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' OPPOSITION TO INTERVENORS' MOTION FOR RECONSIDERATION

Introduction

This Commission's Order[1] approving the merger between AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth") (collectively, "Joint Applicants") was the product of a rigorous review of the proposed transaction. The parties conducted extensive discovery, and the Commission was present during and participated in live cross-examination of the parties' witnesses and reviewed comprehensive pre-filed testimony and post-hearing briefs. At the conclusion of this extensive process, the Commission, having noted the joint stipulation of facts executed by the Joint Applicants and the Attorney General, firmly concluded that the merger is "consistent with the public interest."[2] Furthermore, after noting the Joint Applicants' position that the merger "will be seamless and transparent to Kentucky customers," and after cataloguing the numerous public interest benefits relied upon by Joint Applicants,[3] the Commission squarely rejected the self-serving conditions proposed by Intervenors NuVox Communications,

[1] Order, *Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T Inc. and BellSouth Corporation*, Case No. 2006-00136 (July 25, 2006) ("Order").

[2] *Id.* at 5.

[3] *Id.* at 1-2.

Inc.; Xspedius Management Company Switched Services, LLC; and Xspedius Management Company of Louisville, LLC: "The Commission has considered these proposed conditions and finds that they should not be implemented at this time. These proposed matters are not sufficiently related to the proposed merger of AT&T and BellSouth to be considered in this proceeding."[4]

Now, dissatisfied with the result of this process, Intervenors ask the Commission to reconsider that ruling, and to impose a condition pursuant to which the Commission would either (i) undertake to enforce any federal conditions that may be imposed on the merger, or, in the alternative, (ii) open a docket to address the numerous unrelated issues that Intervenors have attempted to inject into this proceeding.[5] As to the first of these, however, the Commission has already rejected Intervenors' proposal, and Intervenors provide no new evidence that would warrant reconsideration of that decision under KRS 278.400. As to the second, Intervenors elected not to seek such relief previously, and Commission precedent accordingly bars them from doing so now.[6]

Beyond these threshold objections, moreover, Intervenors' claims do not withstand scrutiny. As Joint Applicants explained in their post-hearing brief, this Commission lacks jurisdiction to enforce federal conditions, and in any case a commitment to do so could lead to conflicting rulings and intolerable forum shopping. And, contrary to Intervenors' alternative proposal, there is no basis to use this proceeding

[4] *Id.* at 4.

[5] *See* Motion for Reconsideration of the Commission's July 25, 2006 Order or, in the Alternative, to Establish a Post-Merger Docket, Case No. 2006-00136 (filed Aug. 4, 2006) ("Motion").

[6] *See, e.g.*, *In re Application of Kentucky Power Company*, No. 2005-00068, 2005 WL 2708890, at *3 (Ky. P.S.C. Oct. 17, 2005); *infra* p. 3 & n.11.

to open a docket to address speculative harms that the Commission has already concluded "are not . . . related to the proposed merger."[7]

Discussion

Intervenors' Motion is silent on the standards governing requests for rehearing. That silence is telling. Such requests are governed by KRS 278.400, which provides that the Commission "may change, modify, vacate or affirm its former orders" on rehearing.[8] Critically, in exercising the discretion conferred by that provision, this Commission has consistently held that, while a petition for rehearing is appropriate where a party seeks to present previously unavailable evidence,[9] it is not a proper vehicle to re-hash arguments that have already been rejected,[10] or to make arguments that could have been – but were not – raised previously.[11]

Intervenors' Motion runs afoul of these settled principles. Indeed, Intervenors acknowledge that their Motion is based not on new evidence, but rather on

[7] Order at 4.

[8] KRS 278.400 (2005).

[9] *See, e.g., Shafizadeh v. Cingular Wireless*, No. 2003-00400, 2005 WL 1153812 (Ky. P.S.C. Apr. 26, 2005) ("Rehearing is appropriate when any party seeks to offer additional evidence that could not, with reasonable diligence, have been previously offered."); *In re Kanney*, No. 2005-00073, 2005 WL 1769058, at *1 (Ky. P.S.C. June 13, 2005) (same); *see also* KRS 278.400 (providing for rehearing procedure so that parties "may offer additional evidence that could not with reasonable diligence have been offered on the former hearing").

[10] *See In re Application of Kentucky Power Company*, 2005 WL 2708890, at *5 (rejecting a joint petition for rehearing because the "arguments were previously raised and rejected").

