

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

ORIGINAL

SECRETARY  
COPY

FACSIMILE

(202) 955-9792

www.kelleydrye.com

ORIGINAL

RECEIVED

SEP 16 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

NEW YORK, NY  
TYSONS CORNER, VA  
LOS ANGELES, CA  
CHICAGO, IL  
STAMFORD, CT  
PARSIPPANY, NJ  
BRUSSELS, BELGIUM  
HONG KONG  
AFFILIATE OFFICES  
BANGKOK, THAILAND  
JAKARTA, INDONESIA  
MANILA, THE PHILIPPINES  
MUMBAI, INDIA  
TOKYO, JAPAN

VIA ELECTRONIC MAIL

Mr. William Maher  
Chief, Wireline Competition Bureau  
Federal Communications Commission  
445 12th St., SW  
Washington, DC 20554

Ms. Tamara L. Preiss  
Chief, Pricing Policy Division, Wireline Competition Bureau  
Federal Communications Commission  
445 12th St., SW  
Washington, DC 20554

Re: **BellSouth Multi-State Section 271 Application, WC Docket No. 02-150**  
**Ex Parte**

Dear Mr. Maher and Ms. Preiss:

On behalf of NuVox Communications, Inc. ("NuVox"), I am writing in response to BellSouth's September 13, 2002 *ex parte* by Ernest Bush ("Bush Letter") in the above-referenced docket which introduces into the record various arguments (some for the first time) intended to justify BellSouth's denial of cost-based interconnection to NuVox and other CLECs in violation of checklist item i. BellSouth's September 13, 2002 *ex parte* demonstrates that it is at best terribly confused about the issue raised by NuVox - compliance with checklist item i,<sup>1</sup>

<sup>1</sup> BellSouth, however, apparently now understands that NuVox has raised checklist compliance and not a billing dispute in this docket. On Friday, NuVox and BellSouth reached an agreement in principle, subject to incorporation into and execution of a confidential settlement agreement, regarding the billing dispute over cost-based interconnection under the NuVox/BellSouth interconnection agreement. NuVox is not planning to withdraw any of its pleadings in this docket. Indeed, NuVox will continue to make the arguments it has made in this proceeding now and, if necessary, in future regulatory proceedings. However, NuVox would very much prefer not to have to raise the cost-based interconnection issue again in future section 271 proceedings or in arbitration

Mr. William Maher, Chief, Wireline Competition Bureau  
Ms. Tamara L. Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau  
September 16, 2002  
Page Two

Commission precedent regarding CLECs' rights to cost-based interconnection, and the facts. Section 271(c)(2)(B)(1) requires BellSouth to provide cost-based access to interconnection trunks and facilities in accordance with sections 251(c)(2) and 252(d)(1). As the Commission has long held, interconnection is distinct from regimes governing compensation for traffic that flows between carriers on interconnection trunks. Thus, the issue here is about the facilities and not the "traffic" that flows through them.<sup>2</sup>

### **The Standard Nine State Agreement and SGATs Provide No Refuge**

BellSouth asserts that its Standard Nine State Agreement, as well as several others that incorporate the jurisdictional factors-based ratcheted interconnection billing scheme are available for opt-in by NuVox.<sup>3</sup> As demonstrated in NuVox's September 13, 2002 *ex parte*, BellSouth's Standard Nine State Agreement and SGATs<sup>4</sup> unlawfully limit BellSouth's offer of cost-based interconnection by offering cost-based rates only to the extent such trunks and facilities are used for the exchange of local traffic (which is an imprecise term that easily could be manipulated by BellSouth). Thus, neither BellSouth's Standard Nine State Agreement nor SGAT offer interconnection at cost-based rates, as required by the Act, the *Local Competition Order* and the Commission's rules.<sup>5</sup> NuVox has no intention of operating pursuant to an interconnection agreement or SGAT that permits BellSouth to deny cost-based access to

---

proceedings concerning what the terms of the next NuVox/BellSouth interconnection agreement will be (BellSouth has indicated that NuVox would have to arbitrate to avoid imposition of non-cost based rates via jurisdictional factors-based ratcheted interconnection billing under a new agreement). The Commission should resolve this issue now by finding that BellSouth's jurisdictional factors-based ratcheted interconnection billing scheme is inconsistent with the requirements of checklist item i, the *Local Competition Order*, and the Commission's rules – and that the current NuVox/BellSouth interconnection agreement (in contrast to the Standard Nine State Agreement) provides refuge from that unlawful regime. However, the current NuVox/BellSouth interconnection agreement expires in June of next year.

