves in a hearing mode. Some of the people who have spoke today, they already have pending motions or petitions to intervene. And at that time we would have to rule on whether or not they have standing to intervene. And at that time we would either proceed or not with the hearing.

COMMISSIONER DEASON: So anyone seeking to protest this order would have to show standing to file that protest?

MR. FUDGE: Yes, Commissioner.

MR. COOKE: Commissioner, let me just amplify on that. It's a PAA, so interested parties -- substantially affected parties could file a petition for a hearing. There would be an issue as to whether intervenors are entitled to intervene in this matter. I think one of the things we have struggled with is there is precedent in the Commission orders previously that has said that competitive impacts on companies is not a matter for consideration under 364.33 and .335, which is the statutory provisions we're dealing with. So we would have to grapple with that issue in terms of interventions.

COMMISSIONER DEASON: So is it possible that we could issue an order, it would be protested, and we go to a hearing but no one has standing to intervene in the hearing?

MR. COOKE: I would say theoretically, but I think that's pretty theoretic.

COMMISSIONER DEASON: Madam Chairman, if there are no other questions, I can move staff's recommendation on Issue 1.

CHAIRMAN EDGAR: Commissioner Tew, did you have a question?

COMMISSIONER TEW: I was just going to ask staff about Saturn Telecom's concerns.

Have they filed a complaint or anything with the Commission, and are they able to?

MR. COOKE: Commissioner, can I -- I'm sorry to interrupt.

CHAIRMAN EDGAR: Mr. Cooke. No, you're recognized.

MR. COOKE: I'm just concerned about one thing, which is, as I heard it, there is a separate docket on that matter. And to the extent we -- I think we need to be cautious about specific questions with regard to that proceeding, per se. I don't think your question goes that far, Commissioner. I'm just throwing that out as an advisory.

CHAIRMAN EDGAR: I appreciate the comment.

MR. COOKE: And they do have a complaint, correct?

MR. WIGGINS: (Indicating yes.)

MR. COOKE: If it is the one I'm thinking of, there was a docket filed fairly recently.

CHAIRMAN EDGAR: Commissioner Tew, does that answer your question, or do you have additional?

COMMISSIONER TEW: I guess I have a follow-up.

Nothing about the outcome of this item, whatever the Commission does, should impact that complaint or the process that complaint takes?

MR. FUDGE: Your monitoring and oversight authority under 364.01 and the complaint process would continue to exist regardless of the merger.

CHAIRMAN EDGAR: Commissioner Arriaga.

COMMISSIONER ARRIAGA: Madam Chair, Commissioner Deason made a motion, and, if I may, I would like to second the motion.

CHAIRMAN EDGAR: You may.

Commissioner Deason, your motion is recognized and on the table. Did I hear correct you are -- okay. And then, yes, Commissioner Arriaga has seconded the motion.

So we have a motion and a second. We are on Issue 1. Is there discussion?

Okay. All in favor of the motion on Issue 1 say aye.

(Simultaneous affirmative vote.)

CHAIRMAN EDGAR: Opposed? Show the motion for Issue 1 adopted.

We are on Issue 2.

COMMISSIONER CARTER: Madam Chair.

CHAIRMAN EDGAR: Commissioner Carter.

COMMISSIONER CARTER: I think now would be the appropriate time to make sure, because I do feel strongly that the language from Commissioner Tew gets us where I think we need to be. I think we do need to be on record of saying something to the FCC, and I think that the language -- if we're going to be just saying that we would like for them to -- basically, I view her language -- if I am allowed to speak on this, Madam Chair?

CHAIRMAN EDGAR: You are.

COMMISSIONER CARTER: Basically, I view her language -- well, let me just say I adopt it by reference. It's saying that we are basically asking the FCC to do its job

in protecting the interests of citizens regardless of where they may be geographically located in the context of this merger. And I think that that's what we are asking them to do. I think that we want to make sure we are on record as doing that, and I think that the language accomplishes that.

And whenever is an appropriate time, I would move Issue 2 with that language for clarification.

CHAIRMAN EDGAR: Commissioners -- I'll come back to you, Commissioner Carter -- further discussion on the proposed comments from staff that are before us. No.

I guess then I have one, then, for our staff. Commissioner Carter has described these proposed comments as asking the FCC to do its job. And when I read it that was actually sort of the way I read it, too. So I'm not sure who on our staff to direct this to, but when the staff was putting together these comments for our consideration, is that characterization the intent or the thinking with the drafting, or is it something additional?

