

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 )

**MOTION FOR RECONSIDERATION OF THE COMMISSION’S JULY 25, 2006  
ORDER OR, IN THE ALERNATIVE, TO ESTABLISH A POST-MERGER DOCKET**

**Introduction**

NuVox Communications, Inc. (“NuVox”) and Xspedius Management Company Switched Services, LLC and Xspedius Management Company of Louisville, LLC (collectively referred to herein as “Xspedius”) (with NuVox and Xspedius being referred to herein collectively as the “Intervenors”), by counsel, hereby respectfully submit this Motion for Reconsideration of the Commission’s July 25, 2006 Order or, in the Alternative, to Establish a Post-Merger Docket to evaluate the merger’s affects on telecommunications competition in Kentucky.

**Argument**

In light of the magnitude of the Joint Applicants’ proposed merger, there is little doubt that this transaction constitutes an industry-altering event. As stated throughout this docket, Intervenors believe, and feel that they have proven, that this merger will cause serious harm to competition in Kentucky’s telecommunications markets. The protection of competitive viability is vitally important particularly to small businesses throughout the Commonwealth that enjoy improved customer service, better pricing, and more innovative service options due to the efforts of competitors such as Intervenors in the market.

The ability of Intervenors and other competitive carriers to offer alternative telecommunications services to Kentucky's consumers has been the product of the tireless work of this Commission and the competitive industry since the passage of the Telecommunications Act of 1996. Intervenors fear that much of that time, effort and expense may be nullified as a result of the virtual recreation of "Ma Bell." This realistic possibility is the reason that Intervenors chose to fully participate in this docket and incur the substantial expense of so doing.

Intervenors appreciate that this Commission is one of the few in the region that held a full evidentiary proceeding to consider this matter, and are thankful for the opportunity to participate in this process and offer evidence during the June 7, 2006 hearing. Intervenors remain concerned that, without at least the minimally intrusive merger conditions proposed by NuVox and Xspedius, the merger will seriously jeopardize competition in Kentucky. Intervenors respectfully disagree with the Commission's ultimate determination that the proposed merger of Joint Applicants satisfies Kentucky's public interest and other statutory standards established under KRS 278.020(5) and (6) and, in part, believe that this finding is based on erroneous findings of fact.<sup>1</sup>

From the outset, Intervenors have not asked that the proposed merger be denied in total, but only that the Commission exercise its broad statutory discretion to impose merger conditions that can help guard against the anti-competitive ramifications of the merger of the largest competitors in

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<sup>1</sup> As a non-exclusive example, in the Order the Commission seems to adopt the Joint Applicants' contention that they do not currently compete against each other in the same Kentucky markets, stating "[c]urrently, the operating subsidiaries of both companies do not compete in Kentucky and, thus, their merger will not affect competition." See Order at 2. On its face, this position is belied by BellSouth's most recent public disclosures to its shareholders in which BellSouth contends "[a]lthough our competitors vary by state and market, we believe that at December 31, 2005, **our most significant local service competitors were AT&T Corp. . . . and our most significant long distance competitors included AT&T. . . .**" Bellsouth, 2005 10-K, February 28, 2006, at 7 (emphasis added).

Kentucky's markets.<sup>2</sup> Specifically, Intervenors have advocated as merger conditions: (1) a price cap plan for unbundled network elements; (2) strengthening the Section 271 performance plan; (3) eliminating audits associated with the pre-TRO Enhanced Extended Links "Safe Harbors"; (4) providing customers with an opportunity to have a "fresh look" at carriers post-merger; and (5) state enforcement of any additional federal conditions adopted by the Federal Communications Commission ("FCC").

The Commission approved the Joint Applicants' application for merger subject to some terms and conditions, but did not include any of the conditions proposed by Intervenors, stating that Intervenors' proposed conditions "are not sufficiently related" to the merger "to be considered in this proceeding." *See* Order at 4. The Commission also qualified its decision stating that it declined to implement Intervenors' proposed conditions "at this time," *see* Order at 4, and that such decision was "without prejudice," *see* Order at 6.

These qualifications, Intervenors believe, represent the Commission's acknowledgement that the anti-competitive concerns raised throughout this docket are legitimate, and that the negative effects of the merger may very well have to be addressed by the Commission at some point. Of course, the problem with such a wait-and-see approach is that, if the Commission waits to act, the damage may be irreversible. That possibility is the primary factor motivating Intervenors' filing of this Motion which, as detailed below, requests only limited reconsideration and modification by the Commission of its current Order. In short, the Commission can and should take action now with respect to its Order to mitigate the possibility of irreparable harm to competition in the Commonwealth.

