

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Application Pursuant to Section 214 of the)	
Communications Act of 1934 and)	
Section 63.04 of the Commission's)	WC Docket No. 06-74
Rules for Consent to the Transfer of)	DA 06-904
Control of BellSouth Corporation to)	
AT&T, Inc.)	

**EMERGENCY PETITION TO REQUIRE DISCLOSURE
OF PROHIBITED *EX PARTE* COMMUNICATION**

Pursuant to 47 C.F.R. § 1.1214, NuVox Communications and XO

Communications (hereinafter referred to as "Petitioners"), by their attorneys, hereby petition the Commission to order the disclosure of all communications that AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth") (jointly, the "Applicants") have made in the above-captioned proceeding since October 5, 2006. Specifically, the Petitioners respectfully request disclosure of purported "conditions" submitted by the Applicants that have been referenced in a recent news article, because such "conditions" constitute a substantive *ex parte* communication submitted after the record in this proceeding was to have closed in anticipation of the Commission's Agenda Meeting, and were submitted in violation of the Government in the Sunshine Act, codified at 5 U.S.C. § 552b, and the Commission's *ex parte* rules, 47 C.F.R. §§ 1200-1213.

BACKGROUND

The Commission has designated this proceeding as "non-restricted," such that the "permit-but-disclose *ex parte* procedures" of Rule 1.1206 will apply. *Commission Seeks*

Comments on Application for Consent to Transfer of Control Filed by AT&T, Inc. and BellSouth Corporation, WC Docket No. 06-74, DA 06-94 at 7 (Apr. 19, 2006). As demonstrated herein, the Commission's *ex parte* rules prohibit a party from filing information in this proceeding unless that information is placed in the public record.

Today, October 12, 2006, a news article was released quoting Robert Quinn, a "top company lawyer" at AT&T: "We have put a full set of conditions on the table that are reasonable and protect consumers. I want a deal with these guys; we want a 4-0 vote." See **Exhibit 1** ("AT&T offers concessions to get FCC OK on BellSouth").

The docket in this proceeding does not include any filing by either Applicant that would fit this description. Accordingly, counsel for the Petitioners, Tom Cohen, has contacted counsel for the Applicants to request that these purported "conditions" be produced to Petitioners and/or placed in the public record in this case. See **Exhibit 2** (Email from Tom Cohen, Kelley Drye & Warren LLP, to Joan Marsh and Robert Quinn (Oct. 12, 2006)). Applicants failed to respond to this request. *Id.*

ARGUMENT

Petitioners respectfully request that the Commission order the Applicants to file all *ex parte* presentations made since October 5, 2006, the date of the Sunshine Agenda notice, for public viewing. Petitioners make this request pursuant to Commission Rule 1.1214, which provides that

Any party to a proceeding or any Commission employee who has substantial reason to believe that any violation of this subpart has been solicited, attempted, or committed shall promptly advise the Office of General Counsel in writing of all the facts and circumstances which are known to him or her.

The Applicants' submission of any information in this docket without making it available to the public violates the Commission's *ex parte* rules. Rule 1.1206 states, in pertinent part, that "ex parte presentations are permissible ... provided that ex parte presentations to Commission decision-making personnel are disclosed pursuant to paragraph (b) of this section." 47 C.F.R. § 1.1206(a). Part (b) of that rule requires that "[a] person who makes a written ex parte presentation subject to this section shall, no later than the next business day after the presentation, submit two copies of the presentation to the Commission's secretary under separate cover for inclusion in the public record." *Id.* § 1.1206(b).

Rule 1.1204(a) lists several types of *ex parte* presentations that are exempt from these disclosure requirements, including a "presentation is requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence." 47 C.F.R. § 1.1204(a)(10). That exemption applies, however, only to proceedings that, as here, are not designated for hearing in which the Commission or its staff results in "new written information elicited from such request ... regarding the merits." *Id.* Importantly, any presentation to the Commission, if provided in response to a Commission request, must be disclosed if it results in "new information regarding the merits." Plainly the purported "conditions" that AT&T has proposed constitutes "new information on the merits," because Applicants believe they will affect the outcome of this proceeding and no other party to this proceeding can fathom what they are.

In addition, where, as here, a proceeding has been placed on the public agenda (a so-called "Sunshine Agenda"), Rule 1.1203 provides that no party may submit any further *ex parte* presentations. This proceeding was placed on the Sunshine Agenda on October 5, 2006.

Petitioners anticipate that the Applicants will oppose this Petition on the ground that the “conditions” referenced by Mr. Quinn constitute a communication in furtherance of settlement, and thus will invoke the exemption in Rules 1.1203 and 1.1204 related to “settlement negotiations” and “new information ... disclosed during settlement discussions.” That exemption, however, cannot operate here.

Commission precedent demonstrates that the concept of “settlement” is applicable only in the context of proceedings to enforce Commission rules. *E.g.*, *In re BellSouth Corp.*, File No. EB-00-IH-0134, FCC 00-389, Consent Decree ¶¶ 10-13 (Nov. 2, 2000); *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers*, CC Docket No. 96-238, Second Report and Order, FCC 98-154, 13 FCC Rcd. 17018 ¶ 28 (1998) (establishing Accelerated Docket). As described generally in Order FCC 98-154, “settlement discussions” are appropriate where the Enforcement Bureau has commenced a proceeding to investigate the conduct of a particular carrier. For example, *In re BellSouth* involved an Enforcement Bureau investigation into allegations that BellSouth had violated the Commission’s good faith negotiations requirement by unreasonably restricting access to cost data underlying its demanded rates for copper loops. BellSouth agreed to settle the case, promising compliance with conduct remedies involving its negotiation procedures and providing monetary consideration in the amount of \$750,000.

