COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

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

JOINT APPLICANTS' POST-HEARING BRIEF

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INTRODUCTION AND EXECUTIVE SUMMARY

Petitioners AT&T Inc. ("AT&T"), BellSouth Corporation ("BellSouth"), and BellSouth Telecommunications, Inc. ("BST") (collectively, "Joint Applicants") hereby respectfully file their post-hearing brief in support of their Joint Application for Approval of Indirect Transfer of Control.[1]

The holding-company merger at issue in this proceeding responds directly to the seismic changes that are driving competition in telecommunications markets in Kentucky and around the country. Cable, Voice over Internet Protocol ("VoIP"), and wireless competitors have all experienced explosive growth over the past few years. The result in Kentucky, as elsewhere, has been dramatic. CLECs now have 26 percent of the overall market and a greater percent of the business market. *See* Roberts Test. 9:20-10:4 (Joint App. Exh. K). Moreover, BST currently faces at least six wireline competitors in every one of its switching offices in Kentucky. *See id.*

AT&T and BellSouth have sought to respond to these competitive challenges by joining forces to bring new, better, and more efficient services to consumers. The record in this proceeding establishes overwhelmingly that the proposed merger of these holding companies will not affect BST's well-established financial, technical, and managerial ability to provide high-quality services in Kentucky.

The record is equally clear in establishing that the merger will yield many public interest benefits. It will hasten the development of integrated wireline-wireless products and services that consumers want by unifying ownership and managerial control of Cingular Wireless. It will speed AT&T's entry into the market for video services, thereby providing much needed competition in a market long frustrated by the stranglehold of the dominant cable incumbents. It

[1] Please see the Cautionary Language Regarding Forward-Looking Statements attached as Exhibit A.

will improve services to government customers, especially in the highly significant areas of national security and disaster preparedness. And it will benefit *all* customers – from single-line mass-market customers to large multi-location international enterprises – through increased research and development, network integration, and substantial cost savings.

These benefits will be achieved without causing any countervailing harm to the substantial competition that the Joint Applicants already face. No party here has even submitted testimony arguing that the merger will decrease competition for mass-market consumers, including the residential customers with whom this Commission has traditionally been most concerned. In any event, as the Federal Communications Commission ("FCC") has held, because AT&T Corp. made an irreversible decision to stop marketing wireline telecommunications to the mass market before its merger with SBC Communications Inc. ("SBC"), AT&T "is no longer a significant provider . . . to mass market customers." *SBC/AT&T Merger Order*[2] ¶ 103.

There also will be no harm in the business market, the market segment that has long been the most competitive. The record evidence shows that AT&T and BellSouth compete for different segments of the business market. Moreover, the arguments made by NuVox and Xspedius's witness, Mr. Gillan, about alleged market concentration are meaningless and entitled to no weight. As NuVox and Xspedius ultimately "*concede[d]*" on the record, Mr. Gillan's analysis was based on a basic "error." Tr. 235 (Berlin) (emphasis added). In any event, Dr. Aron has demonstrated that Mr. Gillan's backward-looking mode of analysis does not capture the rapid changes in the marketplace, and it is, therefore, irrelevant. As the FCC

[2] Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* WC Docket No. 05-65, FCC 05-183, 20 FCC Rcd 18290 (rel. Nov. 17, 2005) ("*SBC/AT&T Merger Order*").

concluded in reviewing this same issue in the SBC/AT&T merger, these rapid technological changes and the "multitude of choices" available to these "sophisticated" consumers means that there will be no harm in this highly competitive market. *SBC/AT&T Merger Order* ¶ 75.

Because there is no competitive harm resulting from this merger, there is no reason to adopt *any* of the conditions that NuVox and Xspedius have proposed. Imposing such conditions would force the merged company to operate inefficiently to meet artificial requirements that have no relationship to customers' needs or to the demands of a competitive marketplace. Inefficient operations lead to lower service quality, delays in the introduction of new products and services, unhappy customers, and, in the end, lost business and lost jobs. None of those results is in the public interest.

Moreover, the conditions that NuVox and Xspedius propose are simply improper attempts to use this proceeding to extract *private* benefits that are inconsistent with the public interest, that have been addressed by this Commission elsewhere, and/or that can be reviewed again as necessary in other dockets opened by this Commission.

The Commission should likewise decline to adopt the conditions proposed by the Communications Workers of America ("CWA"). Those conditions also do not respond to any public interest harm related to the merger, and, moreover, they are either irrelevant and unnecessary (as with CWA's request that the Commission impose service quality standards, despite the fact that such standards already exist) or counter to the public interest (as with the CWA's request for short-term job guarantees that will hurt the long-term competitiveness of the merged entity and thus ultimately reduce employment prospects).

For all these reasons, and others discussed below, this Commission should conclude, as have the commissions in Florida, North Carolina, and 10 other states, that this merger is in the

public interest and that no conditions are necessary.[3] Similarly, on June 29, 2006, the Louisiana PSC Staff issued a Position Statement (attached as Exhibit E hereto) concluding (at 11-12) that "there are clear benefits that will be received by end-users of the subsidiary companies in Louisiana as a result of this merger, yet at the same time, the end users and Intervenors will not experience any negative public interest concerns." The Louisiana PSC Staff further recommended (at 18) that the same proposed conditions raised by the intervenors here be addressed in other dockets and *not* "though the imposition of conditions."

For the Commission's convenience, Joint Applicants are also attaching Proposed Findings of Fact and Conclusions of Law as Exhibit B.

I. THE AT&T/BELLSOUTH MERGER AND THE STIPULATED FACTS REGARDING THE EFFECT OF THE TRANSACTION

As the Joint Applicants have emphasized, this merger is a holding-company transaction. AT&T will purchase all of the issued and outstanding shares of BellSouth, the parent holding company of BST, which, in turn, is the operating company that acts as an ILEC in parts of Kentucky. *See*, *e.g.*, Merger Agreement § 4.1 (Joint App. Exh. B); Joint Stip. of Facts and Evidence ¶ 1 (June 6, 2006); Kahan Test. 9:11-13 (Joint App. Exh. L). As a result of the merger,

[3] *See* Order Approving Transfer of Control, Docket Nos. P-55, Sub 1630, P-140, Sub 89 (N.C. Utils. Comm'n May 18, 2006) ("North Carolina Order") (attached as Exhibit C); Notice of Proposed Agency Action – Order Approving Indirect Transfer of Control, Docket No. 060308-TP, Order No. PSC-06-0531-PAA-TP (Fla. PSC June 23, 2006) (attached as Exhibit D) (proposed agency action to become final unless party with standing protests by July 14, 2006); Staff Recommendation, PSC Docket No. 06-123 (Del. PSC Apr. 5, 2006) (Delaware commission did not act on application per staff recommendation, effecting statutory approval); Order, Formal Case No. 1045-T-3 (D.C. PSC May 18, 2006); Order, Docket No. P442,5458/PA-06-509 (Minn. PUC May 24, 2006); Letter from ChristiAne G. Mason, N.H. PUC, to Douglas L. Patch, Orr & Reno, DT 06-051 (Apr. 28, 2006) (accepting staff recommendation and indicating that commission approval of merger is not required); Order, Docket No. TM06030262 (N.J. BPU June 9, 2006); Order, Case 06-C-0397 (N.Y. PSC May 18, 2006); Order, Docket No. A-310503F0004 (Pa. PUC June 1, 2006); Order Approving Merger, Docket No. 06-087-02 (Utah PSC May 16, 2006); Order, Docket No. 7168 (Vt. PSB June 7, 2006); Order, Case No. PUC-2006-00054 (Va. SCC May 4, 2006).