<sup>2</sup> Because NuVox provides both telephone exchange and exchange access services to its customers and does not seek interconnection solely for the purpose of terminating interexchange traffic, it is entitled to cost-based interconnection under the Act, the *First Report and Order* and the Commission's rules.

<sup>3</sup> Bush Letter at 3.

<sup>4</sup> This statement presumes that each of the BellSouth SGATs contain language that is the same or substantially similar to Section I.E. of the North Carolina SGAT. North Carolina SGAT (6/17/02) at I.E. ("Rates for **interconnection for local traffic** are set out in Attachment A." (emphasis added))(filed July 22, 2002 NCUC).

<sup>5</sup> According to BellSouth, the AT&T/BellSouth agreement incorporates its jurisdictional factors-based ratcheted interconnection billing regime. Bush Letter at 3. NuVox has no insight as to why AT&T agreed to incorporate BellSouth's jurisdictional factors-based ratcheted interconnection billing regime into its contract and has neither the time nor inclination to confirm that it actually did agree to do so or why it did so. Regardless, AT&T asserts in footnote 27 to its Reply Comments that it supports the assertions made by NuVox and KMC on this issue in their initial Joint Comments. Thus BellSouth is mistaken in its claim that AT&T did not raise the issue in this docket. Bush Letter at n.2.

Mr. William Maher, Chief, Wireline Competition Bureau  
Ms. Tamara L. Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau  
September 16, 2002  
Page Three

interconnection, as required by the Act, the *Local Competition Order* and the Commission's rules – particularly when its own interconnection agreement contains no such limitation.

### **BellSouth's Reliance on State Arbitrations (or the Lack Thereof) Is Misplaced**

BellSouth places much reliance on its contention that no CLEC has arbitrated the issue of its application of a PLF and jurisdictional factors-based ratcheted interconnection billing.<sup>6</sup> That reliance is entirely misplaced. First, BellSouth's success in imposing this regime on certain competitors does not provide the regime with newfound legitimacy. For those carriers who knowingly accepted the regime via express incorporation of it into their contracts, NuVox can only say that it hopes those carriers made BellSouth pay dearly for it. Second, many carriers such as NuVox have been unable in the past to muster the resources necessary to arbitrate in nine states (or any) against BellSouth. Acceptance of terms by choosing not to arbitrate (or even by opt-in) has nothing to do with whether such terms reflect BellSouth's federal obligation to offer cost-based access to interconnection. Third, carriers cannot be expected to arbitrate provisions that are not expressly incorporated into interconnection agreement proposals. For example, on September 13, 2002, BellSouth finally admitted that neither PLF nor its regime of jurisdictional factors-based ratcheted interconnection billing was expressly incorporated into the NuVox/BellSouth agreement.<sup>7</sup> How was NuVox to know that BellSouth intended to apply the regime?

NuVox now understands that BellSouth intends to insist on incorporating its jurisdictional factors-based ratcheted interconnection billing scheme into the new interconnection agreement that NuVox and BellSouth will begin negotiating later this year. NuVox believes that if BellSouth were in fact to insist upon such terms (currently included in the Standard Nine State Agreement that typically serves as the starting point for such negotiations) – thereby refusing to offer cost-based access to interconnection and forcing requesting carriers such as NuVox to arbitrate and win in order to get it – BellSouth would be in violation of its duty to negotiate in good faith, as set forth in section 251(c)(1).

### **Interconnection via Dedicated Transport Is Available Under the NuVox/BellSouth Interconnection Agreement**

Although NuVox is not privy to the questions the Commission asked BellSouth with respect to dedicated transport, BellSouth's response provides the Commission with a good sense of what competing carriers face on a daily basis.<sup>8</sup> As the Bureau found in the Virginia

<sup>6</sup> Bush Letter at 2, 8.

<sup>7</sup> *Id.* at 4-5.

<sup>8</sup> *Id.* at 3-4. The Commission has just been "SMEd" by BellSouth.

Mr. William Maher, Chief, Wireline Competition Bureau  
Ms. Tamara L. Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau  
September 16, 2002  
Page Four

Verizon arbitration order (which BellSouth tellingly calls a “recommended decision”), interconnection trunks encompass facilities defined under the Commission’s rules as dedicated transport and ILECs may not require CLECs to order such facilities from their access tariffs.<sup>9</sup> Although Mr. Bush asserts that dedicated transport is not a substitute for interconnection trunks,<sup>10</sup> that statement appears to be inconsistent with BellSouth’s interconnection agreements and SGATs. For example, section 1.8 of Attachment 3 of the NuVox/BellSouth interconnection agreement provides for interconnection via dedicated transport. In addition, dedicated transport rates are set forth in the interconnection rates sheets appended to Attachment 3.

