

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 27, 2006

IN RE:)	
)	
JOINT FILING OF AT&T INC. AND BELL SOUTH)	DOCKET NO.
CORPORATION TOGETHER WITH ITS)	06-00093
CERTIFICATED TENNESSEE SUBSIDIARIES)	
REGARDING CHANGE OF CONTROL OF THE)	
OPERATING AUTHORITY OF BELL SOUTH)	
CORPORATION'S TENNESSEE SUBSIDIARIES)	

**ORDER DENYING MOTIONS TO COMPEL DISCOVERY
OR STRIKE TESTIMONY OF WITNESSES**

This matter is before the Hearing Officer upon two discovery motions: *Motion of Intervenor Nuvox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Chattanooga, LLC and ITC^DeltaCom Communications Inc. d/b/a ITC^DeltaCom to Compel Responses to Discovery Requests or in the Alternative, to Strike the Testimony of Debra J. Aron and other BellSouth Witnesses Regarding Wireless Services as Irrelevant ("Joint Intervenor's Motion")* and *Motion of Intervenor Time Warner Telecom of the Mid-South, LLC and US LEC of Tennessee, Inc. to Compel Responses to Discovery Requests or, in the Alternative to Strike the Testimony of Debra J. Aron and other BellSouth Witnesses Regarding Wireless Services as Irrelevant ("Time Warner/US LEC Motion")* filed on June 19, 2006 and June 21, 2006, respectively. AT&T Inc. ("AT&T") and BellSouth Corporation and its Tennessee certificated subsidiaries (collectively "BellSouth") filed an *Opposition to Motion to Compel or Motion to Strike* in response to the *Joint Intervenor's Motion* on June 20, 2006.

AT&T and BellSouth filed their *Opposition to Motion to Compel or Motion to Strike of Time Warner Telecom and US LEC* on June 22, 2006. Upon reviewing the *Joint Intervenors' Motion* and the *Opposition thereto* and the *Time Warner/US LEC Motion* and *Opposition* filed thereto, together with the pertinent discovery requests and responses and pre-filed testimony, the Hearing Officer finds that the two motions to compel or strike are not well-founded and should be denied. This decision was announced to the parties during a telephonic status conference held on June 26, 2006.

Background

On March 31, 2006, the parties AT&T and BellSouth submitted the *Joint Filing of AT&T Inc., BellSouth Corporation and BellSouth's Certificated Tennessee Subsidiaries Regarding Change of Control ("Joint Filing")*. According to AT&T and BellSouth, the *Joint Filing* serves as notice to the Tennessee Regulatory Authority ("Authority") of the change of control of BellSouth Corporation, the parent of BellSouth's Tennessee certificated subsidiaries, to AT&T. The *Joint Filing* provides detailed information regarding the parties involved, a description of the transaction and a statement of public interest. At a regularly scheduled Authority Conference held on April 17, 2006, the voting panel assigned to this docket, Chairman Ron Jones, Director Pat Miller and Director Sara Kyle, appointed General Counsel or his designee to act as Hearing Officer for the purpose of preparing this matter for hearing and voted to adopt a proposed procedural schedule which provided for the conduct of discovery and the submission of pre-filed testimony.

The following parties were granted intervention: Time Warner Telecom of the MidSouth, LLC ("Time Warner"); NuVox Communications, Inc. ("NuVox"); Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC

(collectively “Xspedius”); the Communications Workers of America, AFL-CIO (“CWA”); ITC DeltaCom Communications, Inc. d/b/a ITC DeltaCom (“DeltaCom”); Dieca Communications, Inc. d/b/a Covad Communications Company (“Covad”); and US LEC of Tennessee, Inc. (“US LEC”). The parties in this docket have substantially followed the procedural schedule in issuing and responding to discovery requests and in the submission of pre-filed testimony. Discovery requests have been numerous and expansive and the production of documents has been voluminous.

The Motions to Compel Discovery or Strike Testimony

The focus of the two motions to compel or strike is aimed at one discovery request seeking specific information about Cingular wireless subscribers. The Request No. 13 was propounded to AT&T and BellSouth by the Joint Intervenor on May 19, 2006 as follows:

13. Please set forth the number of Cingular subscribers, by year, since 2000: (i) in Tennessee; (ii) in BellSouth’s footprint in Tennessee; (iii) in BellSouth’s 9-state region; (iv) in AT&T’s footprint in legacy SBC’s 13-state region; and (v) nationwide.

AT&T and BellSouth objected to the request in the following manner:

13. AT&T and BellSouth object to this Request on the grounds that it seeks information regarding wireless services. Such services are not within the jurisdiction of the TRA and consequently are not relevant to this proceeding. *See* 47 U.S.C. § 332(c)(3).