In brief, enforcement proceedings do not shape rules of general applicability, but rather entail the Commission’s investigation — through the Enforcement Bureau — of prior conduct by a particular party and carry the threat of individual sanction. Here, by contrast, the Wireline Competition Bureau is conducting a proceeding in which the public was invited to

comment on the public interest implications of the AT&T-BellSouth merger. The Applicants are under no threat of sanction, and the Commission is not accusing either company of malfeasance. Under these circumstances, the “settlement discussion” exemption to the Commission’s *ex parte* rules cannot apply.

The Applicants therefore should be ordered to file, within 24 hours as Rule 1.1206 requires, all materials evidencing so-called “conditions” that were filed in this proceeding.

October 12, 2006

Respectfully submitted,

**NUVOX COMMUNICATIONS
XO COMMUNICATIONS, INC., AND**

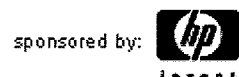
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EXHIBIT 1



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UPDATE 1-AT&T offers concessions to get FCC OK on BellSouth

Thu Oct 12, 2006 12:44 PM ET

(Adds FCC chairman comments, details, stock activity)

By Jeremy Pelofsky

WASHINGTON, Oct 12 (Reuters) - AT&T Inc. <T.N> wants unanimous approval from the U.S. Federal Communications Commission to acquire BellSouth Corp. <BLS.N> and has offered some concessions to the agency, a top company lawyer told Reuters on Thursday.

The FCC was scheduled to vote on the \$80.6 billion acquisition on Thursday. However, the vote was postponed until Friday while Republican FCC Chairman Kevin Martin tried to broker a deal on conditions sought by the two Democratic commissioners.

Martin had initially proposed approving the deal with no conditions, according to sources, but later offered one requiring the company to provide competitors access to at least 30 commercial buildings in BellSouth's territory so they can offer service.

"We have put a full set of conditions on the table that are reasonable and protect consumers," Robert Quinn, AT&T's senior vice president for regulatory affairs, told Reuters. "I want a deal with these guys; we want a 4-0 vote."

Quinn declined to elaborate on the conditions offered. He took the unusual step of pressing AT&T's case by attending an FCC commissioners' meeting that went forward with votes on other issues and did not address the merger.

While there are five FCC commissioners and the Republicans have a 3-2 majority, Republican Robert McDowell has said he does not plan to vote on the deal because he previously worked for a group that represented rivals to AT&T and BellSouth.

Martin could ask the FCC general counsel to allow McDowell to vote by arguing it would benefit the public interest. But for the moment, the FCC chairman has chosen to try to hammer out a compromise with the Democrats and the companies.

"I'm focused on trying to address the concerns that have been raised by the Democratic commissioners," Martin told reporters after the FCC meeting. "I can't make a prediction on the outcome."

Martin is scheduled to spend next week in Asia, heightening pressure to broker a deal quickly. The BellSouth acquisition would bolster AT&T's position as the top U.S. telecommunications provider.

The two Democrats, Jonathan Adelstein and Michael Copps, were infuriated that the Justice Department's antitrust division cleared the deal on Wednesday without any conditions, and they argued the FCC should conduct a more rigorous review.

"If they seriously engage with us, we can get there," AT&T's Quinn said.

Issues being debated at the FCC include Internet access, wireless airwaves that BellSouth owns and is using for high-speed Internet service, and prices for wholesale access to the networks by competitors to serve business customers.

Analysts at Stifel, Nicolaus & Co. said in a research note to clients that it was unclear whether the agency would vote on Friday and while the Democrats would likely extract some targeted conditions, they would not be overly harsh.

"We continue to expect the FCC to approve the current deal with conditions similar to last year's relatively modest ones," it said. "We remain skeptical the Republicans or the companies, which could facilitate a compromise, will agree to sweeping new requirements."

The delay and prospect of conditions did not seem to worry investors as both AT&T and BellSouth shares moved higher in midday trading on the New York Stock Exchange. AT&T was up 54 cents to \$33.50 while BellSouth rose 75 cents to \$44.19.

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EXHIBIT 2

Cohen, Thomas

From: Cohen, Thomas
Sent: Thursday, October 12, 2006 12:58 PM
To: 'Marsh,Joan Marie (Joan) - EXTAF'; 'rwquinn@att.com'
Subject: AT&T's Proposed Conditions in 06-74

Joan/Bob--In the news article from Reuters, it quotes Bob as saying that you placed a full set of conditions on the table. I would like to access them. When were these filed at the Commission?

Tom

http://today.reuters.com/news/articleinvesting.aspx?type=governmentFilingsNews&storyID=2006-10-12T150753Z_01_N12298624_RTRIDST_0_TELECOMS-BELLSOUTH-FCC.XML

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CERTIFICATE OF SERVICE

I, Courtenay P. Adams, hereby certify that, on this 12th day of October 2006, I caused a copy of the foregoing *Emergency Petition to Require Disclosure of Prohibited Ex Parte Communication* to be sent via electronic mail to the following individuals:

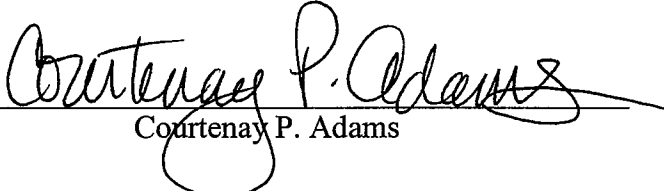
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