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September 9, 2002

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VIA HAND AND ELECTRONIC MAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room
Washington, D.C. 20554

Re: BellSouth Multi-State Section 271 Application
WC Docket No. 02-150 -- Ex Parte Notification and Written Ex Parte

Dear Ms. Dortch:

On Friday, September 6, 2002, Bo Russell and Jerry Willis of NuVox, and I, serving as counsel to NuVox Communications, Inc., participated in an *ex parte* conference call with Tamara Preiss, Joshua Swift and Dick Kwiatkowski of the Commission's Wireline Competition Bureau in the above-referenced docket telephonically. During this call, NuVox discussed its assertion that BellSouth fails to provide cost-based access to interconnection in violation of the FCC's *Local Competition Order*, Sections 251(c)(2), 252(d)(1) and 271(c)(2)(B)(1) of the Act, and FCC Rules 51.305(a)(3), 51.309(b), 51.503(b) and (c), and 51.505. NuVox raised these allegations in its initial comments filed jointly with KMC on July 11, 2002 and then responded to BellSouth reply comments and a reply affidavit addressing these allegations in a written *ex parte* filed with the Commission on August 29, 2002.

The issue raised by NuVox involves all interconnection trunks and is not limited to transit trunks. During the call, NuVox described the interconnection trunks and facilities

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Marlene H. Dortch, Secretary
September 9, 2002
Page Two

employed to connect its network with BellSouth's. In particular, NuVox explained that BellSouth's practice of refusing to provide cost-based access to interconnection extended to all interconnection trunks and facilities, and is in no way limited to those (relatively few) trunks and facilities dedicated to transit traffic.

The issue is an "interconnection" issue and is not a dispute over per minute "access charges" vs. "reciprocal compensation". NuVox also explained that the issues raised by it are "interconnection issues" (checklist item i) and not traffic-sensitive "transport and termination" issues (checklist item xiii). The charges at issue are not per minute "access charges", "reciprocal compensation" or "intercarrier compensation", rather, what is at issue is BellSouth's imposition of non-cost-based tariffed rates for trunks and facilities deployed to carry traffic between the NuVox and BellSouth networks.

On paper, BellSouth's interconnection billing practice is unlawful and in practice, BellSouth maximizes its anticompetitive impact. NuVox also explained how BellSouth's scheme of jurisdictional factors-based ratcheted interconnection billing works in theory and walked through BellSouth's documentation of the practice which consists of a model interconnection agreement, a web-posted guide and several carrier notification letters. Notably, the paper that the practice does not appear on is the NuVox/BellSouth interconnection agreement and many others that pre-date BellSouth's unilateral adoption of the practice with respect to NuVox and an unknown number of other CLECs.

NuVox also underscored that, in practice, BellSouth's scheme of jurisdictional factors-based ratcheted interconnection billing works very differently, with BellSouth artificially manufacturing factors designed to maximize application of non-cost-based rates to interconnection trunks and facilities. In particular, NuVox highlighted BellSouth's use of a "0% PLF default factor" which is contrary to BellSouth's own web-posted and tariffed default factor policies. NuVox also explained that it is difficult to detect and track BellSouth's imposition of its unlawful scheme because of the complexity of BellSouth's bills and the resource requirements it would take to conduct monthly wholesale manual audits of BellSouth's bills.

This problem is not limited to NuVox. NuVox explained that BellSouth's denial of cost-based interconnection was not limited to NuVox. Several other carriers, including KMC, AT&T and NewSouth, have raised the issue in this proceeding. NuVox also stated that it is aware of other carriers impacted by the issue but pointed out that there could be any number of reasons for them not filing in this proceeding. NuVox explained that some may be negotiating with BellSouth and some may not be inclined to file in an FCC 271 proceeding because of issues regarding resources or individual carriers' assessments of whether such filings are the best use of scarce resources. NuVox also stated that the problem easily could be one that other CLECs would not have detected or recognized.