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<sup>2</sup> *See* KRS 278.020(6), providing "[t]he commission may make investigation and hold hearings in the matter as it deems necessary, and thereafter may grant any application under this subsection in whole or in part and with modification and upon terms and conditions as it deems necessary or appropriate."

Specifically, Intervenors hereby request that the Commission supplement or modify its Order as follows:

- Reconsider and change the Commission’s decision not to state, as a condition of merger approval, that it intends to enforce any appropriate federal conditions that are established in conjunction with the merger; and
- State that the Order is an *interim* order, pending completion of the federal investigations of the proposed merger by the Department of Justice (“DOJ”) and the FCC, and that, upon the establishment of any federal conditions imposed by these agencies, this Commission will review anticompetitive concerns found by the FCC and DOJ and may, at that time, consider imposing such merger conditions as seem appropriate to the Commission at that time;

Or, in the alternative:

- Establish a new docket to examine the concerns and issues raised by Intervenors in this proceeding, entirely outside of the merger proceeding and without the rushed deadlines and attendant pressures that were mandated by statute in connection with the merger docket.

**I. THE COMMISSION, UPON RECONSIDERATION, SHOULD DECIDE THAT IT CAN AND WILL ENFORCE ANY MERGER CONDITIONS THAT ARE SET BY THE DOJ AND FCC.**

The Commission is no doubt aware that, as compared to federal agencies, it is far better positioned to oversee and implement the detailed requirements even of federally-adopted policies.<sup>3</sup> The Commission has vast experience in this regard. To the extent that the FCC ultimately approves the merger with conditions that protect and advance competition, CLECs will need access to an efficient forum to address any disputes that arise under those conditions.

Naturally, some conditions may not be amenable to state resolution. Nonetheless, the Commission (and the public interest) would be better served by a process whereby the New AT&T is

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<sup>3</sup> Intervenors note that the Commission did not make a finding that it absolutely would not enforce federally mandated conditions *per se*, but merely declined to make such enforcement a merger condition at this time.

called upon to raise such an argument as a defense to Commission action on a particular condition, rather than invoking the mere question of Commission authority as a shield against its oversight.

The Louisiana Commission took a similar approach, stating its intention, in a subsequent docket, to establish any merger conditions or concessions that are available in other jurisdictions:

Assuming this merger is approved by all required agencies, both on the state and federal level, the Commission shall open post-merger a docket to ensure that Louisiana customers, both retail and wholesale, are protected by receiving the benefit of any conditions or concessions available in other jurisdictions. By way of this docket, the Commission can ensure that retail and CLEC customers receive the most pro-competitive options, whether they are offered in the former SBC or BellSouth regions.

*See Louisiana Public Service Commission, Order No. U-29427, In re: Request for approval and/or letter of non-opposition to the indirect change in control of certain certificated entities resulting from the planned merger, issued August 2, 2006 (“Louisiana Order,” attached hereto as Exhibit A), at 10.*

In sum, any failure by Joint Applicants to adhere to federally imposed merger conditions will hurt consumers here in Kentucky. Enforcement actions before this Commission are typically/historically more effective, more economical, and more prompt than similar actions brought before the FCC. By finding that this Commission can and will enforce all appropriate federally-established merger conditions, to the extent enforcement becomes necessary, the Commission will send two important messages:

1. The Commission firmly expects Joint Applicants to adhere to any federally established merger conditions; and
2. CLECs doing business in Kentucky can rely on this Commission to ensure that conditions the FCC and DOJ find necessary to protect local competition will be enforced in Kentucky.

**II. THE COMMISSION, UPON RECONSIDERATION, SHOULD DESIGNATE THE ORDER AS “INTERIM” SUBJECT TO COMPLETION OF ONGOING FEDERAL INVESTIGATIONS.**

As a simple function of time and resources, the merger-related investigations being undertaken at the federal level by the DOJ and the FCC are fundamentally more robust than could possibly be undertaken by this Commission in light of the statutory parameters imposed by Kentucky law. This is one reason that the Intervenors requested that the Commission agree to enforce any FCC-mandated merger terms.

