

COMMONWEALTH OF KENTUCKY
BEFORE THE 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)

**NUVOX COMMUNICATIONS, INC.'S
RESPONSES TO JOINT APPLICANTS' DATA REQUESTS**

NuVox Communications, Inc. ("NuVox" or "Respondent"), by counsel, hereby submits its Responses to the Data Requests propounded by AT&T, Inc., BellSouth Corporation and BellSouth Telecommunications, Inc. (referred to herein collectively as the "Joint Applicants").

DATA REQUEST NO. 1: Does NuVox agree that, post-merger, AT&T, Inc., through its indirect subsidiary BellSouth Telecommunications, Inc., will have the financial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5)?

RESPONSE: Respondent's analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on various aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondent is presently unable to agree or disagree that, post-merger, Joint Applicants will have the financial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5). It is possible that Joint Applicants' responses to Respondent's Data Requests or other facts that come to light prior to filing testimony in this proceeding will provide Respondent with a basis to agree or disagree. In any event, Respondent believes that the Staff of the Kentucky Public Service Commission ("KPSC") is likely to focus its analysis in part on the issue of financial ability, whereas Respondent intends to focus its case in Kentucky primarily on the public interest standard set forth in KRS 278.020(6).

DATA REQUEST NO. 2: If the response to Request No. 1 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports NuVox’s response.

RESPONSE: *See Respondent’s Response to Data Request No. 1 above.*

DATA REQUEST NO. 3: Does NuVox agree that, post-merger, AT&T, Inc., through its indirect subsidiary BellSouth Telecommunications, Inc., will have the technical ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5)?

RESPONSE: Respondent's analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on various aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondent is presently unable to agree or disagree that, post-merger, Joint Applicants will have the technical ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5). It is possible that Joint Applicants' responses to Respondent's Data Requests or other facts that come to light prior to filing testimony in this proceeding will provide Respondent with a basis to agree or disagree. In any event, Respondent believes that Staff of the KPSC is likely to focus its analysis in part on the issue of technical ability, whereas Respondent intends to focus its case in Kentucky primarily on the public interest standard set forth in KRS 278.020(6).

DATA REQUEST NO. 4: If the response to Request No. 3 is anything other than an unqualified “yes,” state with specificity each and every fact that supports NuVox’s response.

RESPONSE: *See Respondent’s Response to Data Request No. 3 above.*

DATA REQUEST NO. 5: Does NuVox agree that, post-merger, AT&T, Inc., through its indirect subsidiary BellSouth Telecommunications, Inc., will have the managerial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5)?

RESPONSE: Respondent's analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on various aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondent is presently unable to agree or disagree that, post-merger, Joint Applicants will have the managerial ability to provide reasonable service in Kentucky pursuant to KRS 278.020(5). It is possible that Joint Applicants' responses to Respondent's Data Requests or other facts that come to light prior to filing testimony in this proceeding will provide Respondent with a basis to agree or disagree. In any event, Respondent believes that Staff of the KPSC is likely to focus its analysis in part on the issue of managerial ability, whereas Respondent intends to focus its case in Kentucky primarily on the public interest standard set forth in KRS 278.020(6).

DATA REQUEST NO. 6: If the response to Request No. 5 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports NuVox’s response.

RESPONSE: *See* Respondent’s Response to Data Request No. 5 above.

DATA REQUEST NO. 7: Does NuVox agree that the merger of AT&T, Inc. and BellSouth Corp. is being made in accordance with the law pursuant to KRS 278.020(6)?

RESPONSE: No, the proposed merger of AT&T, Inc. and BellSouth Corp. is not being made in accordance with the law pursuant to KRS 278.020(6) primarily because the merger is not consistent with the public interest. *See* Respondent's Response to Data Request No. 11 below.

DATA REQUEST NO. 8: If the response to Request No. 7 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports NuVox’s response.

RESPONSE: *See Respondent’s Responses to Data Request Nos. 7 and 11.*

DATA REQUEST NO. 9: Does NuVox agree that the merger of AT&T, Inc. and BellSouth Corp. is being made for a proper purpose pursuant to KRS 278.020(6)?

RESPONSE: No, the proposed merger of AT&T, Inc. and BellSouth Corp. is not being made for a proper purpose pursuant to KRS 278.020(6) for the same reasons that the merger is not consistent with the public interest. *See* Respondent's Response to Data Request No. 11 below.

DATA REQUEST NO. 10: If the response to Request No. 9 is anything other than an unqualified “yes,” state with specificity each and every fact that supports NuVox’s response.

RESPONSE: *See* Respondent’s Responses to Data Request Nos. 9 and 11.

