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March 22, 2004

*Via Electronic Filing*

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re: Written Ex Parte Notice  
*Access Charge Reform*, CC Docket No. 96-262; *Developing a Unified*  
*Intercarrier Compensation Regime, US LEC Petition for Declaratory Ruling*,  
CC Docket No. 01-92

Dear Ms. Dortch:

This *ex parte* letter responds to the March 2, 2004 *ex parte* presentation of NewSouth Communications (NewSouth) in the above-referenced proceeding.<sup>1</sup> In its submission, NewSouth contends that the Commission should “clarify” its rules governing the provision of interstate access service by competitive local exchange carriers (LECs). Specifically, NewSouth urges the Commission to authorize competitive LECs, after June 21, 2004, to be compensated for providing terminating tandem switching service in instances where they are clearly not providing that service. In fact, as discussed below, the Commission’s existing rules prohibit NewSouth from tariffing interstate access charges for services that it does not provide to an interexchange carrier that is terminating traffic to a customer on NewSouth’s network. The NewSouth request, thus, amounts to an untimely request for reconsideration of the Commission’s April 27, 2001 *Order* governing competitive LEC access charges<sup>2</sup> and, accordingly, should be rejected summarily. Even if, *arguendo*, the FCC were to conclude that its rules do not currently resolve clearly the precise issue raised by the NewSouth *Ex Parte*, it should use the opportunity presented by the pending petitions for reconsideration to rule unambiguously that competitive LECs after June 21, 2004 may not tariff the full incumbent LEC benchmark rate, including its tandem switching charge, in circumstances, such as those

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<sup>1</sup> Letter from Jake E. Jennings, NewSouth, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (March 1, 2004), attached to letter from Jake E. Jennings, NewSouth, to Marlene H. Dortch, FCC, CC Docket No. 96-262 (March 2, 2004) (NewSouth *Ex Parte*).

<sup>2</sup> *Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd 9923 (2001) (*Order*).

described in the NewSouth *Ex Parte*, where the competitive LEC does not perform tandem switching functions.

The Commission concluded in the April 27 *Order* that after June 21, 2004, a competitive LEC would be permitted to tariff and assess for its interstate access services no more than “the rate charged for similar services by the competing [incumbent] LEC.”<sup>3</sup> The Commission also has made clear in prior decisions that an incumbent LEC may not impose terminating interstate access charges for access services that the incumbent in fact did not provide to the carrier that delivers the traffic for termination.<sup>4</sup> Contrary to these clear rulings, however, NewSouth seeks approval to tariff and assess charges for tandem switching in circumstances in which an incumbent LEC would not be permitted to impose those charges.

As shown by the diagram that accompanied the NewSouth submission, MCI terminating traffic that is destined for NewSouth end users is routed through a tandem switch operated by an incumbent LEC. The incumbent LEC then routes the traffic to a NewSouth switching facility in exactly the same manner as the incumbent routes traffic to its own end offices that subtend the tandem. Thus, the incumbent LEC’s tandem performs the tandem switching functions for traffic destined for NewSouth’s network as it does for traffic that is destined for end offices on its own local network. Similarly, the only functions performed by the NewSouth switch are those that are performed by incumbent LEC end offices that subtend the same incumbent LEC tandem.

NewSouth claims, however, that it is entitled to be compensated for “access tandem functionality,” despite the fact that an incumbent LEC clearly would not be permitted to assess and recover such compensation under the same circumstances. That NewSouth may describe its end offices as “tandems,” is of no relevance. NewSouth makes it clear in the Local Exchange Routing Guide (LERG) that its switches subtend incumbent LEC tandems.

NewSouth’s contrived attempts to justify its unreasonable billing practice do not require extended discussion. NewSouth misleadingly claims that the FCC “refused to set individual rate elements for [competitive] LEC access charges” and, therefore, “there is no ‘tandem rate’ for [competitive] LECs.”<sup>5</sup> Under NewSouth’s reading of the FCC’s *Order*, competitive LECs apparently are permitted after June 21, 2004 to assess the entire benchmark rate for interstate switched access even if they provide only the transport because there is no “local switching” or “common line” rate. This argument, of course, ignores the fact that the overriding objective of the Commission’s April 27 *Order* is to ensure that the access charges of competitive LECs “decrease over time until they reach

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<sup>3</sup> 47 C.F.R. § 61.26(c); *see also Order* ¶ 52.