Intervenors’ proposal satisfies the Commission’s concern that any merger conditions be “sufficiently related” to the merger. *See* Order, p. 4. Any federally-mandated merger conditions would be, by their very nature, directly related to the merger. Moreover, these federal investigations are likely to shed significant light on the anti-competitive problems associated with the merger of BellSouth and AT&T, especially in light of the Tunney Act proceedings discussed in Intervenors’ July 17, 2006 Letter filed with the Commission. Deferring final approval in this docket until the necessary approval by these federal agencies would provide Joint Applicants the comfort that this Commission will not “hold up the works,” but will nonetheless reserve the Commission’s ability to take appropriate further action consistent with the public interest to the extent the federal investigations further clarify the anti-competitive ramifications of the transaction, by imposing merger conditions to address those ramifications.<sup>4</sup>

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<sup>4</sup> Such an approach is consistent with the recommendations of other state regulators considering the Joint Applicants’ proposed merger. In the applicable Tennessee docket, while ultimately being out-voted by his fellow commissioners, Director Ron Jones moved that the merger should be approved “contingent upon approval by the Federal Communications Commission and completion of the investigation processes of the Department of Justice and Federal Trade Commission,” and that the Tennessee Regulatory Authority “should defer any decision establishing conditions until this transaction is addressed by federal agencies.” *See* Exhibit B attached hereto.

**III. IN THE ALTERNATIVE, THE COMMISSION SHOULD ESTABLISH A NEW POST-MERGER DOCKET TO EXAMINE THE POST-MERGER COMPETITIVE EFFECTS ON KENTUCKY'S MARKETS.**

Intervenors firmly believe that the best way for the Commission to effectively combat the inevitable anti-competitive consequences of the merger is through the imposition of the proactive merger conditions proposed by NuVox and Xspedius. The Commission appears to recognize the merits of the issues raised by Intervenors in this proceeding, in opting to reject Intervenors' proposals "without prejudice" and stating its belief that such proposals are not properly considered "at this time" or "in this proceeding." *See* Order at 4-5. Though Intervenors favor actual pre-merger conditions, Intervenors believe that, should the Commission decide not to reconsider its decision not to set conditions, the Commission could and should, in the alternative, open a separate docket to consider and address the competitive concerns raised by Intervenors during this proceeding. The many pressures on the Commission to timely complete its merger review and the vociferous objections of Joint Petitioners to merger conditions may have been factors that led the Commission not to set such conditions. It can, however, and should examine the issues raised by Intervenors in the comparative calm of a new docket opened expressly to consider such issues, as well as other competitive concerns the Commission may have.

This is in fact an approach that was adopted by the Louisiana Commission. In the Louisiana decision (attached hereto as Exhibit A), the Commission ordered as follows:

The Commission shall open a global rulemaking docket to address a number of concerns raised by the 3 CLEC interveners, particularly with respect to the creation of a "fresh-look window," and other *force majeure* related concerns. Staff anticipates any rules adopted by way of this docket shall be included in the *Local Competition Regulations*.

*See* Louisiana Order at 9-10. Specifically, in Louisiana the Commission issued a letter of non-opposition to the proposed merger, but without prejudice to the authority to engage in further investigation and require any reasonably necessary change mandated by the public interest. Moreover, the Louisiana Commission committed to open a global rulemaking docket for purposes of creating a “fresh look” window advocated by Intervenors, and furthermore, to open a post-merger docket to ensure that CLEC customers receive the most pro-competitive options.

This Commission should similarly establish a new docket to consider and address the issues raised by Intervenors in conjunction with the merger conditions they proposed. Without re-hashing the arguments made in support of each proposed merger condition here, the Commission can see in Intervenors’ prefiled testimony and brief the reasons such Commission intervention are necessary for perpetuating and enhancing competition in Kentucky.

### **Conclusion**

For the reasons stated above, Intervenors respectfully request that this Commission reconsider its Order of July 25, 2006 and (1) Find that the Commission expects to enforce any appropriate federally-mandated merger conditions; and (2) State that the Order is an *interim* order, pending completion of the merger investigations by the DOJ and the FCC, and that, upon the establishment of any federal conditions imposed by these agencies, this Commission will review anticompetitive concerns found by the FCC and DOJ and may, at that time, consider imposing such merger conditions as seem appropriate to the Commission at that time; or, in the alternative, (3) Establish a new docket to examine the concerns and issues raised by Intervenors during this proceeding, entirely outside of the merger proceeding, without the rushed deadlines and attendant pressures mandated by statute for the merger proceeding.

Submitted to and filed with the Kentucky Public Service Commission this 4th day of August

2006.

Respectfully submitted,

/s/ Henry S. Alford

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CERTIFICATE OF SERVICE

Counsel for Intervenors, NuVox Communications, Inc., 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 4th day of August 2006 and filed in hardcopy document form with the Commission also on the 4th day of August 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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