DATA REQUEST NO. 11: Does NuVox agree that the merger of AT&T, Inc. and BellSouth Corp. is consistent with the public interest pursuant to KRS 278.020(6)?

RESPONSE: Respondent's analysis of the potential and/or probable short and long term effects of the Joint Applicants' proposed merger on all aspects of the telecommunications market in Kentucky and in other jurisdictions is on-going. In this regard, Respondent's analysis of the proposed merger's compliance with the statutory requirements of KRS 278.020(6) is preliminary. Respondent's positions and supporting facts will be explained more fully in the testimony and analysis submitted in accordance with the procedural schedule and after the information requested through the Data Requests submitted by Respondent to the Joint Applicants in this docket has been provided. Thus, Respondent's response to Joint Applicants' Data Request No. 11 is subject to further evaluation and modification.

Subject to the foregoing, and based on Joint Applicants' representations and public statements concerning the merger and other information currently available to Respondent, it is Respondent's position that the proposed merger is not in the public interest as required by KRS 278.020(6). The proposed merger between AT&T and BellSouth will further solidify AT&T's dominance as the nation's largest local exchange carrier and will make it all that more difficult for the KPSC to open Kentucky's local markets to competition. As recently as the KPSC's proceedings evaluating barriers to local competition required by the *Triennial Review Order*,

BellSouth was naming both AT&T and SBC as its competitors in the local market.¹ There is an unambiguous reduction in competition caused by the continuing concentration of local markets through AT&T's sequential acquisition of the major components of the former Bell System.

The KPSC must critically review the effect of this concentration on conditions in Kentucky, including in its review the prior characterizations offered by the Joint Applicants. Consider:

- * "Other voice-over-IP providers, including established companies like AT&T . . . are currently offering voice-over-IP services to even greater numbers."²
- * "Wireless service also now competes directly against traditional wireline service."³
- * "[T]he three incumbent interexchange carriers – AT&T, MCI, and Sprint – have traditionally dominated the provision of services to enterprise customers."⁴
- * AT&T competes against BellSouth using dark fiber.⁵
- * AT&T competes against BellSouth using fixed wireless.⁶

¹ Kentucky Public Service Commission Case No. 2003-0379.
² UNE Fact Report, prepared and filed on behalf of BellSouth and SBC *et. al.*, WCB Docket No. 04-313, at I-1.
³ UNE Fact Report at I-2.
⁴ UNE Fact Report at I-6.
⁵ UNE Fact Report at III-18.
⁶ UNE Fact Report at III-24.

The effects of this merger are not limited, however, merely to the harms created by the elimination of AT&T as a competitor to BellSouth. The KPSC must also consider the practical effects on its efforts to create an environment in Kentucky that favors the growth of local exchange competition. If allowed to merge, the new post-merger AT&T/BellSouth mega-conglomerate will enjoy an unprecedented geographic footprint that will uniquely position it to offer multi-location customers discounts and other pricing plans that cannot be matched by any competitor in Kentucky. While there may be actions that the KPSC can take to mitigate the competitive harms of the merger -- for instance, the more open the local network, the less it can be exploited by the post-merger entity to the competitive disadvantage of CLECs -- keeping the local network open will become even more difficult in the face of the sustained opposition from a post-merger carrier with the vast resources that will be enjoyed by AT&T/BellSouth.

As Respondent indicated at the outset, Respondent's analysis of the merger is underway and ongoing. Respondent intends to fully explain its concerns and potential mitigating actions (if any) that the KPSC can adopt once its review is concluded. Even a preliminary analysis demonstrates, however, that this merger will produce less choice, greater concentration and higher prices. It is not in the public interest that it be approved.

DATA REQUEST NO. 12: If the response to Request No. 11 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports NuVox’s response.

RESPONSE: *See* Respondent’s Response to Data Request No. 11 above.

DATA REQUEST NO. 13: State with specificity all facts and contentions that underlie NuVox's statement in its Motion to Intervene that "[t]his case involves issues which are directly relevant to NuVox's business and on-going operations." *Motion to Intervene*, paragraph 2.

RESPONSE: BellSouth, through its operating subsidiaries, is both a supplier and competitor to the Respondent in the Kentucky market. Likewise, AT&T, through its operating subsidiaries, is a potential supplier of certain wholesale inputs, as well as a competitor, to the Respondent in the Kentucky market. The consolidation of these two wholesale suppliers and competitors in the Kentucky market will have a significant impact on all wholesale and retail customers and competitors of the Joint Applicants. This is especially true of those customers and competitors who, like Respondent, rely in whole or in part on the network owned and controlled by the Joint Applicants to provide competitive services to Kentucky residents. A merger of Joint Applicants will eliminate one potential supplier of wholesale inputs to Respondent.

