

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
AT&T Inc. and BellSouth Corporation)	
Application for Transfer of Control)	WC Docket No. 06-74
)	
Petition for Reconsideration filed by)	
Michael Lovern, Sr.)	

MEMORANDUM OPINION AND ORDER

Adopted: October 7, 2008

Released: October 10, 2008

By the Commission: Commissioner McDowell not participating.

I. INTRODUCTION

1. In the *AT&T/BellSouth Merger Order*,¹ the Commission granted a series of transfer of control applications that AT&T Inc. (AT&T) and BellSouth Corporation (Legacy BellSouth) (collectively, the Applicants) had filed in connection with their merger. In this Order, we deny a “Petition for Reconsideration” that Michael Lovern, Sr. (Mr. Lovern) filed regarding that *Order*.² We conclude that Mr. Lovern’s pleading does not meet our procedural requirements for a petition for reconsideration and otherwise lacks merit.

II. BACKGROUND

2. The Commission adopted the *AT&T/BellSouth Merger Order*, granting AT&T and Legacy BellSouth’s applications, on December 29, 2006. By its terms, that order was effective upon adoption;³ and the News Release announcing the adoption of that order reiterated that effective date.⁴ AT&T and BellSouth closed their merger on December 29, 2006.⁵ The Commission subsequently released the

¹ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) (*AT&T/BellSouth Merger Order*), Order on Reconsideration, 22 FCC Rcd 6285 (2007) (*AT&T/BellSouth Merger Reconsideration Order*).

² Michael Lovern, Sr., Petition for Reconsideration, WC Docket No. 06-74 (filed Jan. 26, 2007) (Lovern Petition).

³ *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5773, para. 230.

⁴ *FCC Approves Merger of AT&T Inc. and BellSouth Corporation*, WC Docket 04-74, News Release, at 3 (rel. Dec. 29, 2006).

⁵ See Letter from Wayne Watts, Senior Vice President and Associate General Counsel, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-74, at 1 (filed Jan. 29, 2007) (AT&T Jan. 29, 2007 *Ex Parte* Letter).

AT&T/BellSouth Merger Order on March 26, 2007. The order states that petitions for reconsideration of it “may be filed within 30 days” of the order’s public notice date.⁶

3. On January 26, 2007, Mr. Lovern filed a pleading styled as a “Petition for Reconsideration.”⁷ In this pleading, Mr. Lovern argues that the Commission’s vote approving that merger was invalid because the public record in the merger proceeding did not include certain documents that Mr. Lovern assertedly had filed with the Commission.⁸ Mr. Lovern also contends that the Applicants acted improperly in closing their merger prior to the release of a Commission order approving the merger.⁹ Mr. Lovern requests that the Commission: (a) reevaluate the merger after reviewing the missing documents; (b) order AT&T to relinquish control of BellSouth’s assets pending the completion of all Commission and appellate review of that merger; (c) stay all orders in this proceeding pending completion of that review; and (d) schedule hearings as to what happened to the missing documents.¹⁰

III. DISCUSSION

A. Procedural Issues

4. As an initial matter, we conclude that Mr. Lovern incorrectly styled his pleading as a “Petition for Reconsideration.” The *AT&T/BellSouth Merger Order* is a “final Commission action” within the meaning of our rules.¹¹ Under section 1.106(f) of our rules, petitions for reconsideration of such an action must be filed “within 30 days from the date of public notice of the final Commission action, as that date is defined in § 1.4” of our rules.¹² We construe this language as establishing a filing window within which a petition for reconsideration must be filed in order to be considered timely.¹³

⁶ *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5773, para. 230.

⁷ Lovern Petition at 1. AT&T filed an opposition to this petition on February 5, 2007, and filed a corrected copy of its opposition on February 6, 2007. Mr. Lovern filed a reply on February 12, 2007.

⁸ *Id.* at 4-5.

⁹ *Id.* at 5-6.

¹⁰ *Id.* at 6.