BellSouth acknowledges that Commission’s rules entitle a CLEC to use transport UNEs to provide access services to customers to which they also provide telephone exchange service.<sup>11</sup> Notably, BellSouth does not argue that ratcheted UNE billing is somehow required or permitted. Instead, BellSouth asserts that the issue of whether a requesting carriers may use dedicated transport to originate or terminate interexchange traffic to customers to which they do not also provide telephone exchange service is pending.<sup>12</sup> While not accurate, BellSouth’s statement is also not relevant. NuVox is not similarly situated to IXCs such as BellSouth Long Distance – NuVox provides both telephone exchange and exchange access services to its customers.

### **BellSouth Is Confused On the Facts**

In its September 12, 2002 *ex parte*, BellSouth asserts that “BellSouth will only bill access through this factor arrangement when NuVox is acting as an interexchange carrier and terminating calls to a BellSouth end-user or originating calls from a BellSouth end-user.”<sup>13</sup> This statement is wrong. NuVox does not act as an interexchange carrier that originates calls from or terminates them to BellSouth end users. BellSouth, NuVox and other LECs originate and terminate traffic – not IXCs. Moreover, it appears that Mr. Bush may simply not be aware of the extent to which BellSouth has billed interconnection trunks and facilities at access rates through the so-called “factor arrangement”. BellSouth’s billing at non-cost-based tariffed rates has been nowhere near as limited as Mr. Bush claims.<sup>14</sup>

---

<sup>9</sup> *Consolidated Virginia Verizon Arbitration Proceedings*, Memorandum Opinion and Order, ¶ 217, *see also id.* ¶¶ 215-16 (DA 02-1731).

<sup>10</sup> Bush Letter at 3-4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> See NuVox Aug. 29, 2002 *Ex Parte* at 7-10 for discussion of BellSouth’s use of defaults to bill all interconnection trunks and facilities at access rates; *see also* NuVox Sept. 9, 2002 *Ex Parte* at 2.

Mr. William Maher, Chief, Wireline Competition Bureau  
Ms. Tamara L. Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau  
September 16, 2002  
Page Five

### **BellSouth Is Wrong On the Law**

In its belated attempt to explain the claimed legal basis for its (unlawful) interconnection billing scheme, BellSouth continues to confuse and conflate what is at issue in this proceeding – cost-based access to interconnection trunks and facilities – with traffic termination functions that fall into the separate world of “access charges” and “reciprocal compensation”.<sup>15</sup> Again, BellSouth’s compliance with checklist item i is an issue separate and apart from the troubled world of “intercarrier compensation” for the “transport and termination” of traffic.<sup>16</sup> As a competing LEC, NuVox seeks and has interconnection for the purpose of providing telephone exchange and exchange access services to its customers. Although NuVox and BellSouth both act as IXCs in certain instances,<sup>17</sup> they exchange calls via LEC-to-LEC interconnection.<sup>18</sup>

In the Bush Letter, BellSouth provides nothing to demonstrate that NuVox’s view of the law – as asserted in its initial comments and subsequent *ex partes* – is not consistent with the Commission’s. Instead, BellSouth attempts to create an exemption from requirements to provide cost-based access to interconnection that neither the Commission nor any court has said exists.<sup>19</sup> BellSouth’s discussion of the *Local Competition Order* and its attempt to add newfound meaning and magic to the loaded term “access charges” is a testament to its ability to disingenuously take quotes out of context and to twist them to create confusion designed to serve its own means. Obviously, the Commission can see for itself that paragraphs 190-91, 184-85 and 176 of the *Local Competition Order* do not support – and in fact reject – BellSouth’s arguments. Moreover, BellSouth’s entire discussion of the *Local Competition Order* ignores the plain fact that NuVox does not seek interconnection “solely for the purpose of originating or terminating its interexchange traffic on an incumbent LEC’s network.”<sup>20</sup> Thus, FCC Rule 305(a) applies –

---

<sup>15</sup> See Bush Letter at 5-9.

<sup>16</sup> The dispute here is about the facilities (pipes) not the traffic (water) that flows over them. This is not a dispute over “reciprocal compensation” or “access charges” applicable to the traffic that flows over those facilities.

<sup>17</sup> BellSouth Telecommunications currently serves as an IXC for intraLATA interexchange calls and BellSouth Long Distance seeks authority to serve as an IXC for interLATA interexchange calls.