Additionally, the merged entity will be vastly larger than either of the Joint Applicants are today and will have nearly unlimited resources to bring to bear to thwart Respondent's efforts to provide competitive telecommunications services in Kentucky.

Lastly, BellSouth's practices in its dealings with CLECs, though far from ideal, are in many ways superior to the practices of the former SBC (now part of AT&T). Respondent has legitimate concerns that these superior practices will be eliminated post-merger and replaced by

the inferior legacy SBC practices or even worse. Given that the new AT&T/BellSouth entity will be almost unimaginably huge and will have tremendous resources, there is reasonable concern that even the performance plan in place since BellSouth received Section 271 authority will be wholly inadequate to deter deliberately poor performance in provisioning UNEs. *See also*, Respondent's Response to Data Request No. 11 above.

DATA REQUEST NO. 14: State with specificity all facts NuVox expects to “develop . . . that will assist the Commission in full consideration of the proposed transaction.” *Motion to Intervene*, paragraph 3.

RESPONSE: Some of the facts and issues which Respondent seeks to develop, and which are vital to the KPSC's statutory analysis of the Joint Applicants' proposed merger, are reflected in the Data Requests submitted by the Respondent to the Joint Applicants in this docket. Others are being researched at this time and are currently unavailable to be produced in light of the exceptionally accelerated schedule that this proceeding is following. Without Joint Applicant's disclosure of the facts and documents requested for production pursuant to such Data Requests, the KPSC cannot complete the full statutory review of the proposed transaction required by Kentucky law. Moreover, Respondent intends to further develop these matters in the Pre-filed Testimony which will be tendered on its behalf. *See also*, Respondent's Response to Data Request No. 11 above.

DATA REQUEST NO. 15: Does NuVox agree with Paragraph 33 of the Joint Application set forth

below:

33. Nor will the wholesale obligations of BellSouth's operating subsidiaries under interconnection agreements and orders of this Commission be affected by the merger. BellSouth's subsidiaries operating in Kentucky will still be bound to those agreements and orders post-merger closing to the same degree as before the merger, and all performance standards and other regulatory requirements that currently apply to BellSouth operating subsidiaries will be unaffected by the merger.

RESPONSE: No. Although the merger does not unilaterally change the legal framework addressing BellSouth's wholesale obligations and does not abrogate the terms of an effective interconnection agreement, existing interconnection agreements expire and must be renewed. The arbitration process in important ways privatizes the regulation of wholesale services with the competitive entrants whose limited resources must be used to resolve substantive and competitively significant issues with the incumbent. Although the KPSC is the ultimate arbiter of wholesale disputes, the resources needed to challenge complex cost studies, operational impediments and the incumbent's persistent efforts to dilute wholesale obligations must be borne, in the first instances, by the competitive industry.

The AT&T/BellSouth merger will further exacerbate the resource imbalance that advantages the incumbent in the arbitration process. The relative cost to enforce and protect the entrant's wholesale rights must be spread across a dramatically lower revenue base than those of

the incumbent. Thus, while legal obligations in *theory* may not change, the *practical* consequence of the merger will be to create an even greater resource imbalance, the results of which will make it even more difficult to achieve commercial viable interconnection relationships with BellSouth.

Additionally, interconnection agreements are extremely voluminous contracts and are subject to various interpretations. Though the new AT&T/BellSouth conglomerate may be bound to existing ICAs as a matter of law, as a matter of practice the new entity may attempt to interpret its obligations differently and in a manner detrimental to CLECs. This is even truer of items CLECs purchase from BellSouth pursuant to tariff, given BellSouth's and the new AT&T/BellSouth conglomerate's ability to change those at will.

DATA REQUEST NO. 16: If the response to Request No. 15 is anything other than an unqualified

“yes,” state with specificity each and every fact that supports NuVox’s response.

RESPONSE: See Respondent’s Response to Data Request No. 15 above.

Submitted to and filed with the Kentucky Public Service Commission this 11th day of May,
2006.

Respectfully submitted,

/s/ Henry S. Alford

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CERTIFICATE OF SERVICE

Counsel for Respondent NuVox Communications, Inc. hereby certifies that a true and accurate electronic copy of this filing was transferred to the Commission via the Electronic Filing Center this 11th day of May, 2006 and filed in hardcopy document form with the Commission also on the 11th day of May, 2006. Further, consistent with the Commission's Order of April 12, 2006, notice of the filing of this Motion was served via electronic mail on all parties of record. Parties of record can access the information at the Commission's Electronic Filing Center located at <http://psc.ky.gov.efs/efsmain.aspx>.

/s/ Henry S. Alford

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