BellSouth will become a first-tier subsidiary of AT&T. *See* Kahan Test. 9:13-15. BST will remain a subsidiary of BellSouth. *See* Joint Stip. of Facts and Evidence ¶ 5; Roberts Test. 3:3-22.

In this regard, the Joint Applicants and the Attorney General[4] have agreed on a Joint Stipulation of Facts and Evidence that establishes that this holding-company merger will be seamless to consumers in Kentucky. The Joint Stipulation confirms the following facts:

- Because this is a holding-company merger that involves no debt, "Joint Applicants will not (a) engage in any debt financing requiring liens or the pledging of assets by the Joint Applicants' subsidiaries operating in Kentucky, (b) require any subsidiary or affiliate to guarantee the debt of any other subsidiary, affiliate, or holding company of the Joint Applicants, or to grant liens in favor of any lender providing financing, and as a result, (c) the ratepayers shall not bear, directly or indirectly any debt or transactional costs, liabilities or obligations in order to consummate this merger." Joint Stip. of Facts and Evidence ¶ 1; *see id.* ¶ 3 (for one year following merger closing, Joint Applicants will notify the Commission and the Attorney General's Office "in a timely manner" regarding "any downgrading of AT&T Inc.'s debt by Moody's or Standard & Poor's").
- The merger will have "no effect on the rates, terms and conditions of the services that the Joint Applicants' subsidiaries currently provide in Kentucky." *Id.* ¶ 2.
- "Joint Applicants will maintain state headquarters in Kentucky for their Kentucky operating subsidiaries and will continue to work with the Kentucky Public Service Commission and the Attorney General's Office to assist them in fulfilling their important duties." *Id.* ¶ 3; *accord* Letter from Edward E. Whitacre Jr., Chairman and

[4] The Attorney General is uniquely authorized by statute to act as a consumer advocate in Kentucky. *See* KRS §§ 15.010, 367.150(8).

CEO of AT&T Inc., to F. Duane Ackerman, Chairman and CEO of BellSouth Corp. (Mar. 4, 2006) (Joint App. Exh. C).

- "Joint Applicants' Kentucky operating subsidiaries will continue to comply with the lawful rules, regulations, and requirements of the Commission." Joint Stip. of Facts and Evidence ¶ 5; *see* Kahan Test. 9:21-23 ("[T]his Commission will have the same authority to regulate . . . as it does today.").
- "The Joint Applicants' Kentucky operating subsidiaries will . . . adhere to the Commission's applicable service quality standards, including the posting of service performance results and filing of corrective action reports under the appropriate circumstances." Joint Stip. of Facts and Evidence ¶ 5.[5]
- "The Joint Applicants will continue BellSouth's historic levels of charitable contributions and community activities . . . . Moreover, upon reasonable notice and opportunity to respond, the Joint Applicants will provide to the Kentucky Public Service Commission and the Attorney General's Office data regarding economic development activities and civic and charitable activities." *Id.* ¶ 6.
- "[T]he Joint Applicants' Kentucky operating subsidiaries that are parties to collective bargaining agreements will continue to adhere to their collective bargaining agreements." *Id.* ¶ 7.
- "After the merger closes, the existing interconnection agreements between [BST] and the CLECs will remain in effect." *Id.* ¶ 8; *see* NuVox & Xspedius Responses to Joint

[5] Joint Applicants will discuss with Commission Staff appropriate methods of posting these performance results. *See* Tr. 69 (Roberts).

Applicants' Initial Data Requests at 19 (Response 15) (May 11, 2006) (both conceding that merger "does not abrogate the terms of an effective interconnection agreement").[6]

- Because the merger will allow the combined company to "be better able to respond effectively and expeditiously to the evolving needs of government customers," the Joint Applicants "will contact the Kentucky Department of Homeland Security to familiarize it with the combined company's enhanced capabilities as a result of this merger." Joint Stip. of Facts and Evidence ¶ 9.

II. THIS TRANSACTION SATISFIES THE REQUIREMENTS OF KRS § 278.020

Under KRS § 278.020, this Commission's approval is required before any corporation "shall acquire or transfer ownership of, or control, or the right to control, any utility under the jurisdiction of [this Commission] by sale of assets, transfer of stock, or otherwise." KRS § 278.020(5). The Commission "shall grant its approval" for the transfer if the entity acquiring the utility "has the financial, technical, and managerial abilities to provide reasonable service." *Id.* Additionally, under KRS § 278.020(6), the Commission "shall approve any proposed acquisition when it finds that the same is to be made in accordance with law, for a proper purpose and is consistent with the public interest."

The Commission has exempted acquisitions of "[interexchange carriers ('IXCs')], long-distance resellers, and operator service providers," as well as "CLECs" and "wireless carriers,"

[6] No action by CLECs will be necessary for agreements to remain in effect after the merger. *See* Tr. 83, 100 (Kahan).

from these approval requirements.[7] This exemption does not apply, however, to an ILEC.[8] Accordingly, this Commission's approval is required *only* as to the indirect transfer of control of BST, which operates as an ILEC in parts of Kentucky. For the reasons discussed below, that transfer of control readily satisfies the statutory requirements.

A. Because This Is a Holding-Company Transaction, BST Will Continue To Have the Financial, Technical, and Managerial Abilities To Provide Reasonable Service

Because this is a holding-company transaction that does not involve the issuance of debt, it will not affect BST's demonstrated financial, technical, and managerial ability to provide the same high-quality service it did before the merger. Put differently, the record shows that AT&T, as the indirect parent of BST, will meet the statutory requirement of providing reasonable service in Kentucky.

The transaction will not affect BST's (or any of the other Joint Applicants') *financial* ability to provide service because none of these entities will be required to guarantee any debt, pledge any assets, or grant any liens as part of the merger. *See* Joint Stip. of Facts and Evidence ¶ 1; Order at 4, *Petition by ALLTEL Corp. To Acquire the Kentucky Assets of Verizon South, Inc.*, Case No. 2001-00399 (Ky. PSC Feb. 13, 2002) ("One of the primary reasons that ALLTEL will have the financial ability to provide reasonable service is that it is acquiring a financially sound ongoing business without issuing debt."). Moreover, as demonstrated by the 10-K filings of BellSouth and AT&T (Exhibits F and H to the Joint Application), both of these companies

[7] Order at 6-7, *Exemptions for Interexchange Carriers, Long-Distance Resellers, Operator Service Providers and Customer-Owned, Coin-Operated Telephones*, Admin. Case No. 359 (Ky. PSC June 21, 1996) ("First Exemption Order"); Order at 4, *Exemptions for Providers of Local Exchange Service Other Than Incumbent Local Exchange Carriers*, Admin. Case No. 370 (Ky. PSC Jan. 8, 1998).