MR. KENNEDY: This is Ray Kennedy, Commission staff. You are correct in your statement, that was the intent. To the best of my knowledge, we have never filed comments on mergers before. The fact that it's such a broad, as described by everyone here, a broad merger, you know, wireless, wireline, Internet, you name it. Considering the jurisdictional authority of this Commission and all, we didn't want to go into

those kind of details, so we kept it intentionally broad with the intent that the FCC would do what it did in prior mergers where it would focus on conditions that the CLECs believe were good. They need more they say, and they have filed numerous ones with the FCC to comment on each and every filing they made or condition they want. I'm not sure we would be capable of doing that, quite frankly, in the jurisdictional aspects of it all.

CHAIRMAN EDGAR: So am I to understand from our staff that you have no recommendation as to any general or specific conditions that you would recommend to this Commission that we consider recommending?

MR. KENNEDY: We certainly could add to what we have here. I may have an example of a potential change. If you would like me to throw that out, I will.

CHAIRMAN EDGAR: If you have a suggestion, I'm interested in hearing it.

MR. KENNEDY: I have a couple. If we look at the last paragraph on Page 11, we could -- to make it a commitment, in essence, we could take out in the first sentence in the last paragraph the words "if any." I've got to make sure I read the right one. I actually have extra copies which would make it easier. I will continue on. And then add a sentence right after the first sentence where we would say, "At a minimum, the FPSC believes that the FCC should adopt the same conditions

that were proposed and implemented in FCC WC Dockets 05-65 and 05-75." That would be certainly a stronger commitment on a position to the FCC. And I heard one mention during this proceeding of another docket that I did not include that might could be added, but I don't know the number of it. Someone else mentioned it earlier.

CHAIRMAN EDGAR: Mr. Kennedy.

MR. KENNEDY: Yes, ma'am.

CHAIRMAN EDGAR: Could you repeat for me the sentence, and I guess it is now before me, but I'm going to ask you to repeat it anyway, the sentence that you said was a possibility for discussion as a potential addition.

MR. KENNEDY: Okay. In the last paragraph after the first sentence, after the first full sentence we would add a new sentence. It would read as follows: "At a minimum, the FPSC believes that the FCC should adopt the same conditions that were proposed and implemented in FCC WC Dockets 05-65 and 05-75." Those happen to be the two discussed in the paragraph right above that, the SBC/AT&T merger and MCI/Verizon merger.

CHAIRMAN EDGAR: Okay, thank you.

Commissioner Arriaga.

COMMISSIONER ARRIAGA: Madam Chair, look at Page 11 of the proposed language from staff, the last sentence. I have a heartache with that sentence. I mean, we believe the FCC is in the best posture to protect the stakeholders and consumers.

I don't know. I mean, I'm okay with -- I just don't think so. And for us to capitulate that way bothers me a little bit.

MS. SALAK: That was caveated with the -- that impact intermodal services, only because we don't have jurisdiction over a lot of the intermodal services.

COMMISSIONER ARRIAGA: Well, we could say we don't have jurisdiction over intermodal service. But to say that they are in the best posture to protect the stakeholders and consumers --

MS. SALAK: It was only meant because we thought, you know, we can't do much about wireless, we can't do a lot about some of the other -- things that are outside our jurisdiction. So it was just looking at the big picture. Otherwise, I think that we are the in best posture to do anything that we have jurisdiction over, obviously, and we will do a better job close to home. But that was meant to be taken in context.

CHAIRMAN EDGAR: And I'm thinking, as I go along here, but noting that we do have one other additional important item that we need to consider today, and the workday is drawing to a close, let me throw this out. It sounds to me like I'm hearing some interest at the bench in filing comments. We haven't affirmatively made that decision yet, but I think I sense some interest in that.

So throwing this out for discussion, maybe we can wrap this up today, maybe not. We'll see. But, Commissioner

Carter, I believe, has expressed some support for the suggested sentence addition that Commissioner Tew mentioned, and I may have -- because I always do a word tweak to that, because I like to use the red pen, as well, but I also have some support for that addition. I think it's a good addition with, of course, my one edit. And from the suggestions that we have just heard from our staff, I kind of like deleting the "if any." It's a small point, but yet I like deleting the "if any."