The *Joint Intervenor’s Motion* states that the information sought in the request is essential for the Intervenor to demonstrate that competition will be harmed by approval of the proposed merger and that withholding such information impairs the Intervenor’s ability to prepare adequate rebuttal testimony. The Joint Intervenor also argue that if AT&T and BellSouth are asserting that the information sought in the request is irrelevant to the proceeding, then any references to wireless services in the pre-filed testimony should be stricken as irrelevant.

The *Time Warner/US LEC Motion* seeks to compel a response to the same request for information as sought by the Joint Intervenors except that the request in their discovery is No. 29.

29. Please set forth the number of Cingular subscribers, by year, since 2000: (i) in Tennessee; (ii) in BellSouth's footprint in Tennessee; (iii) in BellSouth's 9-state region; (iv) in AT&T's footprint in legacy SBC's 13-state region; and (v) nationwide.

AT&T and BellSouth provided the same objection as follows:

29. AT&T and BellSouth object to this Request on the grounds that it seeks information regarding wireless services. Such services are not within the jurisdiction of the TRA and consequently are not relevant to this proceeding. *See* 47 U.S.C. § 332(c)(3).

Time Warner and US LEC argue that an analysis of the market is required if there is to be a determination as to whether the merger is anti-competitive and that such a market analysis must include consideration of the acquisition of wireless services through the merger. Time Warner and US LEC also argue that if wireless services are not relevant then references to such in the pre-filed testimony should be stricken.

AT&T and BellSouth responded that even though they considered that the request sought irrelevant information, counsel for AT&T provided to the Intervenors data regarding wireless subscribership in general and regarding Cingular subscribers in particular. AT&T's counsel was informed that the data was not sufficient. According to AT&T, its counsel's additional attempts to resolve the dispute were rejected. The Intervenors did not address AT&T's production of data or attempts to resolve the dispute in their motions or in any reply filing.

The Hearing Officer has reviewed the motions and responses together with discovery requests and the objections in question. In the first instance, the motions to compel come at a time late in the proceeding. The objections of AT&T and BellSouth had been lodged for nearly

one month before any Intervenor filed a motion to compel responses. The motions to compel were filed after rebuttal pre-filed testimony was submitted. The motions were filed more than a week after the parties had agreed to the hearing dates and after the Hearing Officer had noticed the matter for hearing based on that agreement. The first motion to compel was filed less than 10 days before the hearing and the second motion to compel was filed only seven days before the start of the hearing. The significance of the information sought by the Intervenors appears diminished in consideration of the lack of attention paid to its production.

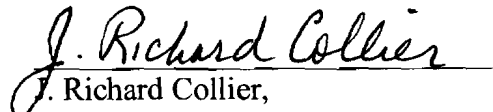
The Hearing Officer finds that although the basis for the objection (lack of relevancy because of lack of jurisdiction) is more of a technical objection rather than a substantive objection, the Intervenors do not overcome the objection by their explanations of the need for the information. The Joint Intervenors claim that rebuttal testimony could not be prepared without the information. Nevertheless, their rebuttal testimony was prepared without the information and it was prepared before the information was sought through a motion to compel. Indeed, the rebuttal testimony filed by the Joint Intervenors, that of Joseph Gillan, discounts the import of wireless services in looking at competition in the business market. The Intervenors assert that the subscribership information of Cingular is essential to a marketplace analysis. Nevertheless, the Intervenors provide no explanation as to how information about Cingular subscribership, in the absence of information of other wireless subscribers will develop a market picture regarding competition.

Upon reviewing the portions of Debra Aron's testimony that the Intervenors are seeking to strike, some of the references to wireless services are general references in the context of other services that are available to consumers. Other portions of her testimony at issue actually provide some of the information sought in the discovery request. Still, other portions of the

testimony are self-explanatory as to the references therein to wireless services. In short, the Intervenor through their requests and motions have not presented a convincing argument regarding the need for this information in order to prepare or present their cases regarding the merger of AT&T and BellSouth. The discovery requests seek information regarding Cingular subscribership and yet the Intervenor seeks to strike testimony referring to any wireless services or wireless services in general. Further, such information was not provided or sought in other states where the merger is being reviewed. The delay in pursuing the information in this docket speaks to the low level of importance of the information in the total picture of consideration of the merger.

IT IS THEREFORE ORDERED THAT

1. The Motion to Compel or Strike filed by the Joint Intervenor on June 19, 2006 is denied.
2. The Motion to Compel or Strike filed by Time Warner and US LEC on June 21, 2006 is denied.


J. Richard Collier,
Hearing Officer