[8] *See* First Exemption Order at 8 (stating that "[t]he Commission does not contemplate extending any of the exemptions provided herein to services provided by incumbent local exchange carriers").

were financially sound entities before the merger, and there is nothing in this record to suggest that they will not remain so. Beyond that, intervenor Xspedius has conceded that it is "foreseeable that AT&T will have the financial ability to provide reasonable service in Kentucky." Xspedius Responses to Joint Applicants' Initial Data Requests at 2 (Response 1).

The record also overwhelmingly demonstrates that BST, as an indirect subsidiary of AT&T, will continue to have the *managerial* and *technical* expertise to provide reasonable – indeed, high-quality – service to consumers. *See* Joint Stip. of Facts and Evidence ¶ 5; Tr. 36 (Roberts). As an indirect subsidiary of AT&T, BST will continue to provide service in Kentucky just as it does today. *See* Joint Stip. of Facts and Evidence ¶ 5. The record shows that BST "regularly meets the retail service objectives set by this Commission" and has consistently satisfied those objectives since 1997. Roberts Test. 3:10-14; *see* Tr. 64 (Roberts). No party to this proceeding has produced evidence indicating that BellSouth provides anything other than superior service in Kentucky today. The record also shows that both AT&T and BellSouth have highly experienced and extremely competent individuals leading their technical and managerial teams. *See* Joint App. Exh. E; Joint Applicants' Responses to Attorney General's Data Requests at 1-2 (Response 1), Exh. B (May 4, 2006).

Finally, after the merger, any issues involving rebranding of service under the AT&T name will be handled in accordance with applicable rules and with the care appropriate to avoid any consumer confusion. *See* Tr. 140-41 (Kahan). AT&T has significant experience with rebranding, and it has historically done so in a way that avoids consumer confusion. For instance, to avoid any consumer confusion, more than six months after the SBC/AT&T merger's closing, AT&T's advertisements still reference SBC. *See* Tr. 140. AT&T will undertake rebranding in this case only after it has a proper plan to do so, and that plan will be implemented

thoroughly, professionally, and consistent with any applicable rules and regulations of this Commission. *See* Tr. 141 (Kahan).

B. The Merger Will Promote the Public Interest

The record is equally clear in establishing that this merger will promote the public interest (and be consistent with law and serve proper purposes) through better service, more competition, and new and exciting product offerings. The merger will enhance the public interest in multiple ways, many of which are not even contested.

Unification of Cingular Wireless's Ownership Will Make Possible New Converged Services and Enhance Efficiency. Although the Cingular joint venture between AT&T and BellSouth has been a success, the current joint venture structure has impeded Cingular's ability to act efficiently and react quickly to changes in competitive conditions. *See* Kahan Test. 7:4-12; Tr. 96-97 (Kahan); *see also* Aron Test. 23:1-3 & n.35 (Joint App. Exh. N) ("Economic theory tells us that division of ownership such as in joint ventures can significantly impede decision-making."). For example, AT&T, BellSouth, and Cingular each are in various stages of deploying three separate IP Multimedia Subsystems ("IMS") to deliver new IP-based services. *See* Rice Test. 2:5-20 (Joint App. Exh. M). IMS technology will allow voice, data, and video services to be provided in any combination over any wired or wireless network. *See id.* The merger will hasten deployment of a *single* IMS network, and thus bring innovative, converged wireless-wireline applications to business and residential consumers more quickly. *See id.*; Tr. 150 (Rice). For these reasons, contrary to Mr. Gillan's unsupported assertion, *see* Gillan Test. 14:12-16 (June 2, 2006), unifying the ownership and managerial control of Cingular will bring significant benefits to the public in the form of new products and more efficient services.

Increased Video Competition. The merger also will allow more rapid deployment of facilities-based competitive video services in Kentucky. AT&T is currently in the midst of Project Lightspeed, which is a massive investment of more than $4 billion to upgrade AT&T's existing 13-state local network to a fiber network. *See* Kahan Test. 5:17-22. Project Lightspeed will enable AT&T to offer its customers an advanced suite of voice, video, and data services, including an IP-based video service, or "IPTV." *See id.* at 11:14-17. AT&T is engaged in a controlled launch of its IPTV service in San Antonio, Texas, and plans to roll out the service to other markets where it currently has local exchange networks. *See id.* at 6:1-4. AT&T projects that the *initial phase of deployment* will lead to its IPTV service being available to approximately 18 million subscribers by the first half of 2008. *See id.* at 6:4-7.

The combined company will be able to bring similar benefits to Kentucky customers faster than would likely occur absent the merger. *See id.* at 11:10-13. BellSouth itself is in the midst of a major deployment of fiber to support higher-speed data services, but has not yet made a decision to commit to deploying video services. *See id.* at 12:11-15. BellSouth's expanded fiber infrastructure can nevertheless be used to allow AT&T to roll out IPTV more quickly in BellSouth's region. *See id.* Moreover, the combined company will experience significant cost savings in rolling out video that will allow it to become a better competitor to cable. *See id.* at 12:16-14:2; Tr. 109 (Kahan). The merger will thus substantially enhance video competition, which, given that cable rates have been increasing at three-and-a-half times the rate of inflation, is a particularly significant public interest benefit of the merger. *See* Tr. 110 (Kahan).

Mr. Gillan is wrong to suggest that the Commission should ignore these benefits because the Joint Applicants have not guaranteed video deployment by any date certain in Kentucky. *See* Gillan Test. 16-17. That argument ignores basic marketplace realities. Cable companies are

already rolling out triple-play bundles of video, high-speed Internet access, and voice service, and AT&T must be able to offer the same kinds of packages "to respond to the market conditions." Tr. 108-09 (Kahan). Although AT&T cannot "start postmerger integration until after the deal is completed" and accordingly does not currently "understand the details of the [BellSouth] network in Kentucky," its intent is to "roll [video] out as quickly as possible after the close, doing a thorough job of planning, designing, engineering, constructing the infrastructure incrementally that's required in Kentucky." Tr. 109, 110 (Kahan). There is thus every reason to believe that the merger will bring enhanced video competition to Kentucky consumers.

Better Service to Government Customers, Strengthened National Security, and Enhanced Disaster Recovery. The merger will create a stronger, more efficient U.S.-owned and -controlled supplier of critical communications capabilities to the government. The merged entity will have a unified, end-to-end IP-based network that will have greater reliability and resiliency than three separately operated and maintained networks. *See* Rice Test. 5:18-6:3; Kahan Test. 10:18-11:7. These kinds of merger effects substantially enhance national security and, as the FCC has explained, are therefore important public interest benefits that must be taken "extremely seriously." *SBC/AT&T Merger Order* ¶ 186.

The merger will likewise enhance the ability of the combined company to respond quickly and effectively to natural disasters. Unified managerial control over the local exchange operations in both the BellSouth states (including Kentucky) and the states where AT&T has local exchange operations will facilitate the deployment of equipment and personnel required to restore service following a disaster. *See* Rice Test. 13:21-15:3. Crucial time will be saved in deploying the right personnel and equipment where they are needed most. *See id.* Further, AT&T has spent hundreds of millions of dollars developing unique disaster recovery capabilities

and assets, and the merger will allow these assets to be used for the benefit of BellSouth and its customers in Kentucky. *See id.* at 15:6-16:2. The Joint Applicants, moreover, have stated on the record that they will contact the Kentucky Department of Homeland Security to discuss these enhanced capabilities to ensure that responsible government officials are aware of them before any emergency occurs. *See* Joint Stip. of Facts and Evidence ¶ 9; Tr. 159-60 (Rice). Notably, neither Mr. Gillan nor any other witness takes issue with either the existence or the importance of these benefits.