<sup>18</sup> Both NuVox and BellSouth pay “reciprocal compensation” and “access charges” to each other on the traffic exchanged between the two over those interconnection trunks and facilities. Those trunks and facilities – the subject of the dispute here over compliance with checklist item i – are priced and paid for separately. Thus, despite BellSouth’s efforts to confuse and conflate, this dispute is not about “access charges”.

<sup>19</sup> In the Bush Letter, BellSouth merely expands upon its section 251(g) argument provided originally in its Ruscilli/Cox Reply Affidavit. Additional references by BellSouth to the Commission’s *Intercarrier Compensation NPRM*, prove only that BellSouth has spent additional time combing Commission releases searching for quotes that will help in its effort to confuse and conflate interconnection with transport and termination. See Bush Letter at 5, 7.

<sup>20</sup> This language is reflected in both paragraph 191 of the *Local Competition Order* and Rule 305(b). It is not susceptible to the novel call-by-call interpretation that BellSouth now suggests. See Bush Letter at 5-6.

Mr. William Maher, Chief, Wireline Competition Bureau  
Ms. Tamara L. Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau  
September 16, 2002  
Page Six

not Rule 305(b).<sup>21</sup> Instead of rehashing its legal argument based on the *Local Competition Order*, NuVox respectfully refers the Commission to its initial comments filed on July 11, 2002<sup>22</sup> and its August 29, 2002 *ex parte*.<sup>23</sup>

BellSouth's reliance on *CompTel* is similarly misplaced. As explained in NuVox's August 29, 2002 *ex parte*, the Eighth Circuit's *CompTel* decision affirmed the Commission's *Local Competition Order* in this regard and expressly recognized that IXCs could purchase cost-based interconnection if they chose to provide local service – telephone exchange and/or exchange access – to others (*i.e.*, become LECs, too). Rather than rehashing entirely what NuVox has said before with respect to *CompTel*, NuVox respectfully refers you to its August 29, 2002 *ex parte* at 12.

Although BellSouth now recognizes that the *ISP Remand Order* has been remanded, it continues to insist that the Commission's section 251(g) analysis contained therein can be extended to create an exemption to BellSouth's obligation to provide cost-based access to interconnection.<sup>24</sup> As NuVox explained in both its initial Comments and August 29 *ex parte*, the Commission has never interpreted section 251(g) in the manner suggested by BellSouth here. Moreover, the DC Circuit has made quite clear that section 251(g) cannot bear the weight BellSouth seeks to put upon it. Again, rather than completely restate its legal arguments, NuVox respectfully refers the Commission to its previous filings on this point.<sup>25</sup>

\* \* \* \* \*

---

<sup>21</sup> NuVox is not sure what BellSouth means by "flat-rated access charges". Like "interexchange access", this term serves only to underscore BellSouth's confusion regarding the law and the facts. In applying tariffed rates from its "access tariffs" to NuVox's interconnection facilities, BellSouth has applied both flat-rated and per-mile tariffed rates. In short, NuVox is not trying to avoid paying "access charges" – it is simply asserting that BellSouth's application of access rates to interconnection trunks and facilities is contrary to the requirement set forth in checklist item i.

<sup>22</sup> Joint Comments of KMC and NuVox at 6-8.

<sup>23</sup> NuVox Aug. 29, 2002 *Ex Parte*, at 10-13.

<sup>24</sup> Bush Letter at 6-7.

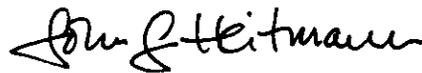
<sup>25</sup> Joint Comments of KMC and NuVox at 7-8; NuVox Aug. 29, 2002 *Ex Parte*, at 11-13.

KELLEY DRYE & WARREN LLP

Mr. William Maher, Chief, Wireline Competition Bureau  
Ms. Tamara L. Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau  
September 16, 2002  
Page Seven

If you have any questions about the foregoing, please do not hesitate to contact me at 202/955-9888.

Respectfully submitted,



Brad E. Mutschelknaus  
John J. Heitmann

**KELLEY DRYE & WARREN LLP**  
1200 19<sup>th</sup> Street, NW, Suite 500  
Washington, DC 20036  
(202) 955-9600  
(202) 955-9792 (facsimile)  
[jheitmann@kelleydrye.com](mailto:jheitmann@kelleydrye.com)

*Counsel for NuVox Communications, Inc.*

cc: Christopher Libertelli  
Matthew Brill  
Dan Gonzalez  
Jordan Goldstein  
Scott Bergmann  
Aaron Goldberger  
Maureen Del Duca  
Joshua Swift