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Sent: Monday, May 08, 2006 3:19 PM
To: Filings@psc.state.fl.us
Subject: 060308-TP Joint Response in Opposition to NuVox Communications, Inc. Petition to Intervene
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B. Docket No. 060308-TP

In Re: Joint Application for Approval of Indirect Transfer of Control of Facilities Relating to Merger of AT&T, Inc. and BellSouth Corporation

C. BellSouth Telecommunications, Inc.
on behalf of James Meza III

D. 13 pages total (includes letter, certificate of service and pleading)

E. AT&T, Inc. and AT&T of the Southern States, LLC ("AT&T"), BellSouth Corporation ("BellSouth"), BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (collectively "Joint Applicants") Joint Response in Opposition to NuVox Communications, Inc.'s Petition to Intervene

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May 8, 2006

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 060308-TP - Joint Application for Approval of Indirect Transfer of Control of Facilities Relating to Merger of AT&T, Inc. and BellSouth Corporation

Dear Ms. Bayo:

Enclosed is AT&T, Inc. and AT&T of the Southern States, LLC ("AT&T"), BellSouth Corporation ("BellSouth"), BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (collectively "Joint Applicants") Joint Response in Opposition to NuVox Communications, Inc.'s Petition to Intervene, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

James Meza III

cc: All Parties of Record
E. Earl Edenfield, Jr.
Jerry D. Hendrix

CERTIFICATE OF SERVICE
DOCKET NO. 060308-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via First Class U.S. Mail and Electronic Mail this 8th day of May, 2006 to the following:

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James Meza III

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Joint Application for Approval of Indirect Transfer of Control of Facilities Relating to Merger of AT&T Inc. and BellSouth Corporation	)	Docket No. 060308-TP
		Filed: May 8, 2006

JOINT RESPONSE IN OPPOSITION TO NUVOX COMMUNICATIONS, INC.'S PETITION FOR LEAVE TO INTERVENE

AT&T Inc. and AT&T of the Southern States, LLC ("AT&T"), BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, "Joint Applicants") respectfully oppose the petition of NuVox Communications, Inc. ("NuVox") for leave to intervene in this matter.[1]

NuVox has failed to satisfy the relevant requirements for intervention in this proceeding as set forth in Rule 25-22.039, Florida Administrative Code. This is a transfer-of-control proceeding – in particular, a proceeding under which the Florida Public Service Commission ("Commission") is considering the indirect transfer of control of the telecommunications facilities of BellSouth Telecommunications, Inc. resulting from the merger of its parent company,

[1] Pursuant to Rule 25-22.039, Florida Administrative Code, any person seeking to intervene in a proceeding must petition the Prehearing Officer for leave to intervene and must include allegations sufficient to prove that the intervenor is entitled to participate in the proceeding. Because NuVox must seek permission to intervene, the request is effectively a motion for leave. *See, e.g.*, Order No. PSC-00-0421-PAA-TP at 6, *In re Joint Application of MCI WorldCom, Inc. and Sprint for Acknowledgement or Approval of Merger Whereby MCI WorldCom Will Acquire and Control Sprint and Its Florida Operating Subsidiaries*, Docket No. 991799-TP (Fla. PSC Mar. 1, 2000) (denying Telecommunications Resellers Association's ("TRA") Motion for Leave To Intervene in MCI and Sprint merger proceeding). As such, NuVox cannot file a reply to this Response in Opposition. *See* Order No. PSC-04-0333-PCO-SU at 2 n.2, *In re Application for Certificate To Provide Wastewater Service*, Docket No. 020745-SU (Fla. PSC Mar. 30, 2004) (refusing to consider a "memorandum in opposition" to a response in opposition to a petition to intervene because the intervenors' filing was an "unauthorized reply to a response").

BellSouth Corporation, and AT&T pursuant to Section 364.33, Florida Statutes. NuVox has not alleged a constitutional or statutory right or a Commission rule that entitles it to participate in this proceeding. Thus, under settled law, NuVox can intervene only if it demonstrates, first, that the transfer-of-control of BellSouth Telecommunications, Inc. facilities in Florida will cause it real and immediate injury. NuVox has made no such showing. Specifically, NuVox has not demonstrated how this indirect transfer-of-control will affect BellSouth Telecommunications, Inc.'s existing obligations to NuVox in any way (much less do so immediately), nor could it do so. That is because BellSouth Telecommunications, Inc. will remain subject to the same wholesale obligations after the merger, including any obligations in its interconnection agreement with NuVox that existed prior to the merger.[2] Moreover, the merger will in no way affect this Commission's regulatory authority over BellSouth Telecommunications, Inc. or its ability to enforce the terms of any agreements between NuVox and BellSouth Telecommunications, Inc. that are subject to the Commission's jurisdiction. Nor has NuVox established any other way that it will be immediately harmed by the granting of the Joint Application. Simply put, the merger will have no impact on NuVox, and NuVox has not established, and cannot establish, otherwise.

Second, and independently, NuVox's motion should be rejected because NuVox is simply a competitor seeking to inject itself into this transfer-of-control proceeding. It is settled law in Florida, including precedent established and confirmed by this Commission, that a transfer-of-control proceeding under Section 364.33 is not designed to protect competitor interests. For that reason as well, NuVox should not be permitted to intervene.

[2] *See* Joint Application at 10.

NUVOX HAS NOT MET THE STANDARD FOR INTERVENTION

A. The Commission's Precedent Precludes Intervention

Pursuant to Rule 25-22.039, Florida Administrative Code, a petition for leave to intervene must demonstrate that the party seeking intervention is "entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule," or that the party's "substantial interests . . . are subject to determination or will be affected through the proceeding." As NuVox has not alleged a constitutional or statutory right or a Commission rule that entitles it to participate in this proceeding, NuVox's intervention would be proper only if it could demonstrate that its substantial interests are subject to determination or will be affected through the proceeding.

Under a long line of Commission decisions, the proper test to determine "substantial interest" is that announced in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. Dist. Ct. App. 1981). *See* Order No. PSC-00-0421-PAA-TP at 6[3] ("[W]e agree with MCI WorldCom/Sprint that the two-pronged test set forth in *Agrico* is the appropriate test for determining substantial interest."); *see also* Order No. PSC-98-0702-FOF-TP, *In re Request for Approval of Transfer of Control of MCI Communications Corp.*, Docket No. 971604-TP (Fla. PSC May 20, 1998) (applying *Agrico* test in denying intervention of a competitor/customer (GTE), and a union (CWA) from the Commission's consideration of a transfer of control as part of the MCI-WorldCom merger); Order No. PSC-06-0033-FOF-TP, *In re Joint Application for Approval of Transfer of Control of Sprint-Florida*, Docket No. 050551-

[3] This order, which also approved the transfer-of-control in that merger between holding companies, was ultimately vacated because the merger was not consummated, so approval of the transfer of control was no longer necessary. *See* Order No. PSC-00-1667-FOF-TP, *In re Joint Application of MCI WorldCom, Inc. and Sprint Corp. for Acknowledgment or Approval of Merger*, Docket No. 991799-TP (Fla. PSC Sept. 18, 2000). This, of course, has no bearing on the Commission's decision or reasoning in denying intervention.

TP (Fla. PSC Jan. 10, 2006) (applying *Agrico* test in denying CWA's protest of the Commission's approval of a transfer–of-control of Sprint-Florida from Sprint-Nextel to LTD Holding Company on the grounds that CWA lacked standing). NuVox acknowledges that the *Agrico* test applies here. *See* Petition ¶ 14.

Under *Agrico*, a person has a substantial interest in the outcome of an administrative proceeding if: (1) the person will suffer injury in fact that is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing,[4] *and* (2) the substantial injury is of a type or nature that the proceeding is designed to protect. *See* 406 So. 2d at 482. The first prong of this test deals with the degree of injury; the second prong of the test deals with the nature of the injury. *See AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla. 1997). NuVox bears the burden of demonstrating that it meets both prongs and therefore has standing to intervene in this proceeding. *See* Order No. PSC-00-0421-PAA-TP at 4-5. If NuVox fails to make either showing under the *Agrico* test, its petition must fail. *See id.* at 5.

This Commission has consistently applied the *Agrico* test to deny intervention in transfer-of-control proceedings involving telecommunications companies. A decision directly on point arose from the Commission's 1998 proceeding involving the MCI/WorldCom merger. GTE sought leave to intervene based on alleged injuries it would suffer as a wholesale customer due to the decrease in competition between MCI and WorldCom in the wholesale market. The Commission found that GTE's asserted injuries were far too speculative to confer standing under the first prong of *Agrico*. The Commission went on to rule that the asserted injuries also were beyond the scope of a transfer-of-control proceeding because Section 364.33 "does not give us the ability to protect the competitive interests asserted." Order No. PSC-98-0702-FOF-TP at 18.

[4] Section 120.57, Florida Statutes, prescribes procedures for the conduct of administrative hearings.

Two years later, the Commission issued a virtually identical ruling in a proceeding concerning the indirect transfer of control of regulated operating subsidiaries resulting from the proposed merger of MCI WorldCom, Inc. and Sprint Corporation. *See* Order No. PSC-00-0421-PAA-TPP at 5 (citing Order No. PSC-98-0702-FOF-TP). In that proceeding, the TRA, a national trade organization representing telecommunications service providers and suppliers (with several members that were authorized to provide local and interexchange service in Florida), sought to intervene on the basis that the proposed merger "will result in the narrowing of competitive network service providers" and therefore "may adversely affect TRA members providing telecommunications services in Florida, who rely on wholesale network services provided by Sprint or MCI." *Id.* at 3. The Commission rejected TRA's petition and found that it failed to satisfy *both* of the *Agrico* prongs. *See id.* at 4. First, the Commission rejected TRA's contention on the degree-of-injury prong because "the 'loss' of a competitor in the market, in itself," does not demonstrate harm to TRA. *Id.* at 7. "TRA's speculation as to the effect that the merger of MCI WorldCom and Sprint will have on the competitive market amounts to conjecture about future economic detriment. Such conjecture is too remote to establish standing . . . . We find that this standard is equally applicable whether TRA is arguing its substantial interest as a competitor or as a customer." *Id.* at 6-7; *see also* Order No. PSC-06-0033-FOF-TP at 6 (confirming need for immediate harm). Second, the Commission reaffirmed its previous judgment that Section 364.33 "is not a merger review statute" and therefore that TRA's assertion of the competitive interests of its members was insufficient to meet the nature-of-injury prong. Order No. PSC-00-0421-PAA-TP at 5.[5]

[5] More recently, and in an analogous situation, the Commission denied the CWA's attempt to intervene and protest the Commission's approval of the transfer-of-control of Sprint-

B. Under These Established Commission Precedents, Intervention by a Competitor Should Be Denied Here

This established Commission precedent controls here and requires denial of intervention. First, NuVox cannot satisfy the degree-of-injury prong of the *Agrico* test. As discussed above, NuVox must first demonstrate that it will suffer an injury in fact of sufficient immediacy to entitle it to a Section 120.57 hearing. *See Agrico,* 406 So. 2d at 482. NuVox has not met its burden of demonstrating such a real and immediate injury.

In seeking to satisfy this first aspect of the *Agrico* test, NuVox speculates, without any support or analysis, that the merger will affect its "ability to secure the wholesale services which it needs and which it currently purchases from BellSouth pursuant to an interconnection agreement approved by this Commission." Petition ¶ 18. NuVox's speculation is not well-founded. In fact, *this merger will not affect BellSouth Telecommunications, Inc.'s wholesale obligations under its interconnection agreement and this Commission's decisions*. The merger of AT&T and BellSouth Corporation is a parent-level, holding company transaction. Thus, BellSouth Telecommunications, Inc. will have the same wholesale obligations to competitors that it had before the merger, including its obligations under its interconnection agreement with NuVox. Likewise, the completion of the transaction will not affect the Commission's regulatory authority over BellSouth Telecommunications, Inc. Thus, any other existing regulatory requirements that apply to BellSouth Telecommunications, Inc. to the benefit of NuVox will likewise be unaffected by the merger.

NuVox also cannot satisfy its burden as to the first prong of the *Agrico* test through its assertions about the affect of the merger on Florida consumers. *See, e.g.*, Petition ¶ 18 (claiming

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Florida and Sprint Payphone from Sprint-Nextel to LTD Holding Company pursuant to Section 364.33. *See* Order No. 06-0033-FOF-TP.

that "the transaction will affect the quality of service to consumers in Florida"). Even if there were a basis for NuVox's conjecture with respect to Florida consumers – and there emphatically is not – NuVox does not represent the interests of consumers in Florida. Any claim of standing by NuVox must be based on its own interests, not on its assertions about the interests of Florida consumers. *See Alterra Healthcare Corp. v. Estate of Shelley*, 827 So. 2d 936, 941 (Fla. 2002) ("'In the ordinary course, a litigant must assert his or her own legal rights or interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'") (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)); Order No. PSC-96-0768-PCO-WU, *In re Application for a Limited Proceeding To Include Groundwater Development and Protection Costs in Rates in Martin County by Hobe Sound Water Company*, Docket No. 960192-WU (Fla. PSC June 14, 1996) (denying a town intervention because it had no standing to represent the interests of consumers who are residents and taxpayers).

Moreover, the Commission previously rejected a similar "service quality" argument in denying the CWA's attempt to intervene in the Sprint/Nextel merger. *See* Order No. PSC-06-0033-FOF-TP. The CWA argued that it had standing to intervene in that proceeding because, according to the CWA, the merger would result in the degradation of service to Sprint customers. *See id.* at 4. In denying the CWA's petition to intervene and rejecting this argument, the Commission held that the "Commission's proposed agency action directly and immediately affects Sprint, not CWA or its members." *Id.* at 6. The Commission further held that, even assuming degradation of service, "the causal chain has too many links in it to view the downstream effects as 'direct' or 'immediate.'" *Id.* NuVox presents no legitimate argument to depart from this precedent.

Additionally, NuVox contends that its interests as a competitor will be hurt by what it claims will be the loss of one of the "most vigorous competitors" in the Florida market. Petition ¶ 16. Assuming *arguendo* that NuVox's assertion about the vigorous nature of the competition that AT&T currently provides is correct (it is not, because, among other things, AT&T made an irreversible decision to stop marketing wireline mass-market local and long-distance services in 2004), NuVox never explains how *its* interests are harmed by the loss of one of its competitors. NuVox cannot prove injury on the basis that it may face *less* competition and therefore have easier access to customers. Moreover, even if NuVox's theory of injury were cognizable, it is little more than remote speculation as to how the merger might ultimately affect NuVox. Such uncertain conjecture about possible economic detriment is insufficient to support standing. *See AmeriSteel*, 691 So. 2d at 477-78; *see also* Order No. PSC-00-0421-PAA-TP at 7 ("We do not believe that the 'loss' of a competitor in the market, in itself, demonstrates harm to TRA. Companies drop out of markets quite frequently for a variety of reasons.").

Second, and independently, NuVox's petition for leave to intervene must be denied because it fails to meet the second prong of the *Agrico* test concerning the type and nature of the alleged injury. NuVox's only potential concern here is that the indirect transfer of control will somehow harm its competitive interests as a telecommunications carrier. Specifically, NuVox alleges that, "[a]s one of the remaining *competitors* providing local telecommunications service in Florida," the merger will harm its interests. Petition ¶ 16 (emphasis added). Those competitive injuries are not of a type or nature that a transfer-of-control proceeding is designed to protect. As this Commission has squarely held, in a decision that NuVox does not cite, much less address, Section 364.33 "does not give [the Commission] the ability to protect the competitive interests asserted." Order No. PSC-98-0702-FOF-TP at 18; *accord* Order No. PSC-

00-0421-PAA-TP at 5 (emphasizing that Section 364.33 is "not a merger review statute" and denying intervention to trade association of competitors). Just as in those cases, NuVox's petition fails to establish a "substantial interest" of a type or nature which a proceeding under Section 364.33 is designed to protect. *See Agrico*, 406 So. 2d at 482. As in those cases, NuVox does not have standing to intervene for this reason as well.[6]

CONCLUSION

For the foregoing reasons, the Joint Applicants respectfully request that the Commission deny NuVox's petition for leave to intervene.

[6] The Commission should not be persuaded by NuVox's contention that an evidentiary hearing is required to make a public interest inquiry. The Commission has previously approved several transfer-of-control transactions pursuant to Section 364.33 without an evidentiary hearing. *See, e.g.*, Order No. PSC 00421-PAA-TP at 9. And, the Commission can obtain any necessary information related to the transaction from the parties' directly. Indeed, in the only Commission authority cited by NuVox concerning the public interest (and the only Commission authority cited throughout NuVox's entire petition), the Commission made a public-interest determination without an evidentiary hearing. *See* Order No. PSC-06-0033-FOF-TP at 10.

Respectfully submitted, this 8th day of May 2006,

FOR BELLSOUTH CORPORATION,
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