Vertical Integration Will Result in Better and More Efficient Services. The vertical integration of AT&T and BellSouth IP networks will, as the FCC recognized in approving the analogous SBC/AT&T merger, provide significant public interest benefits to *all* categories of customers. *See* Rice Test. 2:5-5:2. The integration of such "complementary networks" is in the public interest because "customers will benefit not only from new services, but also from the improvements in performance and reliability resulting from the network integration." *SBC/AT&T Merger Order* ¶ 191. Indeed, consumers are already seeing benefits from the vertical integration of SBC/AT&T in terms of both new products and more reliable and efficient services. *See* Rice Test. 6:6-9:8 (detailing the benefits already being provided).

Without any evidence, Mr. Gillan suggests that the integration of complementary networks somehow poses a threat to the ability of competitors to obtain nondiscriminatory interconnection. *See* Gillan Test. 18:12-17. That is simply wrong. The federal Telecommunications Act of 1996 ("1996 Act") and the FCC's implementing orders impose detailed requirements governing the rates, terms, and conditions under which BST interconnects with the local telecommunications networks of companies such as NuVox and Xspedius. *See*,

e.g., 47 U.S.C. § 251(a)(1), (c)(2); *Local Competition Order*[9] ¶¶ 192-225, 542-607. The 1996 Act further requires ILECs such as BST to negotiate, and if necessary arbitrate before this Commission, interconnection agreements incorporating such requirements. *See* 47 U.S.C. § 252. Neither the legal requirements nor the implementing interconnection agreements will be affected by this merger. Additionally, this Commission has in place performance measures and penalty plans to ensure that BST is providing nondiscriminatory interconnection consistent with the 1996 Act,[10] and the Commission is fully capable of monitoring BST's performance under those measures. If any party believes that these measures do not adequately ensure nondiscriminatory interconnection, it is free to seek modifications to the existing plans as appropriate.

Increased Research, Development, and Innovation. A significant benefit of the merger is the increased research and development that will be made possible by the greater scale of the combined company. *See, e.g.*, Kahan Test. 8:6-9:2. As the FCC concluded in approving the SBC/AT&T merger, "by broadening its customer base, the merged entity will have an increased incentive to engage in basic research and development." *SBC/AT&T Merger Order* ¶ 195. The same is true here. Moreover, all the cost savings from the merger will allow the merged entity to invest further in research, development, and innovation, which will substantially benefit consumers. *See, e.g.*, Kahan Test. 5:17-22.

Although increased research and development will benefit all classes of consumers, *see id.* at 8:6-9:2; Rice Test. 11:12-12:12, the benefits to rural customers are particularly noteworthy. Christopher Rice, who is AT&T's senior executive responsible for network engineering,

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[9] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*") (subsequent history omitted).

[10] *See* Order, *Investigation Concerning the Propriety of InterLATA Services by BellSouth Telecommunications, Inc.*, Case No. 2001-00105 (Ky. PSC Oct. 19, 2001) ("BellSouth InterLATA Services Order").

development, and planning, has explained that the merger increases the potential to expand BellSouth's already-extensive broadband deployment in Kentucky even further into rural areas: "AT&T and BellSouth can consolidate their efforts to explore ways to more efficiently deploy broadband services to rural areas and other hard-to-reach areas. In particular, the pooling of AT&T and BellSouth resources and information, combined with the technical expertise of Cingular, holds great promise for the development and deployment of broadband services using wireless technologies." Rice Test. 11:3-8. As Mr. Rice further explained at the hearing, AT&T is currently implementing pre-WiMax trials of wireless broadband services in Nevada and Texas. *See* Tr. 156-57. Again, Mr. Gillan does not even address these significant merger benefits, much less does he argue that they will not promote the public interest.

III. THERE IS NO BASIS IN THIS RECORD TO IMPOSE CONDITIONS ON THIS MERGER

A. Conditions Cause Real Consumer Harm and Would Be Appropriate Only in Limited Circumstances Not Presented Here

This Commission should reject suggestions that it approve this merger with conditions. Merger conditions are not "benign." Tr. 230 (Aron). Rather, they "*harm[ ] consumers*" by forcing the merged entity – and *not* its competitors – to operate inefficiently. Tr. 231 (Aron) (emphasis added). Such inefficiencies, in turn, lead to delays in the introduction of new products and services, lower-quality service, lost business, and lost jobs. As explained by Dr. Aron, conditions "impede[ ] the ability of [the merging] parties . . . to achieve the benefits that will ultimately inure to consumers," including "greater efficiencies" and "bringing out . . . new products more quickly." Tr. 230-31; *see* Tr. 137 (Kahan) (explaining that "[a]nything that hampers our ability to succeed in the marketplace, be good competitors, give quality of service, a

fair value, anything that stands in the way, in the long term, will be detrimental to employees, the communities, and our customers").

Because conditions have these significant negative effects, a principled analysis requires that conditions be imposed *only* where the record demonstrates that a merger will cause specific competitive harm(s) that the proposed conditions are narrowly tailored to address. As Dr. Aron has testified, the Department of Justice has created guidelines for merger conditions that require just such a "rigorous, logical nexus" between the merger, the demonstrated "harms to consumers from the merger," and the "remedies being proposed." Tr. 229, 230; *see* United States Dep't of Justice, Antitrust Division, *Policy Guide to Merger Remedies* at 2 (Oct. 2004) ("*DOJ Guide to Merger Remedies*"). A principled inquiry further requires that the Commission reject any proposals designed to address pre-existing market conditions – as opposed to harms that are a direct result of the merger – as well as any proposals that are intended to protect the private interests of particular competitors, as opposed to benefiting competition. *See DOJ Guide to Merger Remedies* at 4-5 ("the purpose of a remedy is not to enhance premerger competition"; "decree provisions should promote competition generally rather than protect or favor particular competitors"); Tr. 230 (Aron).

In this regard, the fact that, in some prior mergers, conditions have been imposed does not mean that such conditions did not cause consumer harm. For instance, in the SBC/AT&T merger, the merging parties acquiesced in certain "voluntary" commitments at the *federal* level in order to expedite approval of the merger by the FCC. *See* Tr. 248-49 (Aron). To the extent that those commitments required the companies to take actions they would not have taken otherwise, and thus required them to behave inefficiently, they made consumers worse off than they would have been had they not been necessary to speed approval of the merger. *See* Tr. 229-

30 (Aron). Indeed, FCC Chairman Martin noted that the merger should have been approved without any such conditions and that markets would have "remain[ed] vibrantly competitive absent these conditions." *SBC/AT&T Merger Order*, Martin Statement at 1.

In any event, regardless of the record developed at the federal level in that case, based on the record *in this case*, none of the conditions proposed by parties to this proceeding satisfies the established standards. In fact, they all fail because, as a threshold matter, there has been *no* showing of any harm caused by this merger that requires a remedy. Below, the Joint Applicants address first the conditions proposed by NuVox and Xspedius, and then turn to those proposed by CWA.