[11] *See id.* at *3 (noting that "Kentucky Power had a full and fair opportunity in this proceeding to propose" the issues raised in its petition, and denying petition for rehearing because "Kentucky Power's rebuttal testimony could have included the evidence it now seeks to present on rehearing," and because "Kentucky Power had the opportunity in its rebuttal testimony to propose [the new matter] and to present evidence . . . but Kentucky Power chose to do neither"); *In re Kanney*, 2005 WL 1769058, at *1 (recognizing that "this Commission, when reviewing an application or petition for rehearing, will consider only additional evidence that could not with reasonable diligence have previously been presented," and denying petition for rehearing where "virtually all of this evidence existed prior to April 29, 2005 and with reasonable diligence Joint Applicants could have offered such evidence prior to the issuance of our Order of that date").

"disagree[ment] with the Commission's ultimate determination that the proposed merger . . . satisfies Kentucky's public interest."[12] Under this Commission's established precedent, such disagreement is on its face insufficient to warrant reconsideration of the Commission's thoroughly reasoned decision. And, while Intervenors allude to unspecified "erroneous findings of fact" underlying the Commission's decision,[13] they do not even attempt to identify new evidence that calls any such findings into question.[14] For this reason alone, the Motion should be denied.

Furthermore, the primary relief that Intervenors seek in the Motion – a commitment by the Commission to enforce any federal conditions that may be imposed as a result of federal agency review of the merger – is repeated nearly verbatim from Intervenors' prior pleadings in this matter.[15] Indeed, the rationale that Intervenors offer for this proposed condition in the Motion is *exactly the same* as the rationale they offered previously – *i.e.*, that, "[t]o the extent that the FCC ultimately approves the merger with

[12] Motion at 2.

[13] *Id.*

[14] Intervenors note in passing (at 2 n.1) a BellSouth Securities and Exchange Commission filing that, they claim, indicates that BellSouth views AT&T as a competitor in the enterprise market. But Intervenors properly do not describe this filing as new evidence. As Intervenors acknowledge, this filing was made in February 2006, many months before the hearing and briefing in this case, and it therefore is in no sense "new evidence." Indeed, these same Intervenors have pointed to this same filing in other state proceedings reviewing the merger (including in Tennessee, where the state commission held hearings and approved the merger without conditions despite Intervenors' claim that AT&T and BellSouth directly compete in the enterprise market, *see* Transcript of Authority Conference, *In re Joint Filing of AT&T Inc. & BellSouth Corporation together with its Certificated Tennessee Subsidiaries regarding Change of Control of the Operating Authority of BellSouth Corporation's Tennessee Subsidiaries*, Docket No. 06-00093 (Tenn. Reg. Auth. July 10, 2006) (attached to Intervenors' Motion)). The Mississippi commission has also approved the merger without conditions after a full evidentiary hearing where CLECs made the same claim. *See* Final Order, *Joint Application of AT&T Inc. and BellSouth Corp. Together with Its Certificated Mississippi Subsidiaries for Approval of Merger*, Docket No. 2006-UA-164 (Miss. PSC July 25, 2006) (attached hereto as Exh. A).

[15] *Compare* Motion at 4-5 *with* Post-Hearing Br. of Intervenors NuVox and Xspedius at 32-33, Case No. 2006-00136 (filed June 30, 2006) ("Intervenors' Post-Hearing Br.").

conditions . . . , CLECs will need access to an efficient forum to address any disputes that arise under those conditions."[16] The Commission has already rejected this proposal.[17] Because Intervenors offer nothing new in support of their proposal, it is not a proper basis for reconsideration.

In any event, apart from Intervenors' failure to identify new evidence that would warrant reconsideration, this proposal fails on the merits. As Joint Applicants have explained,[18] because this merger causes no competitive harm, no federal merger conditions are appropriate or should be imposed on the proposed transaction. But even if the FCC did impose conditions, it would not be this Commission's role to enforce them. The D.C. Circuit has 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.[19] It is even clearer that state commissions lack authority to enforce FCC orders in the *absence* of such a delegation. And, although Intervenors point to the Louisiana commission's order approving the merger as support

[16] Motion at 4. *Compare* Intervenors' Post-Hearing Br. at 32 ("To the extent that the FCC ultimately approves this acquisition with conditions . . . , it is important that CLECs have access to an efficient forum to address any disputes that arise under those conditions.").

[17] *See* Order at 4.

[18] *See* Joint Applicants' Post-Hearing Br. at 29-30, Case No. 2006-00136 (filed June 30, 2006) ("Joint Applicants' Post-Hearing Br.").