<sup>4</sup> *See AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556, ¶ 32 (1998).

<sup>5</sup> NewSouth *Ex Parte* at 2.

the rate charged by the incumbent LEC.”<sup>6</sup> Indeed, the Commission explicitly noted that its objective is “to permit [competitive] LECs to receive *revenues* equivalent to those” that incumbent LECs receive from interexchange carriers.<sup>7</sup> NewSouth’s proposal, in contrast, would allow a competitive LEC to tariff switched access rates that an incumbent LEC would not be allowed to impose in the same circumstances. Because an incumbent LEC would not be permitted to impose an access charge for tandem switching when the incumbent only provided end office functionality, the Commission’s April 27 *Order* prohibits a competitive LEC from imposing such a charge in the same circumstances. Otherwise, a competitive LEC’s switched access charges would exceed those of the incumbent LEC.

NewSouth’s related contention that reducing its applicable interstate benchmark rate by the incumbent LEC’s tariffed tandem switching rate would be “arbitrary”<sup>8</sup> similarly is without merit. NewSouth asserts that such an adjustment to its tariffed rates would be unlawful because an incumbent LEC’s “tandem rate is untethered from its own costs.”<sup>9</sup> NewSouth’s argument again simply ignores the principal objective of the April 27 *Order*, which is to ensure that after the transition period, a competitive LEC’s switched access charges do not exceed those of the applicable incumbent LEC. Consequently, in circumstances where an incumbent LEC’s applicable switched access charges would exclude its tandem switching charge, a competitive LEC’s benchmark should be adjusted downward to exclude the same rate element so that the competitive LEC’s charges do not exceed those of the incumbent LEC.

Finally, NewSouth claims that in circumstances where incumbent and competitive LECs “jointly provide access,” it would be “arbitrary to conclude that one of these two carriers can legitimately charge for its provision of tandem functionality whereas the other would not.”<sup>10</sup> The suggestion that two LECs “jointly” providing access service to an interexchange carrier could each “legitimately” be engaged in the provision of tandem switching service is ridiculous. As NewSouth well knows, a tandem switch serves as an aggregation point for terminating interexchange traffic that is destined for end users served by several different end offices. That is the function that the incumbent LEC tandem performs in the configuration shown in NewSouth’s diagram. NewSouth’s switch, by contrast, has no subtending end offices and delivers traffic only to end users served by that same switching facility.<sup>11</sup>

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<sup>6</sup> *Order* ¶ 4.

<sup>7</sup> *Id.* ¶ 54 (emphasis added).

<sup>8</sup> NewSouth *Ex Parte* at 2.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> NewSouth’s self-serving assertion that an interexchange carrier “can take steps to avoid any purported ‘double charging’” (*id.*) does not merit serious attention. The reason

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In sum, contrary to NewSouth's claims, the Commission's existing access charge rules prohibit a competitive LEC from tariffing a tandem switching charge that would apply in circumstances, such as those presented by NewSouth's *Ex Parte*, in which the competitive LEC in fact does not provide tandem switching functionality. Further, as shown above, that is clearly the result most consistent with the objectives of that *Order*. To the extent that the NewSouth submission suggests that the Commission's rules in these circumstances are unclear, the Commission should use the opportunity presented by the pending petitions for reconsideration in this proceeding to eliminate any claimed ambiguity.

Respectfully submitted,

/s/ Henry G. Hultquist

Henry G. Hultquist

cc: Scott Bergmann  
Matthew Brill  
Daniel Gonzalez  
Trey Hanbury  
Christopher Libertelli  
Steven Morris  
Judith Nitsche  
Tamara Preiss  
Jessica Rosenworcel  
Victoria Schlesinger

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that MCI routes traffic through an incumbent LEC tandem in NewSouth's vicinity is that MCI's terminating traffic volumes are not large enough to justify, as an economic matter, a direct connection between MCI's nearest point of presence and the NewSouth switch. If those volumes were to grow to the level that justified such a facility, MCI would still not need tandem switching functionality from NewSouth, since MCI would directly connect in order to terminate traffic directly to those end users served by NewSouth's switch.