

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-55, SUB 1630
DOCKET NO. P-140, SUB 89

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of
Application of AT&T, Inc. and BellSouth) ORDER APPROVING
Corporation for Indirect Change of Control) TRANSFER OF CONTROL

BY THE COMMISSION: On March 31, 2006, AT&T, Inc. (AT&T) and BellSouth Corporation (BellSouth Corp.; collectively, Petitioners) jointly filed an Application requesting Commission approval pursuant to G.S. 62-111(a)¹ to transfer control of certain competing local providers (CLPs)—namely, BellSouth Long Distance, Inc. (BSLD) and BellSouth Telecommunications, Inc. (BellSouth)—in connection with a planned merger between AT&T, Inc. and BellSouth Corporation. On April 12, 2006, the Commission granted Petitions to Intervene filed by Time Warner Telecom of North Carolina LP and US LEC of North Carolina, Inc. (collectively, Time Warner). On April 21, 2006, the Commission granted intervention to NuVox Communications, Inc.

Time Warner Motion

On May 12, 2006, Time Warner filed a Motion for Procedural Schedule and Hearing. In this consolidated proceeding, Time Warner noted that the Petitioners are requesting approval of the indirect control of CLP certificates held by BellSouth and BSLD in connection with the transfer of control of BellSouth Corp. and its subsidiaries to AT&T, Inc. Time Warner identified several aspects of the proposed combination which it believes deserve regulatory scrutiny through a deliberative process in which the parties can file testimony and cross-examine witnesses.

The first concern had to do with the extent of horizontal concentration. Time Warner stated that the application discloses that six separate entities holding certificates in North Carolina would be combined under common ownership as a result of the merging. They are: (1) SBC Long Distance, LLC, (2) AT&T Communications of the Southern States, LLC, (3) TCG of the Carolinas, Inc., (4) SNET America, Inc., (5) BellSouth and (6) BSLD. Time Warner argued that the application does not disclose the extent of competition among these entities in various markets in North Carolina in

¹ G.S. 62-111(a) reads in relevant part as follows: “No franchise now existing or hereafter issued under the provisions of this Chapter...shall be sold, assigned, pledged, or transferred, nor shall any control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity....”

any but the most generalized fashion and that allowing such consolidation might lessen competition and create confusion among consumers.

The second concern was the extent to which the merger may impact fair competition, especially as the interconnection arrangements and the procurement of interconnection services and related facilities by Time Warner from the Petitioners. Time Warner noted that in its January 2006 presentation titled "North Carolina Public Utility Infrastructure and Regulatory Climate," the Commission noted certain market failures and instability in the competitive marketplace. Nothing has changed to lessen these concerns.

Lastly, Time Warner argued that the Petitioners would not be prejudiced by a more deliberate approach to review and that the Federal Communications Commission is early in its 180-day merger review.

AT&T and BellSouth Response

On May 15, 2006, the Petitioners filed a Response in Opposition to Time Warner's Motion. The Petitioners noted the comparative lateness of Time Warner's Motion, and argued that Time Warner misunderstood not only the scope of this proceeding but the effects that the proposed merger will have on the relevant CLP subsidiaries. As the Petitioners explained in their Joint Application, this proceeding is concerned only with the transfer of indirect control of BSLD and of BellSouth *in its capacity as a CLP operating outside of its incumbent local service area in North Carolina*. Because BellSouth is subject to price regulation under G.S. 62-133.5 within its incumbent service territory, the merger approval provision of G.S. 62-111(a) does not apply to BellSouth in its capacity as an ILEC.² Thus, Time Warner's purported concerns about fair competition are misdirected because there is no nexus between Time Warner and US LEC on the one hand and the BellSouth CLP subsidiaries on the other. To the extent that Time Warner has concerns about business relationships with BellSouth in its capacity as an ILEC, this is not the proceeding to consider those issues. In addition, Time Warner is wrong to suggest that this merger will have any adverse effect on horizontal concentration. Competition in this state is well-established and will not be affected by this merger. The holding-company merger will not change the direct ownership of the CLP subsidiaries or this Commission's regulatory jurisdiction over them. There is thus no justification to grant Time Warner's request to delay this proceeding by conducting a full evidentiary hearing.

² G.S. 62-133.5(g) reads: "The following sections of Chapter 62 of the General Statutes shall not apply to local exchange companies subject to priced regulation under subsection (a) of this section: G.S. 62-35(c), 62-45, 62-51, 62-81, **62-111**, 62-130, 62-131, 62-132, 62-133, 62-134, 62-135, 62-136, 62-137, 62-139, 62-142, and 62-153." (Emphasis added).

May 15, 2006, Regular Commission Conference

This matter came before Regular Commission Conference on May 15, 2006. Four persons addressed the Commission: Mr. George Sessoms, presenting the item to approve the transfer of control as requested and described in the Application on behalf of the Commission Staff; Mr. Marcus Trathen, representing Time Warner; and Mr. Dwight Allen and Ms. Susan Ockleberry, representing Petitioners.