I'm not sure that I'm comfortable with the proposed addition of the next sentence simply because I'm not intimately familiar with those conditions that were implemented. I respect the decision of the FCC that if they implemented them then they were probably good, but I am not completely familiar with those conditions. So I don't know that I'm comfortable completely endorsing them for this particular factual situation that is before us at this time.

And, Commissioner Arriaga, I'm not certain that that next sentence actually adds a whole lot. So with that, again for discussion, my proposal for discussion if, indeed, we want to move to filing comments or making the decision to file comments, would be to consider the addition of the sentence from Commissioner Tew, to delete the "if any," but then end the paragraph and the comments with just that first sentence in the last paragraph, if that is clear. And that is for discussion.

Commissioner Carter.

COMMISSIONER CARTER: Madam Chair, once again, your wisdom, you know, just puts us exactly where we are. I was going to suggest that we strike both of those sentences. I think that gets us where we really need to be.

Staff has said we have those references in the paragraphs above, and it seems redundant at best. And I think that -- you know, I feel that I could support that. I think that gets us where we really need to be. Just striking the "if any" from that sentence and ending the paragraph with that sentence there.

CHAIRMAN EDGAR: Commissioner Arriaga.

COMMISSIONER ARRIAGA: I was just going to say, Commissioner Carter, that that sounded like poetry, the issue of wisdom, of which we do recognize in our chairlady.

CHAIRMAN EDGAR: Commissioner Tew.

COMMISSIONER TEW: I, too, agree with your comments. So actually it would be my suggestion as well. And as for my sentence, I really threw it out for discussion. I'm definitely open to tweaking it. I just wanted to reserve the neutrality, I think, of the overall comments.

CHAIRMAN EDGAR: And I think you raise a good point. I do. And I like the addition of the potential for innovations in advanced technologies and the other items that you listed there.

Commissioner Deason.

COMMISSIONER DEASON: I have a question about the filing of the comments. I'm not opposed to filing comments, per se, but the question I have is if we issue -- the decision in Issue 1 is PAA, it gets protested, someone has standing for a hearing, we have a hearing, and then we make a decision based upon evidence, we think there is something inconsistent with the comments we have already filed. So when would these comments be filed that staff is proposing? Would it be post -- we would wait and file those after we know there is a protest, and if there is to be a hearing would we file comments after a hearing, or would we go ahead? Is it your recommendation to go and file these comments as they are today?

MR. COOKE: It's a good question. And you can direct us when to file these comments. So there is not a set time frame, per se. There is a proceeding at FCC. The FCC has already received comments from parties. Those who chose to be parties had to file by June 5th. There are reply comments to those original set of comments at FCC due actually today.

But we also have confirmed that additional comments can be filed with the Commission. They are treating that proceeding, allowing ex parte communications as long as they are disclosed within the record. So we could essentially file these anytime. If you think it is wiser to wait until the 21 days run, we could do that. I'm not sure that anything

necessarily would preclude -- in fact, it would not preclude the Commission from filing additional comments in the future.

Normally we take these up at Internal Affairs. So these are not subject -- these are not PAA. And we can do that again in the future, as well. I'm not sure if I answered your question or not, but --

COMMISSIONER DEASON: No, you answered it. Thank you.

CHAIRMAN EDGAR: Commissioner Carter.

COMMISSIONER CARTER: Madam Chair, I was just going to say that I think that the language is fairly innocuous. And I believe if we start putting more stuff in here then you will say, well, you put this in and you left that out. And I think that we are just expressing -- I read it as expressing the sense of the Commission that, you know, the FCC will do its job. And I wouldn't want us to -- I'm thinking aloud, but I wouldn't want us to get in the posture where procedurally they are headed on one track and then we are saying, well, we will wait until we do a potential appeal or a potential application.

I think that this fairly succinctly states the position of the Commission. And I think it is a good thing to do to be on record saying, I mean, of what we are doing. But I would be a little bit nervous if we were to go through another proceeding on Issue 1 and then start putting little different pieces into it and then send that back to the FCC. That would

make me nervous.

CHAIRMAN EDGAR: Commissioners, other comments? Commissioner Arriaga.

COMMISSIONER ARRIAGA: I'm comfortable with filing the way it has been proposed with the modifications included by Commission Tew, your latest comments. I'm comfortable with going ahead right now. If there are any complaints or any issues that we will find out later, I think there are other dockets that are open and it shouldn't affect these comments. I think we can go ahead with the modifications. So if you want me to make a motion, I will make a motion. It is my motion to go ahead.

