COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

EXPEDITED MOTION FOR ENTRY
OF ATTACHED PROTECTIVE ORDER

NuVox Communications, Inc. ("NuVox"), DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), Xspedius Management Company Switched Services, LLC and Xspedius Management Company of Louisville, LLC (collectively referred to herein as "Xspedius") (with NuVox, Covad and Xspedius being referred to herein collectively as the "Movants"), by counsel, hereby respectfully submit their Expedited Motion for Entry of the Attached Protective Order.

INTRODUCTION

Movants file this Motion to achieve one simple goal – to put in place reasonable and adequate protections so that Movants and Joint Applicants[1] can freely exchange information which they deem confidential and/or proprietary in conjunction with this docket. Unfortunately, as a result of the overly-restrictive and unnecessarily complicated Protective Agreement proposed by Joint Applicants, this has not been achieved to date by the parties through private negotiation. With the date for Movants' filing of Prefiled Testimony looming on June 2, 2006 (*see* Commission's Order dated April 12, 2006, ¶ 6, p. 3),

[1] "Joint Applicants" include BellSouth Corporation ("BellSouth"), BellSouth Telecommunications, Inc. and AT&T, Inc. ("AT&T").

Movants have no alternative but to seek the Commission's immediate intervention into the matter, so as to require the entry of the attached Protective Order which provides more than adequate protections for Joint Applicants with respect to the disclosure of "Confidential Information."

In fact, as stated fully below, Joint Applicants should have no objection to this Motion because the terms of the Protective Order which Movants propose be entered in this docket have already been agreed to by Joint Applicants in the docket initiated before the Tennessee Regulatory Authority ("TRA") addressing the AT&T-BellSouth merger. *See* Protective Order entered in *In Re: Joint Filing of AT&T, Inc. and BellSouth Corporation together with its Certified Tennessee Subsidiaries regarding change of Control of the Operating Authority of BellSouth Corporation's Tennessee Operating Subsidiaries*, before the Tennessee Regulatory Authority, Docket No. 06-00093 (the "Tennessee Proceeding"), attached hereto as Exhibit "A." Thus, it can reasonably be presumed that the protections agreed to by Joint Applicants in Tennessee are adequate, otherwise they would not have agreed to them. Likewise, these same protections should be adequate in Kentucky.

APPLICABLE FACTS

This docket was initiated on March 31, 2006 through the filing of Joint Applicants' application for the approval of the transfer of control of Bellsouth to AT&T. Thereafter, a procedural schedule was entered by this Commission by Order dated April 12, 2006. Pursuant to the Commission's Order, and in recognition that intervening parties would necessarily require certain information from Joint Applicants in order to evaluate the proposed merger and to prepare their cases for hearing, the Commission has allowed for the exchange of Data Requests in this docket.

Soon after the filing of Movants' Motions for Full Intervention, Movants served upon Joint Applicants various Data Requests seeking information relating to the proposed transaction, which are necessary for Movants to evaluate the proposed merger and prepare their respective cases for hearing.[2] In turn, Data Requests were served by Joint Applicants on each of the four Movants.

The parties responded to each others' Data Requests on May 11, 2006. Of the 41 Data Requests submitted by Movants, Joint Applicants responded to 23 of these requests with some form of objection and a statement that "the Joint Applicants will provide reasonably assessable information in response to this Request upon execution of an acceptable protective agreement," or some variant of such statement.[3]

In an admittedly timely fashion, Joint Applicants submitted to counsel for Movants their proposed "acceptable protective agreement" on May 10, 2006. *See* Joint Applicants' proposed Protective Agreement, attached hereto as Exhibit "B." Unfortunately, Joint Applicants' proposed Protective Agreement is far from reasonable, is unduly complicated, attempts to place significant restrictions on Movants' ability to obtain access to and use "Confidential" and/or "Highly Confidential" information in this proceeding in any meaningful manner, and would increase the costs incurred by Movants' participation in this docket beyond tolerable levels. Moreover, it is Movants' belief that this proposed Protective Order represents a material departure from, and is substantially more restrictive than, protective agreements previously agreed to by BellSouth in other dockets before this Commission and in other proceedings in sister states in the BellSouth region.

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[2] NuVox and Covad served their Data Requests to Joint Applicants on May 1, 2006. Xspedius served its Data Requests a day later on May 2, 2006.

[3] *See* Joint Applicants' Reponses to Movants' Data Requests Nos. 2, 3, 5, 6, 8, 9, 10, 11, 12, 17, 19, 21, 22, 29, 30 31, 32, 33, 34, 35, 37, 38 and 40.

As a non-exhaustive list of some of the more objectionable provisions proposed in the Joint Applicants' proposed Protective Agreement, Movants offer the following:

1. Joint Applicants' proposed Protective Agreement creates multi-layered designations of protected information as either "Confidential" or "Highly Confidential." *See* Joint Applicants' proposed Protective Agreement, ¶ 1, p. 1, Exhibit "B" hereto. Counsel for Joint Applicants has confirmed that, pursuant to his good faith understanding, most of the information and data which would be produced by Joint Applicants would be designated as "Highly Confidential."

