

**COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION**

IN THE MATTER OF:)
)
JOINT APPLICATION FOR APPROVAL)
OF THE INDIRECT TRANSFER OF) Case No. 2006-00136
CONTROL RELATING TO THE)
MERGER OF AT&T INC. AND)
BELLSOUTH CORPORATION)

PETITION OF JOINT APPLICANTS FOR CONFIDENTIAL TREATMENT

Petitioners AT&T Inc. (“AT&T”), BellSouth Corporation, and BellSouth Telecommunications, Inc. (collectively, “Joint Petitioners”), by and through counsel, pursuant to KRS 61.870, *et seq.*, and 807 KAR 5:001, Section 7, *et seq.*, request confidential treatment as to documents that are extremely sensitive, generally recognized as confidential or proprietary, and the disclosure of which would permit competitors an unfair competitive advantage. Moreover, most of these documents involve recommendations and memoranda in which opinions are expressed or policies formulated or recommended and thus are exempt from public disclosure for that reason as well. In support of their Petition, the Joint Petitioners state as follows:

1. On April 21, 2006, the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate Intervention, filed his Initial Request for Information from the Joint Petitioners.
2. In response to that set of requests, the Joint Petitioners have provided voluminous amounts of non-confidential materials – 14,620 pages of non-confidential documents and non-confidential narrative responses to 46 separate Data Requests, many of which include subparts.
3. Several of the Attorney General’s questions, however, seek documents and information that are highly confidential and qualify for confidential treatment and protection

from public disclosure under KRS 61.878.¹ The set of documents at issue here is not circulated outside a limited group of personnel at AT&T, BellSouth Corporation, or BellSouth Telecommunications, Inc., nor is it provided to the public. Its internal use is restricted to only those employees who have a legitimate business reason for reviewing such materials, and the Joint Petitioners attempt to control the dissemination of this material through all reasonable means.

4. Under Kentucky law, all of these highly sensitive materials are entitled to protection from public disclosure. Below, the Joint Petitioners establish that the different categories of documents at issue here all amply qualify for confidential treatment under the plain language of the relevant Kentucky statute.

5. **Materials Provided to the United States Department of Justice Under Strict Confidentiality Protections.** The vast majority of the material for which confidential treatment is necessary – 992 out of 1039 pages – are documents responsive to the Attorney General’s Data Request 37, which seeks materials that have been provided to the United States Department of Justice pursuant to the Hart-Scott-Rodino Antitrust Improvement Acts of 1976, 15 U.S.C. § 18a.

¹ Because Joint Petitioners consider all of the materials addressed in this motion to be confidential and proprietary, and due to the amount of data being provided, they are complying with the Commission’s rule by copying all of this response on yellow paper. Because the Joint Petitioners consider this all to be confidential, and because the confidential material is voluminous, the Joint Petitioners do not intend to file a redacted copy of the material. Accordingly, the Joint Petitioners request that the Commission grant a waiver of its rule which generally requires the filing of ten redacted copies of the material in question. The Joint Petitioners note that a similar procedure was requested and approved during the Commission’s review of the Bell Atlantic/GTE merger. *See* Joint Petition for Confidentiality, *Joint Application of Bell Atlantic Corp. and GTE Corp. for Order Authorizing Transfer of Utility Control*, Case No. 99-296, at 1 n.1 (Ky. PSC filed Aug. 9, 1999); Letter Order, Case No. 99-296 (Ky. PSC Aug. 26, 1999) (“August 26, 1999 Letter Order”). *See also* numerous Petitions for Confidential Treatment, *Application for Approval of the Transfer of Control of ALLTEL Kentucky, Inc. and Kentucky ALLTEL, Inc. and for Authorization to Guarantee Indebtedness*, Case No. 2005-00534; Letter Orders, Case No. 2005-00534 (Ky. PSC Mar. 31, 2006).

Because the documents at issue are extremely sensitive competitive materials, they are afforded highly confidential treatment by the Department of Justice. Indeed, *no competitor is allowed to see these documents when they are filed at the Department of Justice, and these documents are so sensitive that it is a federal crime for a federal employee to reveal them.* See 15 U.S.C. § 18a(h); 18 U.S.C. § 1905.

6. More specifically, these documents were provided to the Department of Justice pursuant to its Request 4(c) under the Hart-Scott-Rodino Act. Request 4(c) makes clear by its terms that documents responsive to it are highly sensitive business planning documents, the release of which would cause competitive harm to the Joint Petitioners. In particular, the Department of Justice regulation setting forth what should be provided in response to Request 4(c) requires that documents responsive to that request consist of “all studies, surveys, analyses and reports which were prepared *by and for any officer(s) or director(s) . . . for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets . . .*” 16 C.F.R. Pt. 803, App. at 4(c) (2006) (Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions) (emphasis added).

7. By itself, the very fact that the documents at issue were provided in response to Department of Justice Request 4(c) establishes that they are the kinds of high-level business strategy and planning documents that CLECs and other intermodal and intramodal competitors could exploit to learn of the Joint Petitioners’ competitive strategy and thus should be protected from disclosure under KRS 61.878(1)(c). In the words of the Department of Justice regulation itself, these documents reveal sensitive internal evaluations of “competition, competitors, markets, [and] expansion into product or geographic markets.” 16 C.F.R. Pt. 803, App. at 4(c).