B. The Commission Should Reject the Conditions Proposed by NuVox and Xspedius

1. NuVox and Xspedius Have Not Demonstrated That the Merger Will Cause Any Competitive Harm That Would Justify Conditions

There is no record evidence in this case showing that this merger will cause any competitive harm that would warrant a remedy through conditions. Rather, the conditions sought by NuVox and Xspedius are simply an attempt to inject unrelated issues into this proceeding in order to extract a regulatory advantage. Those proposed conditions are wholly unwarranted, and adopting them would harm the public interest.

At the outset, it is notable that the requests made by NuVox and Xspedius are not grounded in any claim of harm to the mass-market, including residential, customers about whom this Commission has properly always been most concerned. *See* Gillan Test. 19 n.30 (noting that his testimony was "silen[t]" as to the mass market). Nor could any such claim be viable, given the fact that, as Mr. Gillan concedes, AT&T Corp. "abandoned" wireline mass-market service in 2004, well before its merger with SBC. *Id.*; *see* Kahan Test. 14:6-10 (explaining that AT&T

made a "unilateral and irreversible decision to cease actively marketing wireline local and long-distance service"). The FCC relied on that decision to cease marketing services to these customers to conclude that the SBC/AT&T merger would cause no harm in the mass market. *See SBC/AT&T Merger Order* ¶ 103.

That same logic applies at least as strongly here, regardless of whether customers could theoretically obtain mass-market service from AT&T if they were to request it. *See* Tr. 117-18 (Kahan). Very few customers in fact make such calls, and many more mass-market customers are leaving AT&T than subscribing each month in Kentucky. *See* Joint Applicants' Highly Confidential Responses to Covad/NuVox/Xspedius Data Requests, Response 19 (May 25, 2006). Thus, in the FCC's words, AT&T is no longer a "significant provider (or potential provider)" of these services. *SBC/AT&T Merger Order* ¶ 103. Similarly, in light of AT&T's actions to dismantle its "business infrastructure" supporting those services, Tr. 112 (Kahan), any suggestion that it could readily re-enter that market is "speculative and unrealistic." *SBC/AT&T Merger Order* ¶ 103.

NuVox and Xspedius' claim that there will be harm in the business market is incorrect for many reasons. As an initial matter, the record here establishes that AT&T does not even have a local fiber network in Kentucky, so this merger cannot deprive competitors of an alternative wholesale provider of services. *See* Joint Applicants' Highly Confidential Responses to Covad/NuVox/Xspedius Data Requests, Response 10. As Dr. Aron testified, "to the extent that CLECs rely on the provision of special access or other local network facilities . . . , this merger can have no effect on the competitiveness of the supply of those facilities." Tr. 231.

Beyond that, both BellSouth and AT&T witnesses explained that they compete for different kinds of business customers, with AT&T focusing "on the largest retail business

customers," Kahan Test. 15:9-10, and BellSouth targeting "small and medium-sized companies located within either the State or the BellSouth region," Roberts Test. 11:10-12. As Mr. Roberts testified, "the limitations of owning a regional network and technological changes in the marketplace make it difficult for BST to compete realistically for large business enterprise customers that operate nationally and internationally." *Id.* at 11:12-15. The record here thus shows that the two companies' businesses are "largely complementary," *id.* at 11:17-18, and that the merger will cause no anticompetitive harm.

Moreover, as the FCC concluded just last year and as Dr. Aron and Mr. Kahan have demonstrated on the record here, business customers are "sophisticated" consumers of telecommunication services, and they are "aware of the *multitude of choices available to them*." *SBC/AT&T Merger Order* ¶ 75 (emphasis added). These competitive choices include not only traditional CLECs such as TelCove and Cinergy Communications, but also "interexchange carriers, systems integrators, data/IP providers, . . . and equipment vendors." Kahan Test. 15:18-20; *see* Aron Test. 33:5-39:5 (explaining in detail how VoIP providers, equipment vendors, and others can and do compete actively for business customers). Just as the FCC did in the *SBC/AT&T Merger Order*, this Commission should accordingly conclude that this transaction will not cause harm in the "robust[ly]" competitive business market. *SBC/AT&T Merger Order* ¶ 73 n.223. Thus, although some parties may seek to portray the Joint Applicants as somehow insulated from competition (and seeking to "recreate the Bell system" through this merger), the fact is that, as the FCC has specifically concluded with respect to the business market, they face intense competition from a wide variety of intermodal and intramodal competitors, to the point that they are now losing 16,000 switched lines every business day nationwide. *See* Tr. 133-34

(Kahan); Tr. 180, 183-85 (Aron) (explaining the significance of these figures and that non-switched lines include wholesale facilities provided to CLECs).

In this regard, the arguments made by NuVox and Xspedius's witness, Mr. Gillan, about alleged market concentration are entitled to no weight whatsoever. Mr. Gillan's argument about market concentration depends on use of the Herfindahl-Hirschman Index ("HHI"). But Mr. Gillan's analysis contains a fatal error, as the CLECs themselves now admit. NuVox's counsel "concede[d]" at the June 7 hearing that there is "an error in Mr. Gillan's analysis" – in particular, he improperly mixed and matched data from the whole Commonwealth of Kentucky with data from BellSouth's territories in Kentucky, *see* Tr. 226 (Aron) – that led to a "discrepancy in what [his] ultimate number was for the HHI analysis." Tr. 235 (Berlin). Mr. Gillan's analysis is thus meaningless and does not establish any reason for concern about increased concentration in the business market. *See* Tr. 226 (Aron). The Commission need go no further to dismiss the CLECs' claim of competitive harm in the business market and their requests for conditions based on that claim.[11]

Moreover, Mr. Gillan's "whole exercise is misguided." Tr. 228 (Aron). As Dr. Aron explained, HHI analysis is "not intended, in antitrust practice or in merger analysis, to provide a conclusion about whether a merger will have anti-competitive effects." *Id.* Rather, it is merely a "screen" to determine whether further review is warranted; in the SBC/AT&T merger, the FCC undertook just such further review and found that, on facts directly analogous to those presented

[11] Mr. Gillan committed yet another error by failing to identify the proper market. *See* Tr. 227 (Aron). Mr. Gillan improperly considered small and large businesses as a single market; the FCC, by contrast, calculates separate HHIs for these markets. *See id.* Mr. Gillan's additional error on this point also "inflates the concentration in the marketplace." *Id.*

here, there was no competitive harm from the merger in the business market. *Id.*; *see SBC/AT&T Merger Order* ¶¶ 56-80.[12]

Finally, Mr. Gillan argues that the merger will create a "resource imbalance" that will allegedly affect the ability of this Commission to reach correct legal determinations. *See* Gillan Test. 24:21-30:9. Contrary to Mr. Gillan's suggestion, this Commission and its Staff will be fully able to resolve issues presented to it after the merger, just as it has done for many years. There is no reason to believe otherwise. Indeed, the FCC rejected this same claim in the *SBC/AT&T Merger Order*, where it concluded, in paragraph 177, that "there will continue to be numerous competing carriers, trade associations, and other interested parties that remain free to express their positions in regulatory proceedings." Far from disputing that finding (which he does not acknowledge), Mr. Gillan's own Table 3 identifies 14 separate CLECs with more than $100 million each in annual revenues, providing ample incentives and opportunities to advocate their interests. In other respects, however, Mr. Gillan's Table 3 is very misleading. First, it completely ignores the multi-billion-dollar cable competitors. Second, it disregards the fact that this merger does not even affect the alleged imbalance he identifies, because, as a result of the SBC/AT&T merger, AT&T already operated as an ILEC in 13 states, including Texas and California, *before* this merger. Accordingly, to the extent that AT&T's priorities in regulatory advocacy have changed, that change had occurred when SBC acquired AT&T Corp. There is thus no nexus between *this* merger and the supposed problem Mr. Gillan purports to address.