¹¹ See 47 C.F.R. § 0.5(d); see also 47 C.F.R. § 0.5(a)-(c) (pointing out that the Commission has delegated authority to address certain types of matters to various organizational units within the agency). Therefore, the effective date of that order is determined pursuant to section 1.103(a) of our rules, rather than section 1.102 of our rules as Mr. Lovern asserts. Compare 47 C.F.R. § 1.103(a) (setting forth procedures for determining the effective dates of Commission actions) with 47 C.F.R. § 1.102 (setting forth procedures for determining the effective dates of actions the Commission’s organizational units take pursuant to delegated authority); see also Lovern Petition at 2-3; Lovern Reply at 6-7.

¹² 47 C.F.R. § 1.106(f); see also *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5773, para. 230 (stating that “[p]etitions for reconsideration under section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, may be filed within 30 days of the date of public notice of this Order”).

¹³ See *Council Tree Communications v. FCC*, 503 F.3d 284, 287-91 (3rd Cir. 2007) (holding that a statutory provision that requires a petition for review of a Commission order to be filed “within 60 days after . . . entry” of the order establishes a filing window, not a filing deadline); *Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 377-78 (D.C. Cir. 1985) (same); see also *Horsehead Resource Development Co. v. EPA*, 130 F.3d 1090 (D.C. Cir. 1997)

(continued....)

5. The *AT&T/BellSouth Merger Order* also is a “non-rulemaking” order under our rules. Section 1.4(b)(2) of our rules makes clear that the date of public notice of such an order is its release date.¹⁴ Mr. Lovern’s pleading was filed prior to the release date of the *AT&T/BellSouth Merger Order* and thus outside the window that section 1.106(f) establishes for filing a timely petition for reconsideration.¹⁵ Mr. Lovern, moreover, provides no reason that might excuse his filing a petition for reconsideration outside that filing window. We therefore do not treat Mr. Lovern’s pleading as a petition for reconsideration. Moreover, as discussed below, even if the petition had been timely filed, we would still reject it on its merits.¹⁶

6. Mr. Lovern’s pleading also is procedurally defective to the extent it requests that we stay the *AT&T/BellSouth Merger Order* and our other orders in this proceeding.¹⁷ Our rules require that any request for stay be filed as a separate pleading.¹⁸ Mr. Lovern did not comply with that rule. We therefore deny his stay request. Mr. Lovern, moreover, has made no attempt to satisfy the requirements for a stay.¹⁹ We therefore would reject his stay request even if he had filed it as a separate pleading.

B. Substantive Issues

7. Although we deny Mr. Lovern’s petition based on the procedural defects discussed above, we have discretion to address that petition on its merits. We exercise this discretion in order to clarify that Mr. Lovern’s arguments do not undermine our decision to grant AT&T’s and BellSouth’s merger applications.

8. On October 24, 2006, Mr. Lovern filed, as his comments in the *AT&T/BellSouth Merger* proceeding, a copy of a brief that he previously had filed with the United States District Court for the District of Columbia in connection with the prior mergers between SBC Communications, Inc. (SBC)

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(holding that a statutory provision that requires a petition for review of an agency action promulgating a regulation to “be filed within ninety days from the date of such promulgation” establishes a filing window, not a filing deadline, for seeking judicial review).

¹⁴ 47 C.F.R. § 1.4(b)(2).

¹⁵ See *Council Tree Communications v. FCC*, 503 F.3d at 284, 287-91 (3rd Cir. 2007) (finding “incurably premature” a petition for review of a Commission order that had been filed prior to the order’s public notice date).

¹⁶ See *infra* part III.B.

¹⁷ See Lovern Petition at 4, 6-7.

¹⁸ See 47 C.F.R. §§ 1.43 (stating that section 1.44(e), among other provisions, sets forth “[g]eneral rules relating to requests for stay”); 47 C.F.R. § 1.44(e) (requiring that “[a]ny request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading” and that “[a]ny such request which is not filed as a separate pleading will not be considered by the Commission”); see also, e.g., *Applications of Hispanic Information and Telecommunications Network, Inc., for a New Educational Broadband Service Station on the A Group Channels at Anderson, Indiana, et al.*, File No. BPIF-19951016BR, et al., Memorandum Opinion and Order, 20 FCC Rcd 5471, 5479, para. 24 (2005) (declining to consider a stay request that was not filed as a separate pleading).