[19] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-68 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004).

for this proposal,[20] nothing in that order suggests that the Louisiana commission has, or even has asserted, jurisdiction to enforce FCC conditions.[21]

As Joint Applicants have also explained,[22] even aside from that clear jurisdictional barrier, it would be exceedingly bad policy for various state commissions to attempt to enforce FCC conditions. The FCC knows best what its conditions require, and it is fully capable of enforcing those requirements, as it has in prior mergers. If states were to assume the role of enforcing FCC conditions, different states may read the same condition differently, leading to different applications of the same requirement in different locations. That result would give parties the choice of raising the same issues in multiple forums, perhaps simultaneously, and could lead to intolerable forum shopping.[23]

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[20] *See* Motion at 5 (citing Order, *AT&T, Inc. and BellSouth Corporation, Ex Parte; Request for Approval and/or Letter of Non-Opposition to the Indirect Change in Control of Certain Certificated Entities Resulting from the Planned Merger*, Docket No. U-29427 (La. P.S.C. Aug. 2, 2006) ("Louisiana Order")).

[21] Indeed, the Louisiana staff recommended that the Louisiana commission direct the staff to file comments with the FCC *requesting that the FCC authorize* state commissions "to uphold and enforce those conditions the FCC places on the merger," thus making clear that such an express FCC delegation is a minimum necessary prerequisite to any state commission attempt to enforce federal merger conditions. Staff's Position Statement, *AT&T, Inc. and BellSouth Corporation, Ex Parte; Request for Approval and/or Letter of Non-Opposition to the Indirect Change in Control of Certain Certificated Entities Resulting from the Planned Merger*, Docket No. U-29427, at 15 (La. P.S.C. June 29, 2006) ("Louisiana Staff Rec.").

[22] *See* Joint Applicants' Post-Hearing Br. at 29-30.

[23] Intervenors couple their proposal for state enforcement of federal conditions with a request that the Commission make its approval order "interim" pending final approval at the federal level. *See* Motion at 6. Because there is no basis for Intervenors' proposed condition, there is likewise no basis for making the Commission's decision "interim." Furthermore, Intervenors' sole support for this proposal is a dissenting statement by one member of the Tennessee Regulatory Authority, which, as noted above, *see supra* note 13, has approved the merger without conditions. And, in all events, the statutes governing the Commission's review of this merger do not contemplate or permit an "interim" order. *See* KRS 278.020(5), (6); *see also* KRS 278.020(6) (requiring Commission decision on proposed transfer of control within 60 days of the application's filing, or within 120 days if the Commission determines that good cause warrants additional time).

Intervenors' alternative proposal – that the Commission establish a docket to examine the issues Intervenors have attempted to interject into this proceeding[24] – is likewise flawed. Intervenors could have, but did not, seek such relief in their prior pleadings. Indeed, the very model for the Intervenors' proposal is a Louisiana staff recommendation that was subsequently adopted by the Louisiana commission.[25] Intervenors *attached that staff recommendation to their post-hearing brief in this case,* and yet they nevertheless declined to propose such a condition previously. Under this Commission's established precedent,[26] they are not entitled to a second bite at the apple, whether styled as a motion for reconsideration or (more accurately) as one for rehearing.

Beyond that, Intervenors are wrong to suggest that the Commission invited such a proposal in its Order, insofar as it rejected the CLECs' speculative claims "'without prejudice'" and explained that they should not be considered "'at this time'" or "'in this proceeding.'"[27] The Commission's measured language was intended solely to make clear that, in the event the CLECs have a legitimate basis to support what are now only speculative concerns and for which no support now exists, they can seek relief at the appropriate time, in the appropriate forum. At the same time, the Commission squarely ruled that the CLECs' claims "are not sufficiently related to the proposed merger of AT&T and BellSouth to be considered in *this proceeding*."[28] The Motion is, by definition, an attempt to seek relief on these issues "in this proceeding," yet Intervenors

[24] *See* Motion at 7-8.

[25] *See* Louisiana Staff Rec. at 19; Louisiana Order at 10.

[26] *See*, *e.g.*, *In re Application of Kentucky Power Company*, 2005 WL 2708890, at *6.

[27] Motion at 7 (quoting Order at 4-5).

[28] Order at 4 (emphasis added).

provide nothing to call the Commission's reasoned decision into question. Their Motion fails for this reason as well.

Conclusion

The Commission should deny the Motion.

Respectfully submitted, this the 10th day of August 2006.

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

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