[12] Mr. Gillan suggests vaguely that the increase of the Joint Applicants' "footprint" is somehow a harm from this merger, Gillan Test. 12:2, but the ability to provide services that customers with multiple locations want is plainly a public interest *benefit*. In any event, as Mr. Gillan conceded, his clients are regional providers that serve small and medium-sized businesses, not national and international enterprises with multiple locations. *See* Tr. 206-08.

For all these reasons, the claim that this Commission will not be able to carry out its duties after this merger is specious.

2. The Specific Conditions Proposed by NuVox and Xspedius Are Inappropriate, Unrelated to the Merger, and Can Be Addressed in Other Dockets

Because there are no competitive harms associated with this merger, imposing the conditions that NuVox and Xspedius advocate will only harm consumers by making the merged company a less effective competitor without creating any countervailing benefit. Independently, the specific conditions proposed by these parties demonstrate that they are simply seeking to advance private interests that are unrelated to this transaction and bear no relationship to the public interest. This Commission should thus join the North Carolina Utilities Commission, and the many other state commissions that have approved this merger without conditions, in concluding that these CLECs do "not lack for options" if they are aggrieved by these extraneous issues, but that such issues are not relevant to this merger proceeding.[13]

Price Caps for UNEs. NuVox and Xspedius first assert that the Commission should adopt a price-cap regime for UNEs, so that rates would automatically be adjusted every year.

This proposal not only is wholly irrelevant to this merger – which will not affect the rates that BST may charge for access to UNEs under this Commission's orders and its existing interconnection agreements – it is not even relevant to any problem that exists *outside* this merger. Mr. Gillan claims that this condition is necessary to "make sure that CLECs retain stable and predictable access to [BST's] existing network." Gillan Test. 30:18-20. However, he provides no reason to believe that the *existing* UNE rates established by this Commission do not already offer such "stable and predictable access." In fact, those rates were established by this

[13] North Carolina Order at 6; *see also supra* note 3 (collecting decisions).

Commission after a lengthy and detailed proceeding, *see* Order at 38 & App. A, *Inquiry into the Development of Deaveraged Rates for Unbundled Network Elements*, Admin. Case No. 382 (Ky. PSC Dec. 18, 2001), and no CLEC has challenged them in federal court as inconsistent with binding FCC rules or otherwise unlawful. *See* 47 U.S.C. § 252(e)(6) (authorizing such federal court challenges of state commission decisions under the 1996 Act). Moreover, the FCC has specifically confirmed that the rates established by this Commission conform to sections 251 and 252 of the 1996 Act and the FCC's implementing rules. *See Five-State 271 Order*[14] ¶ 33. The rates currently in place are thus undoubtedly lawful, and there is no need to revisit them to ensure "stable and predictable access" to UNEs.

Even if there were a basis to revisit this issue, Mr. Gillan's proposal is substantively misguided. In particular, insofar as it would apply to network elements that must be made available under section 251,[15] this condition improperly confuses two, separate regulatory regimes. As implemented by the FCC, the 1996 Act requires state commissions to set UNE rates based on TELRIC costs – *i.e.*, "[t]he total element long-run incremental cost . . . based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 C.F.R. § 51.505(b)(1). Under NuVox and Xspedius's price-cap proposal, however, UNE rates that are in place today would be potentially reduced automatically, year-over-year, to account for assumed productivity improvements. Accordingly, rather than being "based on . . . *cost*" as the 1996 Act requires, 47 U.S.C. § 252(d)(1)(A) (emphasis added), BST's UNE rates would be

[14] Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595 (2002) ("*Five-State 271 Order*").

[15] To the extent the CLECs would have this condition apply to other facilities or services, such as facilities that must be made available only under 47 U.S.C. § 271, the proposal exceeds this Commission's jurisdiction.

"based on . . . cost[s]" determined by the Commission, *minus* a percentage applied each and every year to account for cost savings that the CLECs *assume* will be realized. As the FCC has concluded, however, while "there may be factors that cause BellSouth's costs to decline over time," "*there may be other factors that cause costs to increase over time*." *Five-State 271 Order* ¶ 102 (emphasis added). The existence of such factors that would increase TELRIC rates over time is "*precisely why state commissions hold hearings to update rates based on consideration of all new information and relevant data*." *Id.* (emphasis added).

Obviously, no such cost hearings have been held here, nor is this docket the appropriate place to consider such a significant (and likely detrimental) departure from the TELRIC standard. Such a fundamental change should not be considered in a *merger* proceeding. *See* Tr. 232 (Aron) ("there's no logical nexus between any purported harms that would plausibly result from this merger and [this CLEC proposal]"). Instead, such a major shift should take place, if at all, only after full and comprehensive deliberation, not as an afterthought in this unrelated proceeding. *See id.* ("[T]he UNE regime . . . is both controversial and complex, and the thought of mixing and matching [UNE pricing] with a price cap regime, which are two very different regulatory structures, is not something that ought to be done as part of a merger review. . . . [A]ny revision of the UNE pricing process ought to be done with a full record on that issue."). Consideration of such a far-reaching change here would be particularly inappropriate in view of the fact that the FCC is itself conducting a full examination of its TELRIC pricing methodology to determine if it is working as intended or needs revision (including consideration of a *change* in its rules to permit such a price-cap proposal).[16]

[16] *See* Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945, ¶¶ 138-140 (2003) ("*UNE Pricing NPRM*"). In this

Performance Penalties. NuVox and Xspedius next offer a prescription for allegedly "ensur[ing]" that the wholesale performance plan adopted by this Commission "operates as intended." Gillan Test. 40:7-11.

Here too, however, the CLECs provide no explanation for why changes to the existing plan are necessary. This Commission, after substantial proceedings in Docket 2001-00105, has put in place performance reporting and penalty plans that it properly concluded provide ample incentive for BST to continue to meet its obligations under the 1996 Act.[17] The FCC, after its own review, likewise concluded that the existing plans in Kentucky "*provide assurance that these local markets will remain open*," *Five-State 271 Order* ¶ 293 (emphasis added), which is precisely what the CLECs claim is necessary here. This Commission, moreover, has monitored the existing performance plans carefully, issuing a series of orders in Dockets 2001-00105 and 2004-00391 on proposed changes to the plan. If the CLECs believe that further modifications to these plans are necessary, they can raise these issues in these other dockets as appropriate; there is no reason, however, to inject such issues into this merger proceeding.