2. Information designated as "Highly Confidential" could be disclosed only to Movants' outside counsel of record (and staff), retained experts and the Commission and its staff – and specifically not to Movants' in-house lawyers or other of Movants' employees (even if such employees have no involvement in the marketing of communications services or competitive decision-making regarding such services). *See* Joint Applicants' proposed Protective Agreement, ¶ 3, p. 3, Exhibit "B" hereto; and

3. "Highly Confidential" materials would be made available for viewing only at Joint Applicants' counsel's office and no copies of such materials could be made. Only "limited" notes relating to such "Highly Confidential" materials would be allowed. *See* Joint Applicants' proposed Protective Agreement, ¶¶ 4(b) and (g), p. 3, Exhibit "B" hereto.

As stated above, these restrictions in particular would render it impossible for Movants to conduct any meaningful review of materials designated by Joint Applicants as "Highly Confidential" and would simply preclude Movants from fully preparing their case for hearing. In fact, because at least Covad anticipates that its in-house attorney will be one of its witnesses at the hearing, the restrictions imposed would render it nearly impossible for this witness to submit fully-developed Prefiled Testimony to the Commission. Moreover, Movants' compliance with such restrictions would increase the expenditure of scant resources associated with all their participation in this case in the form of increased costs of outside counsel, travel costs of consultants and other case preparation expenses.

Thus, in a good faith effort to work through these concerns with Joint Applicants, Movants generated and provided a revised draft of the proposed Protective Agreement to Joint Applicants on

May 12, 2006. Subsequently, on May 15, 2006, counsel for Joint Applicants submitted a next-generation draft of the proposed Protective Agreement to Movants. To Joint Applicants' credit, some of Movants' requested changes were accepted in this draft. However, the most restrictive provisions – those precluding disclosure of "Highly Confidential" information to Movants' in-house counsel and other employees directly involved in the preparation of Movants' case (even if such employees and in-house counsel have no involvement in the marketing of communications services or competitive decision-making regarding such services) – were reinserted into Joint Applicants' draft.

As could be expected, this prompted several phone conversations between external counsel for the parties. As a result of these conversations, and in a final effort to find some middle ground, Movants specifically identified those in-house counsel to whom Movants would need to disclose information deemed "Highly Confidential" in order to prepare for the hearing. Despite the clear prohibitions contained in the proposed Protective Agreement (as revised) against the disclosure of "Highly Confidential" information to any of Movants' personnel involved in marketing efforts or competitive decision-making, Joint Applicants rejected Movants' final overture on May 16, 2006. To summarize, such rejection was based on the Joint Applicants' unilateral determination that, given Movants' relatively small size, all their in-house counsel and management work very closely in all aspects of the business – which Joint Applicants presume to include marketing and competitive-decision making.

Thus, unfortunately, the parties have reached a stalemate with respect to the entry of a privately-negotiated Protective Agreement. The central obstruction remains Joint Applicants' refusal to allow Movants to share materials designated as "Highly Confidential" with in-house counsel and other employees who are directly involved in Movants' case preparation.

ARGUMENTS

I. ENTRY OF THE ATTACHED PROTECTIVE ORDER WILL ALLOW MOVANTS MEASURED ACCESS TO THE INFORMATION NECESSARY TO FULLY ANALYZE THE PROPOSED MERGER, WHILE ALSO PROVIDING JOINT APPLICANTS REASONABLE AND ADEQUATE PROTECTIONS FROM UNWARRANTED DISCLOSURE OR USE OF COMPETITIVELY SENSITIVE INFORMATION

It is self-evident that Movants cannot fully evaluate or prepare their case relating to the proposed merger of BellSouth and AT&T without first having access to facts and information relating to the proposed transaction currently known only to Joint Applicants.[4] In turn, Joint Applicants have a right to reasonable and adequate protections from unwarranted disclosure or use of competitively sensitive information. At least in this docket, Movants and Joint Applicants have been unable to negotiate their way through these issues. The Commission's intersession is necessary to break the logjam.

However, the same stalemate has not come to pass in other proceedings regarding the very subject matter of this docket. Most notably, in the Tennessee Proceeding, the TRA entered its Protective Order with the full agreement of the Joint Applicants, NuVox and another intervening CLEC.[5] Rather than continue the back-and-forth that has been the hallmark of the parties' negotiations to date, Movants respectfully request that this Commission simply enforce the terms and conditions of confidentiality that have already been agreed to by the Joint Applicants in the Tennessee Proceeding and adopt the TRA's Protective Order (Exhibit "A" hereto) as governing in this proceeding.

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[4] Such information is also necessary for Movants' to fully respond to many of the Data Requests which have been propounded to them by Joint Applicants in this docket.

[5] "The parties, AT&T. Inc. and BellSouth, and the intervenors, Time Warner Telcom of the Mid-South LP and NuVox Communications, Inc., are in agreement as to the entry of this Order." TRA Protective Order, entered in the Tennessee Proceeding, ¶ 19, p. 8, Exhibit "A" hereto.