CHAIRMAN EDGAR: Okay. Commissioner Arriaga has made a motion that we file comments as proposed before us with the edits that we have discussed, and we can go over them one more time if we need to for clarity.

COMMISSIONER CARTER: Second.

CHAIRMAN EDGAR: Okay. Thank you, Commissioner Carter. And there is a second. Is there further discussion?

Commissioner Deason, did you have anything?

COMMISSIONER DEASON: No. I mean, I'm agreeable with sending the letter. I guess my question was more procedural as opposed to substantive, but I don't find anything in this letter, as modified, that is particularly troublesome.

CHAIRMAN EDGAR: Commissioner Tew.

COMMISSIONER TEW: Is that my queue to go over the sentence again?

CHAIRMAN EDGAR: It is. And thank you for reading that queue.

COMMISSIONER TEW: I'm just thinking to myself is it because I read too quickly, which I doubt, or is it the accent. "Conversely, if the merger of these entities results in increased investment in advanced technologies and competitive offerings, we expect that Florida's consumers may be positively impacted." And subject to the Chairman's wordsmithing.

CHAIRMAN EDGAR: Thank you. Well, my absolutely nonsubstantive edit would be to delete, "we expect that," so it would be, "Competitive offerings, Florida's consumers may be positively impacted." And, again, a nonsubstantive suggestion.

Are you comfortable with that, Commissioner Tew? Commissioners?

Okay. Then we have a motion and we have a second that we file comments with the edits, additions and subtractions that we have discussed here at the bench. I think that that is clear. Staff, are you clear? I am seeing a nod.

MR. KENNEDY: Yes, ma'am.

CHAIRMAN EDGAR: Okay. Then all in favor of the motion say aye.

(Unanimous affirmative vote.)

CHAIRMAN EDGAR: Opposed? Show the motion carried.

And we do have a third issue.

COMMISSIONER DEASON: Move staff.

COMMISSIONER CARTER: Second.

CHAIRMAN EDGAR: Motion and second on Issue 3. All in favor say aye.

(Unanimous affirmative vote.)

CHAIRMAN EDGAR: Opposed? Show the motion carried. Thank you all.

* * * * * *

STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

COUNTY OF LEON)

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

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

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

DATED THIS 29th day of June, 2006.

JANE FAUROT, RPR
Official FPSC Hearings Reporter
FPSC Division of Commission Clerk and
Administrative Services
(850) 413-6732

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- 1828 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.

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.

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[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.

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[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

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[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.

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[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.

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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

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[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

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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.

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[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

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[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

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

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.: SC06-1828 Lower Case No.: Docket No. 060308-TP

SUBMISSION OF ORIGINAL AFFIDAVITS

Attached hereto are the original affidavits of Marshall M. Criser III and Rick L. Moore in connection with Appellees' Joint Opposition to Emergency Motion for Stay ("Joint Opposition") that was filed in this case on September 18, 2006. Facsimile copies of these affidavits were originally attached to the Joint Opposition in order to expedite the response.

Respectfully submitted, this the 19th day of September 2006.

D. Bruce May, Jr.
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 Appellee, AT&T, Inc.

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; the Florida Public Service Commission, c/o Blanca Bayo, Director, Division of Commission Clerk & Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; and, Major B. Harding and John Beranek, Ausley & McMullen, PA, 227 South Calhoun Street, Tallahassee, FL 32301 this 19th day of September, 2006.

D. Bruce May, Jr.

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.

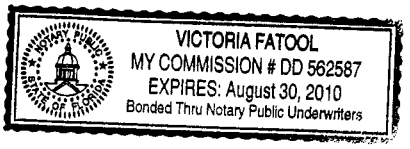
I affirm under the penalties of perjury that the contents of the foregoing Affidavit are true to the best of my knowledge, information, and belief and that this Affidavit was executed on September 18, 2006, in Miami, Florida.

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:



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.

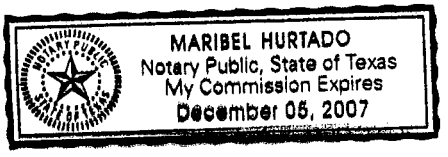
IV. STAYING THE MERGER WILL ALSO POSTPONE SUBSTANTIAL BENEFITS TO CONSUMERS AND HARM THE PUBLIC INTEREST

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.



Notary Public

My commission expires: