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May 3, 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 Time Warner Telecom of Florida, L.P.'s Petition for Leave 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 3rd day of May, 2006 to the following:

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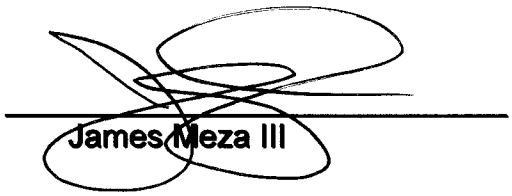
James Meza III

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 3, 2006

JOINT RESPONSE IN OPPOSITION TO TIME WARNER TELECOM OF FLORIDA, L.P.'S PETITION FOR LEAVE TO INTERVENE

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") respectfully oppose the petition of Time Warner Telecom of Florida, L.P. ("Time Warner") for leave to intervene in this matter.[1]

Time Warner has failed to even cite, much less 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 – a proceeding under which the Commission is considering the indirect transfer of control of the telecommunications facilities of BellSouth Telecommunications, Inc. resulting from the merger of its parent company, BellSouth

[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 Time Warner 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 (Fl. PSC Mar. 1, 2000) (denying Telecommunications Resellers Association's ("TRA") Motion for Leave to Intervene in MCI and Sprint merger proceeding). As such, Time Warner 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 (Fl. PSC Mar. 30, 2004) (refusing to consider a "memorandum in opposition" to response in opposition to a petition to intervene because the intervenors' filing was an "unauthorized reply to a response.")

Corporation, and AT&T pursuant to Section 364.33, Florida Statutes. Time Warner has not alleged a constitutional or statutory right or a Commission rule that entitles it to participate in this proceeding. Furthermore, it has failed completely to demonstrate that its substantial interests are subject to determination or will be affected by this proceeding. Indeed, Time Warner has not even alleged that the merger will affect BellSouth Telecommunications, Inc.'s existing obligations to it in any way (much less do so imminently), 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 existing interconnection agreement with Time Warner that existed prior to the merger.[2] Moreover, the merger will in no way affect this Commission's regulatory authority over BellSouth Telecommunications, Inc., nor its ability to enforce the terms of any agreements between Time Warner and BellSouth Telecommunications, Inc. that are subject to the Commission's jurisdiction. Simply put, the merger will have no impact on Time Warner, and Time Warner has not established, and cannot establish, otherwise.

Beyond that, Time Warner 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, Time Warner should not be permitted to intervene.

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[2] *See* Joint Application at 10.

Time Warner's petition is thus demonstrably without merit, and it can be understood as nothing other than an attempt to delay this Commission's consideration of this merger. It should be rejected forthwith.[3]

TIME WARNER 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 Time Warner has not alleged a constitutional or statutory right or a Commission rule that entitles it to participate in this proceeding, Time Warner'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[4] ("[W]e

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[3] As is evident from its deficient intervention petition, Time Warner either failed to review or ignored longstanding case law and Commission precedent on standing to intervene in a holding company level change of control proceeding under Section 364.33. In either case, Time Warner's claim is not supported by settled Florida law on standing, and in fact is devoid of material facts necessary to establish standing. Thus, Time Warner's filing is subject to sanctions under Sections 57.105 and 120.595, Florida Statutes. Were time not of the essence in this proceeding, the Joint Applicants would immediately seek sanctions against Time Warner. However, given the urgency of pending matter, the Joint Applicants seek now only to have the improper conduct noted for the record.

[4] 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*

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 (Fl. 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-TP (Fl. 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 the CWA lacked standing).

Under the *Agrico* test, a party has a substantial interest in the outcome of an administrative proceeding if: (1) it will suffer injury in fact that is of sufficient immediacy to entitle the petitioner to a Section 120.57 hearing,[5] *and* (2) the substantial injury is of a type or nature which 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). Time Warner bears the burden of demonstrating that it meets both prongs and therefore has standing to intervene in these proceedings. *See* Order No. PSC-00-0421-PAA-TP at 4-5. If Time Warner fails to make either showing under the *Agrico* test, its petition must fail. *Id.* at 5.

Application of MCI Worldcom, Inc. and Sprint Corp. for Acknowledgment or Approval of Merger, Docket No. 991799-TP (Fl. PSC Sept. 18, 2000). This, of course, has no bearing on the Commission's decision or reasoning in denying intervention.

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

This Commission has consistently applied the *Agrico* test to deny intervention in transfer of control proceedings involving telecommunications companies. For instance, in a case directly on point is the Commission's 1998 proceeding involving the MCI/WorldCom merger. GTE Communications Corporation 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.