Such an adoption has many advantages. First and foremost, the TRA's Protective Order has already been agreed to by Joint Applicants and NuVox in the Tennessee Proceeding, so there should be no real controversy in applying the same rules here.

Second, and as stated fully below, in light of the current procedural schedule in this docket, time is of the essence. If Movants are to be given any legitimate opportunity to fully participate in this case, this controversy must be resolved now.

Third, the TRA's Protective Order is simply clearer and more concise than the various versions of the Protective Agreement which have been bouncing among the parties. As an example, the TRA's Protective Order does not reflect Joint Applicants' rather artificial distinction between "Confidential" and "Highly Confidential" information and applies all of its protections to all information deemed confidential. Thus, it is simpler and more easily implemented.

Finally, adoption of the TRA's Protective Order will not place Joint Applicants in jeopardy of their confidential information being used to their competitive disadvantage. The TRA's Protective Order contains most, if not all, of the material protections against such potential misuse of information as were originally proposed by Joint Applicants in this docket. Moreover, the TRA's Protective Order contains more than adequate protections regarding the disclosure of such information to Movants' in-house counsel and other employees directly involved in the preparation of this case:

> 3. CONFIDENTIAL INFORMATION shall be used only for purposes of this proceeding and shall be disclosed only to the following persons:
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> (a) counsel of record for the parties in this case and associates, secretaries, and paralegals actively engaged in assisting counsel of record in this and the designated related proceedings;
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> (b) TRA Directors and members of the staff of the TRA;

> Under no circumstances shall any CONFIDENTIAL INFORMATION or copies therefore be disclosed to or discussed with anyone associated with the marketing of services in competition with the products, goods or services of the producing party. Counsel for the parties are expressly prohibited from disclosing CONFIDENTIAL INFORMATION produced by another party to their respective clients, or to any other person or entity that does not have a need to know for purpose of preparing for or participating in this proceeding. Whenever an individual, other than counsel, is designated to have access, then notice (by sending a copy of the executed affidavit) must be given to adversary counsel prior to the access being given to that individual and that individual, prior to seeing the material, must execute an affidavit that the information will not be disclosed and will not be used other than in this proceeding. Any "Confidential Information" constituting information subject to Section 222 of the Federal Act, is disclosed pursuant to the disclosure rights set forth in subsection 222(d) thereof.
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> 4. Prior to disclosure of CONFIDENTIAL INFORMATION to any employee or associate counsel for a party, officer or director of the parties, including any counsel representing the party who is to receive the CONFIDENTIAL INFORMATION, shall provide a copy of this Order to the recipient employee or associate counsel who shall be bound by the terms of this Order.

TRA Protective Order, entered in the Tennessee Proceeding, ¶¶ 3 and 4, pp. 2-3, Exhibit "A" hereto. Thus, under the TRA Protective Order, no one associated with the marketing of competitive goods or services may have access to another party's confidential information under any circumstances; access is limited to only those attorneys, employees and consultants who have a need to know in preparation of a party's case; and prior to disclosure, all persons other than attorneys of record must sign an affidavit acknowledging his or her obligations of compliance with the Order, and a copy of the affidavit must be provided to the disclosing party's counsel. As already confirmed by Joint Applicants' agreement in the Tennessee Proceeding, these are clearly adequate protections.

II. TIME IS OF THE ESSENCE

This matter is scheduled for a hearing on June 7, 2006. Movants' Prefiled Testimony must be submitted by June 2, 2006. Moreover, as of May 16, 2006, Joint Applicants have submitted yet another round of Data Requests to Movants to which responses must be submitted by May 23, 2006. To comply with these deadlines, and to have a legitimate opportunity to properly prepare for the scheduled hearing, Movants must have near immediate access to the information which has been deemed by Joint Applicants as "Confidential" and "Highly Confidential." Even if such access were granted this week, Movants' ability to respond by May 23, 2006 to Joint Applicants' second round of Data Requests with anything other than simple incorporation of their responses to Joint Applicants' first round of Data Requests is doubtful.

Because of the over-reaching nature of Joint Applicants' originally proposed Protective Agreement, Movants have lost a week of case preparation time in this matter. With such a tight hearing schedule, the prejudice to Movants caused by such loss cannot be rectified under any circumstances. Further delay will only exacerbate the situation. Thus, Movants respectfully request the Commission's expedited review of this Motion and the immediate entry and adoption of the TRA's Protective Order (Exhibit "A" hereto) in this docket to govern the exchange of confidential information among Joint Applicants and Movants.

Submitted to and filed with the Kentucky Public Service Commission this 17th day of April, 2006.

Respectfully submitted,

/s/ Henry S. Alford

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CERTIFICATE OF SERVICE

Counsel for Movants, NuVox Communications, Inc., DIECA Communications, Inc. d/b/a Covad Communications Company, Xspedius Management Company Switched Services, LLC and Xspedius Management Company of Louisville, LLC, hereby certifies that a true and accurate electronic copy of this filing was transferred to the Commission via the Electronic Filing Center this 17th day of May, 2006 and filed in hardcopy document form with the Commission also on the 17th 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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