Marlene H. Dortch, Secretary
September 9, 2002
Page Three

Checklist compliance in practice matters – the Commission should not reward BellSouth based on the view that it or some state commission can compel compliance at some point in the future. During most of the call, NuVox defended its position that the FCC can and should do something about this problem in this docket. In this docket, NuVox has asserted that BellSouth fails to provide cost-based access to interconnection in violation of the *Local Competition Order*, Sections 251(c)(2), 252(d)(1) and 271(c)(2)(B)(1) of the Act, and FCC Rules 51.305(a)(3), 51.309(b), 51.503(b) and (c), and 51.505. BellSouth does not deny that it refuses to provide cost-based access to interconnection to NuVox and others via its practice of ratcheted interconnection billing based on jurisdictional factors imported from the transport and termination arena into the interconnection arena. It also has not explained why its interconnection billing practices do not violate the rules and provisions of the Act cited by NuVox.

Instead, BellSouth points the Commission to a web-posted Jurisdictional Factors Reporting Guide and web-posted carrier notification letters that introduce its practice of applying a “PLF” and other factors to interconnection billing and purport to apply it to all interconnecting carriers, regardless of whether it is reflected in BellSouth’s interconnection agreements.¹ Thus, BellSouth has adopted this policy and applies it, regardless of whether it is included in individual interconnection agreements. BellSouth’s current standard interconnection agreement includes the practice, while NuVox’s agreement and those based on it, do not. Indeed, as NuVox explained during today’s call, earlier this year, BellSouth proposed to NuVox a written interconnection agreement amendment incorporating the practice and NuVox declined.

Thus, the situation here is distinguishable from that addressed by the Commission in the Texas 271 proceeding, regarding the availability of a single point of interconnection. There the Commission determined that SBC complied with checklist item i, because a single point of interconnection was available in MCI’s agreement – and others theoretically could side-step SBC’s attempts to deny them such access via a Section 252(i) into that part of the MCI agreement. Here, BellSouth does not point to an interconnection agreement under which it does not impose its unlawful scheme of ratcheted interconnection billing (if it did, it should point to the NuVox/BellSouth interconnection agreement). Instead, BellSouth points the Commission to a web-posted Guide and carrier notifications that purport to make the unlawful scheme and

¹ The only legal argument supplied by BellSouth (to this Commission) in defense of its practice – a reference to a paragraph in the Commission’s now remanded *Order on Remand regarding reciprocal compensation for ISP-bound traffic* – holds no water. In the text quoted by BellSouth, the Commission relied on Section 251(g) as a means of taking ISP-bound traffic outside the scope of reciprocal compensation obligations contained in section 251(b)(5). Notably, the Commission did not there use section 251(g) to create an exemption from BellSouth’s obligation to provide cost-based interconnection. Nevertheless, the US Court of Appeals for the DC Circuit firmly rejected the Commission’s section 251(g) analysis, and the Commission has since acknowledged as much. See *FCC Virginia Arbitration Award*, DA 02-1731, ¶ 245 (July 17, 2002)(citing *WorldCom, Inc. v. FCC*, 288 F.3d 429 (DC Cir. 2002)).

Marlene H. Dortch, Secretary
September 9, 2002
Page Four

associated reporting requirements “contractual obligations”. Although the NuVox/BellSouth interconnection agreement includes no reference to BellSouth’s unlawful scheme, BellSouth applies it anyway. Thus, BellSouth does not “offer” to comply with its checklist item obligation in the same limited fashion that SBC did in Texas. In practice, BellSouth simply refuses to meet its checklist item obligation – regardless of the language contained in its interconnection agreements. Indeed, there does not appear to be any interconnection agreement into which NuVox can opt-in to in order to avoid being denied cost-based interconnection by BellSouth.²

Despite these facts and NuVox’s unchallenged legal analysis, NuVox spent a good deal of time and energy explaining why this matter is not one best characterized as a simple interconnection dispute³ and left to resolution in one or multiple complaint proceeding(s). As stated above and in its August 29, 2002 *ex parte*, NuVox has alleged violations of the FCC’s *Local Competition Order*, Sections 251(c)(2), 252(d)(1) and 271(c)(2)(B)(1) of the Act, and FCC Rules 51.305(a)(3), 51.309(b), 51.503(b) and (c), and 51.505 in this docket. It seems inconceivable that the Commission could find in favor of BellSouth based on the facts and law presented. The record – including BellSouth’s reply comments and affidavits – demonstrates that BellSouth is unwilling to comply with federal law governing interconnection. Given the facts on the record and the law, BellSouth does not warrant a passing grade on checklist item i until it remedies the problem and abandons its unlawful scheme of jurisdictional factors-based ratcheted interconnection billing.