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 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.[6]

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, Time Warner cannot satisfy the degree of injury prong of the *Agrico* test. As discussed above, Time Warner must 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. Time Warner attempts to meet this prong only by alluding to some "substantial interest" that it has in having BellSouth Telecommunications, Inc. adhere to its wholesale obligations, including "assurance of continued traffic exchange, access to interconnection and network elements at just and reasonable rates, terms and conditions, including special access, with adequate service quality metrics and performance incentives, and to regulatory dispute resolution processes, as well as parity in access

[6] 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-Florida and Sprint Payphone from Sprint-Nextel to LTD Holding Company pursuant to Section 364.33. In that decision, the Commission rejected the CWA's argument that the CWA had standing because the merger would result in degradation of service. Order No. PSC-06-0033-FOF-TP at 6. The Commission found that its approval of the transfer of control "affects Sprint, not CWA or its members." The Commission further found that even if the merger resulted in degradation of service, "the effects on CWA and its members would not be 'immediate." *Id.*

to buildings, pole attachments, ducts, conduit, rights-of-way, and other facilities and property interests." Petition ¶ 4.

What Time Warner does *not* do, however, is make any attempt to explain how this proceeding will affect these asserted interests. Time Warner does not and cannot explain how granting this Joint Application will cause concrete *injury* to these interests, much less does it allege an injury of sufficient immediacy to warrant a hearing under Section 120.57. It cannot do so because approving the Joint Application will not cause Time Warner any injury. That is because *this merger will not affect BellSouth Telecommunications, Inc's wholesale obligations under its interconnection agreements 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 agreements with Time Warner. Nor will the completion of the transaction 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 Time Warner will likewise be unaffected by the merger. *Cf.* Order No. PSC-06-0033-FOF-TP at 6 ("The changes contemplated by Sprint may have consequences, such as degradation of service, that may affect CWA or its members. But even assuming that this happens, the effects on CWA and its members will not be 'immediate.' This is not to deny that these effects, if they occur, can trace a ca[us]al chain back to the approval of Sprint's restructuring. Rather, it is to discern that the causal chain has too many links in it to view the downstream effects as 'direct' or 'immediate.'"); *Ameristeel*, 691 So. 2d at 477-78 (rejecting claims of economic detriments of

possible higher rates and resulting relocation of plant); *see also* Order No. PSC-00-0421-PAA-TP at 7 (collecting authorities).

Second, Time Warner'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. Time Warner's claim here is that the indirect transfer of control will somehow harm its competitive interests as a telecommunications carrier. Time Warner thus alleges that as a "*provider* of local telecommunications service in the State of Florida," it has interests in such things as assurance of continued traffic exchange and the network element rates that BellSouth charges. Petition ¶ 4 (emphasis added). As explained above, these asserted injuries are speculative at best and plainly insufficient to support intervention. Furthermore, even if Time Warner's vague allusions to competitive injuries were somehow to be deemed sufficiently immediate to warrant a hearing, those competitive injuries are not of a type or nature that a transfer of control proceeding is designed to protect.

Longstanding Commission precedent clearly establishes that a transfer of control proceeding under Section 364.33 is not intended to protect against competitive injuries that Time Warner asserts here. *See* Order No. PSC-00-0421-PAA-TP; Order No. PSC-98-0702-FOF-TP. This Commission has repeatedly stated in no uncertain terms that Section 364.33 "is *not* a merger review statute"; rather, the only question that Section 364.33 gives the Commission jurisdiction over in this proceeding is whether to approve "the transfer of control of telecommunications facilities *for the purpose of providing service to Florida consumers*." Order No. PSC-00-0421-PAA-TP at 5 (emphases added). As discussed above, because Section 364.33 does not protect competitor interests, this Commission rejected closely analogous intervention petitions filed by TRA and other competitors in prior transfer of control cases. *See id.*; *see also*

Order No. PSC-98-0702-FOF-TP (rejecting attempts of GTE and CWA to intervene to assert alleged injuries to competitors). Just as in those cases, Time Warner'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. By itself, that fact requires denial of Time Warner's petition.

In sum, the purported competitive injuries which Time Warner alludes to in its petition to intervene are purely speculative and are beyond the scope of this transfer of control proceeding in any event. Its petition is frivolous, blatantly ignores existing law, and can be understood only as an improper attempt to obtain delay. It should be denied.

CONCLUSION

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

Respectfully submitted, this 3rd day of May 2006,

FOR BELLSOUTH CORPORATION,
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