¹⁹ See, e.g., *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

and AT&T and between Verizon Communications Inc. (Verizon) and MCI, Inc. (MCI).²⁰ Mr. Lovern's comments, like certain other comments filed in the AT&T/BellSouth Merger proceeding, sought to use unresolved disputes regarding the Applicants to raise concerns about the Applicants' character.²¹ In the *AT&T/BellSouth Merger Order*, the Commission concluded that none of these comments provided "a basis for finding that AT&T lack[ed] the fitness to acquire licenses and authorizations currently held by BellSouth or that BellSouth lack[ed] the fitness to transfer the licenses."²²

9. Mr. Lovern now contends, in effect, that the Commission's decision to approve the AT&T/BellSouth merger was fundamentally flawed because the record before the Commission when it made that decision did not include certain documents he assertedly had filed with the Commission.²³ We disagree. The allegedly missing documents consist of four exhibits that apparently had been attached to Mr. Lovern's District Court brief at the point when he filed it with the District Court, but which are not attached to the copy of the brief in the record in this proceeding.²⁴ The purpose of these exhibits, according to Mr. Lovern, was to prove the allegations in his brief.²⁵ The brief, in turn, was intended to persuade the District Court to address certain "personal claims" that Mr. Lovern has against the Bell Operating Companies (BOCs) "prior to ruling on the [then] proposed [SBC/AT&T and Verizon/MCI] mergers."²⁶

10. Mr. Lovern's claims, and consequently any documents or testimony that might be submitted to substantiate them, provide no basis for denying AT&T's and Legacy BellSouth's merger applications.²⁷ Mr. Lovern's claims relate to a long-running dispute he has had with the Bell Operating Companies (BOCs) and Legacy AT&T (*i.e.*, AT&T prior to its merger with SBC) arising from the design and operation of the BOCs' billing and collection systems. Mr. Lovern makes no allegation that the BOCs' or Legacy AT&T's conduct violated the Communications Act or any Commission rule. Instead, the alleged conduct appears to constitute possible non-FCC related misconduct. As we stated in the *AT&T/BellSouth Merger Order* regarding such misconduct, in deciding character issues, we "will consider certain forms of *adjudicated*, non-FCC related misconduct, that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or

²⁰ See Letter from Michael Lovern, Sr. to Marlene Dortch, Secretary, FCC, WC Docket No. 06-74, at Attach. (filed Oct. 24, 2006) (Lovern Comments).

²¹ See Lovern Comments *passim*.

²² *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5757-58, para. 194.

²³ Lovern Petition at 4-5; Lovern Reply at 2-5.

²⁴ Lovern Petition at Attach., p. 1.

²⁵ *Id.*; Lovern Reply at 4.

²⁶ Lovern Comments at 23.

²⁷ *Cf. United States v. SBC Communications, Inc. and AT&T Corp.*, 2007 WL 1830866, slip op. at 2 n.3 (D.D.C. 2007) (holding that Mr. Lovern's brief sought to "raise issues outside the scope of the Tunney Act proceedings" before the District Court); see also *Michael Lovern Sr.'s First Amendment to His Pending Petition for Reconsideration Based on New Evidence; and Request for an Immediate Hearing* (filed July 10, 2008) (requesting an evidentiary hearing regarding Mr. Lovern's allegations against AT&T).

other laws protecting competition.”²⁸ Mr. Lovern, however, makes no claim that his allegations ever have been adjudicated. Even if they had been adjudicated, we again would find that none of Mr. Lovern's allegations provide any basis for denying AT&T's and Legacy BellSouth's merger applications.²⁹ We accordingly reject Mr. Lovern's request that we reevaluate our decision to approve those applications.³⁰