During the call, it was suggested that BellSouth would be in compliance with item i of the checklist, if it were forced to abide by the terms of its interconnection agreement, as a result of complaint proceedings filed by NuVox. While NuVox’s issues would certainly be addressed at that unknown point in time, such a proceeding or proceedings would not address BellSouth’s current compliance – and that is what must be judged in this proceeding. As of the date its application was filed and through this day, BellSouth was not and is not in compliance with the checklist. NuVox, KMC, AT&T and NewSouth have raised this issue and the record shows that its impact is not limited to these carriers.

Moreover, favorable resolution of a future complaint or multiple complaints by NuVox would not address BellSouth’s practice of imposing this regime on other carriers unilaterally through web-postings and of incorporating it into its model agreement. Must each CLEC file complaints on this issue? Will the FCC’s enforcement bureau entertain them, or will CLECs be

² Notably, the NewSouth/BellSouth interconnection agreement, executed nearly a year after the NuVox/BellSouth interconnection agreement, includes BellSouth’s scheme of jurisdictional factors-based ratcheted interconnection billing. It does not appear that NewSouth can opt-out of regime by invoking the section 252(i) opt-in process, because BellSouth appears to impose its scheme of jurisdictional factors-based ratcheted interconnection billing, regardless of the language contained in the interconnection agreement.

³ In its reply comments and reply affidavits, BellSouth characterized this as an interconnection agreement dispute without citing to any particular provision of the NuVox/BellSouth interconnection agreement that governs.

Marlene H. Dortch, Secretary
September 9, 2002
Page Five

forced to take their complaints before nine different state commissions? Will CLECs have to arbitrate multiple times in order to avoid imposition of the scheme – or will BellSouth continue to impose it, regardless of contract terms?

NuVox also asserted that BellSouth was likely challenge any regulator's authority to address the issue in any context. BellSouth most certainly will assert that the Commission cannot address interconnection agreement disputes and that the states cannot address FCC rules or its imposition of federally tariffed rates.⁴ Should the Commission condone and promote BellSouth's regulatory gamesmanship and war of attrition?

There is a simple, fair and efficient answer to all of these questions and that is for the Commission to make BellSouth decide which it wants more: 271 authority or the continued denial of cost-based interconnection to NuVox and other competitors. If it's going to be the latter, then the Commission should deny section 271 authority until BellSouth voluntarily complies with the Act, the Commission's rules and the *Local Competition Order*, or is forced to, as a result of a complaint proceeding before the Commission or multiple proceedings before the states.

If NuVox must file a complaint proceeding to have this Commission demand compliance with and enforce its rules, NuVox is prepared to martial the resources to do so. But it would be a very perverse result for the Commission to find BellSouth to be in compliance with its checklist obligations before favorable resolution of such a complaint, when the record demonstrates no current compliance and merely suggests that BellSouth could comply, if it honored the terms of its interconnection agreements with NuVox and others, and amended its model interconnection agreement and web-posted policies.

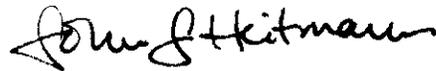
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⁴ In this regard, it is also notable that BellSouth characterized this as an interconnection agreement dispute without citing to any particular provision of the NuVox/BellSouth interconnection agreement that governs.

Marlene H. Dortch, Secretary
September 9, 2002
Page Six

In accordance with Section 1.1206 of the Commission's rules, an original and one copy of this letter is being filed with your office. If you have any questions concerning this filing, please do not hesitate to contact me.

Respectfully submitted,



John J. Heitmann

JJH/cpa

cc: Christopher Libertelli
Matthew Brill
Daniel Gonzalez
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