Beyond these facts, the CLECs do not even attempt to show that BST's performance under the existing plan has been inadequate in any way. And, although Mr. Gillan vaguely suggests that the merger will render the plan inadequate to deter substandard performance, *see* Gillan Test. 40:15-17, he provides no evidence to support that assertion. In particular, he does

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regard, Mr. Gillan significantly mischaracterizes the FCC's statements in suggesting that his proposal is consistent with the federal agency's *current* rules. *See* Gillan Test. 37:13-17. The statement he cites comes from this notice of proposed rulemaking or "NPRM" issued by the FCC. In the portion of the NPRM just prior to the paragraph on which Mr. Gillan relies, the FCC explained that, under its *existin*g rules, "state commissions [need] to conduct a full pricing proceeding every few years." *UNE Pricing NPRM* ¶¶ 138-139. It was in connection with that statement that the FCC invited comment on whether it should change its rules to permit UNE rates to be adjusted automatically over time, "similar to many price cap regimes." *Id.* ¶ 139.

[17] *See* BellSouth InterLATA Services Order at 2 (concluding that the measures and penalties adopted in Georgia are "reasonable and should be adopted").

not (and could not) show that SBC/AT&T's performance has diminished after any of that company's recent mergers.[18] And, as Mr. Kahan explained at the hearing, the Joint Applicants have strong incentives to ensure that wholesale customers "continue using [their] network" and thus "[i]t is not in [the Joint Applicants'] interest nor would [they] do anything that would disrupt the delivery of service" to these wholesale customers. Tr. 102, 103.

Finally, BST's existing performance plans already provide for audits at the request of a state commission,[19] a fact of which Mr. Gillan was apparently not aware, *see* Tr. 213-14, so there is no need to adopt any audit requirement here.[20]

EELs Audits. NuVox and Xspedius next ask the Commission to require BST to forfeit its contractual rights to audit CLEC compliance with FCC safeguards designed to ensure that CLECs do not use the loop-transport combinations known as enhanced extended links (or "EELs") in a manner that is contrary to federal law. *See* Gillan Test. 41:14-44:4. Here again, this proposed condition has nothing to do with the merger and seeks to inject into this proceeding an issue that this Commission has fully addressed elsewhere.

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[18] For instance, as AT&T very recently demonstrated in a filing to the FCC, on a regionwide basis, AT&T's performance in provisioning UNEs and interconnection has improved substantially since the SBC/Ameritech merger in 1999. *See* Joint Declaration of William L. Dysart, Ronald A. Watkins, and Brett Kissel ¶¶ 59-62 (June 15, 2006) (attached to Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Docket No. 06-74 (FCC filed June 20, 2006)). Improvements were also reported on a state-by-state basis. *See id.*, Attachs. 8, 9 (showing that performance measurements improved in virtually every state from 2001 to 2006). In some states, such as Texas, AT&T routinely satisfies more than 97 percent of those measures. *See id.* ¶ 62 & Attach. 9.

[19] The right of a state commission to request an audit is included in section 4.9 of BellSouth's current SEEM plan in Kentucky, which was approved by this Commission on August 31, 2005, in Dockets 2001-00105 and 2004-00391.

[20] Any alleged issues regarding set-offs of overpayments in one state against payments in another, *see* Gillan Test. 41:1-10, can also be raised and addressed in the appropriate dockets.

Absent from Mr. Gillan's testimony is the fact that this Commission already concluded in its April 18, 2005 Order in Docket 2004-00295 that BST is entitled under its interconnection agreement with NuVox to audit the use of certain UNE circuits to ensure compliance with the relevant FCC rules. NuVox appealed that result, but the federal District Court for the Eastern District of Kentucky affirmed this Commission's decision in all respects, concluding that NuVox's arguments were "without merit."[21]

Mr. Gillan's testimony not only disregards this Commission's and the federal court's determinations regarding these audits; it also fails to explain why, if the Commission were to revisit its settled position on these issues, it should not be done in the context of a full proceeding in those other dockets. Regardless of whether the FCC has modified its tests for implementing these continuing restrictions as Mr. Gillan suggests, NuVox and Xspedius should be required to adhere to their obligations, just as all other parties are required to do.

"Fresh Look." Relying on nothing more than a single vague paragraph of testimony from Mr. Gillan, NuVox and Xpedius also request that this Commission take a truly extraordinary – and deeply misguided – step. They ask the Commission to invalidate BST's and AT&T's existing contracts without payment of contractually mandated early termination charges or penalties. *See* Gillan Test. 44:11-19.

This proposal is, in plain terms, preposterous. Consumers freely entered into these agreements and presumably received better prices in exchange for agreeing to buy service for a specific term; moreover, in many instances, carriers that agree to long-term contracts make investments in reliance on the duration of these contracts. *See* Tr. 233 (Aron). The ability to rely on such contractual agreements is a "very important part of economic markets," and

[21] Memorandum Opinion and Order at 7, 12, *NuVox Communications, Inc. v. BellSouth Telecomms., Inc.*, No. 3:05-CV-41-JMH (E.D. Ky. Nov. 1, 2005).

undermining the incentive to engage in such agreements in the future will only harm consumers by depriving them of these kinds of discounts in the future. *Id.* For these reasons, as Dr. Aron explained, to her knowledge, *such a "fresh look" requirement has never been imposed as part of a telecommunications merger. Id.* Far from imposing such an obligation, the FCC has recently concluded that such requirements are disruptive to the market and inconsistent with the public interest. *See* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶ 699 (2003) ("[A]lthough competitive carriers contend that incumbent LECs will receive a windfall in the absence of fresh look, we conclude that the inverse may be true as well. Competitive LECs that entered into long-term special access contracts benefited from term discount arrangements which allowed for lower costs. It may be unfair for these carriers to completely avoid costs they knowingly agreed to shoulder. Indeed, it would put them in a far better position than those competitive LECs that chose to avoid early termination provisions, and to select shorter contract periods with higher prices.") (footnote omitted) (subsequent history omitted).[22]

NuVox and Xspedius have not begun to justify such an extraordinary abrogation of private contracts. As an initial matter, they have not explained how this Commission has the

[22] State commissions have likewise rejected "fresh look" proposals in comparable circumstances. *See*, *e.g.*, Order Granting Approval at 32-33, *Joint Petition of Verizon Communications Inc. and MCI, Inc. for Approval of Agreement and Plan of Merger*, Case No. PUC-2005-00051 (Va. SCC Oct. 6, 2005) ("We find that these requirements [including a 'fresh look' proposal] are not necessary for us to be satisfied that adequate service to the public at just and reasonable rates will not be impaired or jeopardized by granting the Joint Petition."); Decision Authorizing Change in Control at 75, *Joint Application of Verizon Communications, Inc. (Verizon) and MCI, Inc. (MCI) To Transfer Control of MCI's California Utility Subsidiaries to Verizon*, D.05-11-029 (Cal. PUC Nov. 18, 2005) ("[W]e find no merit to the arguments of ORA, CALTEL, Level 3 and Qwest concerning special access, and no rational basis for adopting the restrictions [including 'fresh look'] that they propose.").

legal authority to abrogate these private contracts between carriers and business customers *en masse*, particularly since many of these contracts involve interstate and multistate services that are not even within this Commission's authority. Instead, Mr. Gillan merely speculates in two sentences that some customers may have chosen BST over AT&T or vice-versa. *See* Gillan Test. 44:11-14. That assertion is not only entirely unsupported by data or evidence; it also ignores the Joint Applicants' extensive showing that these companies will continue to provide service just as they did before the merger. *See, e.g.*, Tr. 36 (Roberts). And it likewise disregards the evidence that AT&T and BST do not typically compete for the same customers. *See supra* pp. 18-19. In sum, customers will thus receive the exact same, high-quality service from the same AT&T and BellSouth companies that they have been receiving under their contracts, and there is no basis whatsoever to abrogate such freely negotiated agreements.