11. We also reject Mr. Lovern's request that we order AT&T to relinquish control of BellSouth's assets pending the completion of all Commission and appellate review of that merger.³¹ The *AT&T/BellSouth Merger Order* granted AT&T authority to assume control of Legacy BellSouth's Commission authorizations and licenses. Mr. Lovern presents no persuasive argument for revoking that grant. Moreover, contrary to Mr. Lovern's position,³² the Commission acted within its statutory authority and consistently with its rules in allowing AT&T and Legacy BellSouth to consummate their merger prior to the release of an order approving that merger.³³

12. We decline to schedule a hearing on the circumstances surrounding the missing exhibits, as Mr. Lovern urges.³⁴ Such a hearing would not affect the Commission's decision to approve AT&T's and Legacy BellSouth's merger applications, for the reasons described above.³⁵ “The decision of whether or not hearings are necessary or desirable is a matter on which the Commission's discretion is paramount.”³⁶

²⁸ *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5756, para. 191 (emphasis added); *accord Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20092-93, para. 236 (1997) (*Bell Atlantic/NYNEX Order*).

²⁹ *AT&T/BellSouth Merger Order*, 22 FCC Rcd at 5756-58, paras. 190-94.

³⁰ We note that Mr. Lovern has always been free to submit copies of the allegedly missing exhibits for inclusion in the record in this proceeding. See *Commission Seeks Comment on Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation*, WC Docket No. 06-74, Public Notice, at 7 (June 30, 2006) (establishing “permit-but-disclose *ex parte* procedures” for the AT&T/BellSouth Merger proceeding). Despite this fact, Mr. Lovern has not submitted such copies even though he sent the Commission or individual Commissioners several letters regarding the AT&T/BellSouth merger after discovering that those exhibits were not included in that record. See Lovern Reply at 3; see also Lovern Petition at Attach.

³¹ Lovern Petition at 6.

³² *Id.* at 1, 5-6; Lovern Reply at 5-10.

³³ See *Washington Association for Television and Children v. FCC*, 665 F.2d 1264, 1273 n.24 (D.C. Cir. 1981) (stating that “[w]e are unconvinced that the statute requires a written order” before the Commission's approval of a transfer of control application becomes effective); 47 C.F.R. § 1.103 (stating that for any Commission action, “the Commission may designate an effective date that is . . . earlier . . . in time than the date of public notice of such action”).

³⁴ See Lovern Petition at 6; Lovern Reply at 12.

³⁵ See *United States v. FCC*, 652 F.2d 72, 95 (D.C. Cir. 1980) (en banc) (affirming the Commission's decision not to hold “[a]n evidentiary hearing where it ‘would be a mere waste of time, since it would not aid in, nor change,’ the result”).

³⁶ *SBC Communications Inc. v. FCC*, 56 F.3d 1484, 1496 (D.C. Cir. 1995) (quoting *Gencom Inc. v. FCC*, 832 F.2d 171, 180 (D.C. Cir. 1987)) (internal citations omitted).

Here, the requested hearing would require expenditure of Commission resources without any potential impact on the Commission's analysis in the *AT&T/BellSouth Merger Order*. We therefore find that an evidentiary hearing is neither necessary nor desirable.³⁷ We note that Mr. Lovern, in his subsequent filings, has not included the allegedly missing exhibits, even though he has always been free to submit copies of them for inclusion in the record.³⁸ We also find no evidence that those exhibits were attached to Mr. Lovern's comments at the point he filed his comments with the Commission.³⁹

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 214, 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214, 309, 310(d), section 2 of the Cable Landing License Act, 47 U.S.C. § 35, Executive Order No. 10530, and sections 1.4, 1.41, 1.44(e), and 1.106 of the Commission's rules, 47 C.F.R. §§ 1.4, 1.41, 1.44(e), 1.106, that the "Petition for Reconsideration" filed January 26, 2007 by Michael Lovern, Sr. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ See *SBC Communications Inc. v. FCC*, 56 F.3d at 1496-97.

³⁸ See *supra* n.30.

³⁹ See AT&T Opposition at 2 (pointing out that Mr. Lovern has failed to proffer a copy of his comments, with exhibits, bearing a date-stamp from the Commission Secretary's office as proof that the allegedly missing exhibits were, in fact, attached to those comments as filed).