Commission Staff. Mr. Sessoms explained that AT&T is a Delaware corporation with its principal place of business in San Antonio, Texas. AT&T is a holding company and its subsidiaries provide domestic and international voice and data communications services to residential, business and government customers around the world. AT&T wholly owns four subsidiaries which are authorized to provide local exchange and exchange services as CLPs and/or intrastate interexchange services in North Carolina pursuant to Certificates of Public Convenience and Necessity (Certificates) granted by the Commission. These subsidiaries are AT&T Communications of the Southern States, LLC; TCG of the Carolinas, Inc.; SBC Long Distance, LLC d/b/a AT&T Long Distance; and SNET America d/b/a AT&T Long Distance East. However, according to the Application, these AT&T subsidiaries are not affected by the planned merger and their ownership structure will remain entirely unchanged.

BellSouth Corp. is a Georgia corporation with its headquarters in Atlanta, Georgia. BellSouth Corp. is also a holding company and its subsidiaries provide voice and data communications services to substantial portions of customers in the southeastern United States. Two of BellSouth Corp.'s wholly owned subsidiaries, BSLD and BellSouth, are authorized to provide local exchange and exchange access services as CLPs in North Carolina. BSLD was granted a CLP Certificate by the Commission in Docket No. P-654, Sub 5 on September 24, 2004. (BSLD is also authorized to provide intrastate interexchange services pursuant to a Certificate granted by the Commission in Docket No. P-654, Sub 0 on November 26, 1997, but providers of only interexchange services are exempt from the provisions of G.S. 62-111(a) pursuant to the Commission Order dated January 2, 2004 in Docket No. P-100, Sub 72b.) BellSouth was granted a CLP Certificate by the Commission, to provide such services in all geographic areas outside its incumbent service territory, in Docket No. P-55, Sub 1117 on June 15, 1999. (BellSouth is also an incumbent local exchange carrier which operates under a Commission approved price plan. However, G.S. 62-133.5(g) exempts local exchange companies subject to price regulation from the provisions of G.S. 62-111(a)).

Mr. Sessoms stated that AT&T and BellSouth Corp. entered into an Agreement and Plan of Merger on March 4, 2006. To implement the planned merger, a temporary and special purpose subsidiary of AT&T will merge with and into BellSouth Corp., with BellSouth Corp. being the surviving corporation. At the time of the merger, shareholders of BellSouth Corp. will exchange their shares of stock for shares of AT&T stock.

Following the merger, BellSouth Corp. will become a wholly-owned and direct subsidiary of AT&T. BSLD and BellSouth will continue to be directly owned by BellSouth Corp. However, BSLD and BellSouth will be ultimately owned and indirectly controlled by AT&T because AT&T will own the shares of their corporate parent, BellSouth Corp. Therefore, the Application requests Commission approval pursuant to G.S. 62-111(a) to transfer control of BSLD and BellSouth, in their capacity as CLPs, in connection with the planned merger of AT&T and BellSouth Corp.

According to the Petitioners, the proposed transaction will be transparent to customers in North Carolina. BSLD and BellSouth will continue to exist in their current form after the merger is completed. There will be no transfer of assets or Certificates and the merger will have no effect on the rates, terms, and conditions of service that these entities currently provide.

Mr. Sessoms noted that the Applicants submitted that Commission approval of the proposed transaction is in the public interest for several reasons as set forth in the Application. In the short-run, the merger and transfer of control will be transparent to North Carolina customers since it will have no effect on the rates, terms, and conditions of services currently provided by AT&T and BellSouth Corp. subsidiaries. Ultimately, the proposed transaction should allow the companies to integrate their networks, improving performance and service reliability, and to combine their research and development capabilities, leading to increased innovation and accelerated development of new products and services.

Accordingly, Mr. Sessoms recommended that the Commission issue an order approving the transfer of control as requested and described in the Application.

Time Warner. While alluding to the arguments made in Time Warner's May 12, 2006, Motion concerning horizontal concentration and fair competition, Mr. Trathen instead concentrated on the proposition that the Commission has jurisdiction to significantly broaden the scope of its investigation from the BellSouth CLPs to BellSouth the ILEC. He laid out two main arguments. The first argument sought to bring BellSouth Corp., the holding company, under the Commission's merger jurisdiction and, presumably by that device, to bring in BellSouth the ILEC. This argument hinged upon the phrase in G.S. 62-111(a) to the effect that the Commission has jurisdiction over "any merger or combination affecting any public utility." Mr. Trathen contended that BellSouth Corp. was a "public utility" within the meaning of G.S. 62-3(23)(c).³ The second argument was that BellSouth the ILEC was a fit subject for merger investigation because BellSouth the ILEC was also a CLP. The inference was that this CLP ownership furnished sufficient basis for investigating the ILEC merger, notwithstanding the ILEC exemption under G.S. 62-133.5(g).