State Enforcement of FCC Merger Requirements. Finally, Mr. Gillan fleetingly suggests that this Commission volunteer to enforce any conditions imposed by the FCC on this merger. *See* Gillan Test. 45:6-14. The Joint Applicants do not believe that any federal merger conditions are appropriate or should be imposed here. Even if such conditions are ultimately imposed, the D.C. Circuit has recently held that, absent explicit statutory authority (which does not exist here), state commissions may not enforce or implement FCC orders even when the FCC purports to delegate that authority to them. *See USTA v. FCC*, 359 F.3d 554, 564-68 (D.C. Cir. 2004). It is even clearer that state commissions lack authority to enforce FCC orders in the absence of such a delegation.

Even if this Commission did have such authority, it would be a very bad idea for FCC conditions to be enforced by a multitude of different state agencies. The FCC knows best what its conditions require, and it is fully capable of enforcing those requirements, as it has in prior

mergers. No state commission should be in the position of having to figure out what the FCC meant. Moreover, if states could enforce FCC conditions, different states may well read the same condition differently, leading to different applications of the same requirement in different locations around the country. That result makes no sense. Finally, under the regime advocated by NuVox and Xspedius, parties would have the choice of raising the same issues in multiple forums, perhaps simultaneously. That would be inefficient and lead to forum shopping.

C. The Commission Should Also Reject the Conditions Proposed by the CWA

BellSouth has long had a very good working relationship with the CWA. *See* Tr. 47 (CWA attorney Hoffman). AT&T also has a proud tradition of constructive partnership with the CWA. Indeed, AT&T's Chairman was the first chief executive of a telecommunications company to speak at a national CWA convention. *See* Tr. 133 (Kahan).

The Joint Applicants have every reason to believe that this productive partnership will continue after the merger. Further, the record reflects that the merger should not have a negative effect on the unionized work force in Kentucky. As an initial matter, as noted throughout this proceeding, AT&T and BellSouth intend to honor any and all collective bargaining agreements. *See* Joint Stip. of Facts and Evidence ¶ 7. Furthermore, the Joint Applicants anticipate that the merger will lead to a headcount reduction of 10,000 (out of more than 300,000 employees) globally across all companies (AT&T, BellSouth, and Cingular) over a three-year period. *See* Kahan Test.16:13-18. Given that AT&T and BellSouth together lose nearly 1,800 employees every month (or more than 60,000 employees over this three-year period) through normal attrition, the Joint Applicants anticipate that these reductions can be accomplished largely through attrition. *See id*. at 16:20; Roberts Test. 4:21-23; Tr. 132-35 (Kahan). Over the longer

term, this merger will improve the employment prospects for all employees by creating a stronger competitor that will better attract customers. *See* Tr. 132-35 (Kahan).

For all these reasons, the record here does not demonstrate that this merger creates any concern that requires a remedy. In an attempt to support a contrary suggestion, Ms. Goldman, CWA's witness, suggests that, during the proceedings before the SBC/AT&T merger, those entities "assured state Commissions that the merger would create a much stronger job outlook . . . and would have a positive impact on employment," but that, after the merger, AT&T announced a reduction in force and closed call centers in Arizona, Pennsylvania, and Massachusetts. Goldman Test. 5:18-6:2 (June 2, 2006). Ms. Goldman's statements ignore the fact that these job reductions had nothing to do with the SBC/AT&T merger, but rather involved AT&T's *pre-existing* decision to exit the mass market. As Mr. Kahan explained, those reductions involved "call centers geared to the mass market and/or small business [and,] [a]s the number of customers dropped, then the work volume dropped. . . . *Those [reductions] would have happened whether the merger happened or not.*" Tr. 131-32 (Kahan) (emphasis added). These examples accordingly strongly confirm that the best way to preserve jobs is to be a good competitor, not through artificial short-term protections.

Even beyond the fact that there is no basis for concluding that this merger will create a public interest concern, the specific conditions that CWA proposes should be rejected because they are irrelevant to the merger and/or counterproductive.

Service Quality. Ms. Goldman suggests that the Joint Applicants "commit to maintain the highest standards of service quality." Goldman Test. 2:1-2. But, as discussed above, this Commission already has service quality standards for BST. Ms. Goldman does not, and could not, claim that BST's performance under these existing metrics is not adequate. Moreover,

Ms. Goldman's testimony does not contest the fact that, in today's competitive telecommunications markets, the merged company will have every incentive to continue to provide excellent service. There is thus no evidence that this merger will diminish service quality. Additionally, if there were an issue on this front, it could be adequately addressed in the appropriate Commission dockets.

DSL Capability in Every Central Office. Although Ms. Goldman suggests that the Joint Applicants be required to upgrade every central office in Kentucky to support DSL, *see* Goldman Test. 2:2-3, BST has already completed this project. *See* Joint Stip. of Facts and Evidence ¶ 4. This condition is thus unnecessary.

Maintaining Employment Levels and Retaining Existing Facilities. Finally, Ms. Goldman suggests that the Joint Applicants retain existing employment levels in Kentucky for three years after the merger's closing and "not close any technical operations, call centers, or other facilities in the state of Kentucky" for that same three-year period. Goldman Test. 2:3-8.

These conditions are not only unnecessary for all the reasons discussed above; they are also directly contrary to the long-term interests of consumers and workers in Kentucky. The best way for the Joint Applicants to provide services that customers want, and thus be able to offer more and better jobs, is to have the flexibility to compete efficiently and on a level playing field with their competitors, which obviously are not saddled with any similar conditions. *See* Tr. 134-35 (Kahan). As Mr. Kahan explained, "if we lose flexibility, all that means is we're going to be a less successful competitor," and that, "in the long term, is going to mean fewer jobs." *Id.* at 134-35, 136. The Joint Applicants want to have more employees, but the way to do that is not to impose artificial restrictions on their ability to compete. It is to give them the same flexibility that competitors have to structure their business to best serve their customers.

In the end here, the point is simple, and it was made eloquently by Eddy Roberts, BST's State President: "[J]obs follow customers." Tr. 51. The best way to preserve and expand good job opportunities is for this Commission to approve the merger without conditions so that the Joint Applicants can effectively compete in the rapidly evolving telecommunications markets. Thus, the Commission should reject the conditions proposed by the CWA that would hobble the efficiency of the Joint Applicants and would lead them to lose customers and, ultimately, be forced to reduce jobs.

CONCLUSION

For the foregoing reasons, the Commission should approve this indirect transfer of control without imposing any conditions. For the Commission's convenience, the Joint Applicants submit Proposed Findings of Fact and Conclusions of Law as Exhibit B.

Respectfully submitted, this the 30th day of June 2006,

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

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