Disclosure of such highly sensitive internal evaluations and analysis is a quintessential example of material that would necessarily permit competitors an unfair competitive advantage, which is presumably why the Department of Justice does not permit competitors access to this information. For this reason alone, these documents warrant confidential treatment under KRS 61.878(1)(c)(1). *See also Southeastern United Medigroup, Inc. v. Hughes*, 952 S.W.2d 195 (Ky. 1997) and *Marina Mgmt. Servs., Inc. v. Commonwealth*, 906 S.W.2d 318 (Ky. 1995) (internal company information withheld from public disclosure pursuant to KRS 61.878(1)(c)(1) because of its competitively sensitive nature).

8. Even beyond that, however, consistent with the type of highly confidential and competitively sensitive information necessarily sought by Department of Justice Request 4(c) – and thus the Attorney General’s Data Request 37 in this proceeding – the particular materials that the Joint Petitioners have provided to the Department of Justice and now to the Attorney General (subject to a detailed protective agreement) and that are at issue here are, in fact, of the type that are generally recognized as confidential or proprietary. If openly disclosed, they would permit CLECs and other competitors an unfair competitive advantage and thus qualify for confidential treatment under KRS 61.878(1)(c)(1). In particular, these documents reveal, among other things, future business plans, competitive strategy, competitive opportunities and vulnerabilities, trade secret information, sensitive estimates of transaction values and rationales, and detailed financial estimates and forecasts. These documents also include alternatives that both companies considered to the present transaction as well as strategy documents reflecting financial advice as to how the current transaction should be positioned. Accordingly, all of these materials are highly confidential and could be used by CLECs and other intermodal and intramodal competitors to obtain an unfair competitive advantage. For these reasons, these

documents qualify for confidential treatment under KRS 61.878(1)(c)(1). *See* August 26, 1999 Letter Order (granting confidential treatment to internal studies and reports made in preparation for the transfer of utility control pursuant to the merger of Bell Atlantic Corporation and GTE Corporation).

9. Additionally, and independently, these materials qualify for confidential treatment under KRS 61.878(1)(j). They are entitled to protection under that statutory provision because materials responsive to Department of Justice Request 4(c) are, by their nature, “preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended” that are protected under KRS 61.878(1)(j). As noted above, the relevant Department of Justice regulation requires submission of materials that are prepared for “*the purpose of evaluating or analyzing the acquisition.*” 16 C.F.R. Pt. 803, App. at 4(c) (emphasis added). Documents that “evaluate” or “analyze” an acquisition and advise a corporation’s executives and directors as to the best course of action necessarily involve the formulation or recommendation of the policies of the relevant corporation. They are thus exempt from public disclosure.

10. **Board Meeting Minutes and Other Material Reflecting the Joint Petitioners’ Deliberations and Strategy.** The remaining documents at issue also plainly merit confidential treatment. These documents consist largely of minutes of each of the Joint Petitioners’ Board of Directors meetings discussing and evaluating this transaction provided in response to the Attorney General’s Data Request 25. The other documents are a single page of due diligence analysis provided in response to Data Request 23 and a single page of information derived from a sensitive and proprietary internal model provided in response to Data Request 1(a).

11. The Board of Directors meeting minutes qualify for protection under KRS 61.878(1)(c) and (j) for the same reasons discussed above. These minutes reflect the business priorities, plans, analysis, judgments, and competitive determinations of each company's governing body. No company would permit a competitor access to such sensitive, high-level deliberations, and allowing a CLEC or other competitor to obtain such a record of the Joint Petitioners' confidential internal planning would give the competitor an unfair and wholly unwarranted business advantage for purposes of KRS 61.878(1)(c). Moreover, because these minutes reflect the advice given to the Boards of Directors and their deliberations on that advice, they constitute "preliminary recommendations . . . in which opinions are expressed or policies formulated or recommended" that are entitled to confidential treatment under KRS 61.878(1)(j).

12. Finally, the page of BellSouth due diligence analysis reflects financial evaluation of AT&T's businesses and financial condition, which competitors could again exploit to gain a competitive advantage and likewise involves recommendations used to formulate policy. The page of analysis provided in response to Data Request 1(a) derives from forecasting using AT&T's internal proprietary models in which AT&T has made a significant investment and, moreover, would reveal future business plans. Release of these materials would thus again allow those competitors to obtain an unfair competitive advantage.

13. WHEREFORE, the Joint Petitioners respectfully request that this honorable Commission issue an order granting confidential treatment to the materials discussed in this Petition. Specifically, the Joint Petitioners seek Confidential Treatment for the documents produced in response to the Attorney General Data Requests 1a, 11, 23, 25, 30, and 37. Additionally, the Joint Petitioners respectfully request that the Commission waive its rule and

allow the Joint Petitioners to forgo filing any redacted copies of this material for the reasons explained herein.

Respectfully submitted, this the 5th day of May 2006,

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