³ G.S. 62-3(23)(c) reads in pertinent part as follows: "The term 'public utility' shall include all persons affiliated through stock ownership with a public utility doing business in this State as a parent corporation...to such extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility."

Petitioners. Mr. Allen rejected Time Warner's arguments both in the May 12, 2005, filing and at Regular Commission Conference. He emphasized the existence of the G.S. 62-133.5(g) exemption for BellSouth the ILEC as being dispositive of the Commission's limited jurisdiction in this matter. He noted that the Commission had noted this limited jurisdiction in other mergers, most explicitly in the Verizon/MCI merger. He also mentioned the extreme smallness of the BellSouth CLPs in terms of customer base and that only two of the CLPs mentioned in the Application were BellSouth CLPs, the others being associated with AT&T and whose status would not change as a result of the merger. He expatiated on the benefits of the merger for the end-user customers of the Petitioners and doubted the sincerity of the concerns expressed by Time Warner for competition, as it belongs to a multi-billion dollar conglomerate.

Others. No other persons spoke at Conference. However, Petitioners stated without demur from the Public Staff, who were present, that the Public Staff supported the recommendation for approval. The Attorney General did not speak on the item after having been given an opportunity to do so.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to deny Time Warner's Motion for Procedural Schedule and Hearing and issue an Order approving the transfer of control as requested by Petitioners for the reasons described in the Commission Staff's recommendation. The Commission does not believe that Time Warner has made convincing arguments that the Commission should expand the scope of an investigation into this merger, especially in light of the exemption for BellSouth the ILEC in G.S. 62-133.5(g).

The first argument of Time Warner, as noted above, relied on the provision in G.S. 62-111(a) that provided that mergers "affecting any public utility" are not to be allowed unless there has been application to, and written approval from, the Commission if such approval is justified by the public convenience and necessity. Clearly, this provision does not affect BellSouth the ILEC as such, because G.S. 62-133.5(g) specifically exempts ILECs subject to price regulation from G.S. 62-111(a). Rather, Time Warner argues that it refers to the holding company, BellSouth Corp., on the basis that BellSouth Corp. is a "public utility" under G.S. 62-3(23)(c). This provision provides that "public utility" includes "all persons affiliated through stock ownership with a public utility doing business in this State as a parent corporation or a subsidiary corporation...to such extent that the Commission shall find such affiliation has an effect on the rates and service of such utility." (emphasis added). Time Warner suggests that BellSouth Corp. is such a parent, and it is not an ILEC subject to price regulation and thus exempt from G.S. 62-111(a).

However, even assuming arguendo that there is an effect on rates and service such as to render BellSouth Corp. a public utility, Time Warner's argument does not lead where it evidently wants to go—that is, to an examination of, and presumably conditions upon, the activities of BellSouth the ILEC. Inconveniently for Time Warner's argument, BellSouth the ILEC falls squarely within the G.S. 62-133.5(g) exemption, so no inquiry on this basis is possible. At most, the argument, if accepted, could lead to the CLPs; but the CLP transfer is already being examined under G.S. 62-111(a).

Time Warner's second argument was related to the fact that BellSouth the ILEC had obtained CLP certification. Time Warner argued that this in effect negated BellSouth the ILEC's exemption under G.S. 62-133.5(g) and rendered BellSouth the ILEC as a whole "fair game" for comprehensive merger inquiry. This is not a convincing argument. BellSouth actually holds two franchises, one as an ILEC and one as a CLP. It is a simple matter analytically and practically to separate consideration of BellSouth the ILEC and BellSouth the CLP. Besides, the logic of Time Warner's argument works both ways. If it can be argued that the existence of BellSouth the CLP makes BellSouth the ILEC fair game, the reverse can be argued as well with perhaps even greater force. Indeed, given their relative sizes and importance, the BellSouth ILEC exemption under G.S. 62-133.5(g) could be argued to apply pari passu to BellSouth the CLP, and thus neither should be subject to G.S. 62-111(a).

Lastly, the Commission notes that the holding of evidentiary hearings regarding mergers and acquisitions under G.S. 62-111(a) is discretionary. The statute simply says that application must be made and written approval be given if justified by the public convenience and necessity. Thus, even were the Commission to accept Time Warner's jurisdictional arguments to widen the scope of this proceeding, this would not necessarily equate to the type of proceeding that Time Warner seeks. Time Warner has raised concerns about horizontal concentration and fair competition, but Time Warner does not lack for options should it believe itself to be harmed and should it wish to pursue them, most notably in complaint actions or arbitrations.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 18th day of May, 2006.

NORTH CAROLINA UTILITIES COMMISSION



Patricia Swenson, Deputy Clerk

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Commissioners James Y. Kerr, II and William T. Culpepper, III did not participate.