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September 14, 2006

**ECFS**

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

Re: *Ex Parte* – WC Docket No. 06-74 – In the Matter of AT&T Inc. and  
BellSouth Corporation Applications for Transfer of Control

Dear Ms. Dortch:

In Joint Comments filed in this docket, NuVox Communications (“NuVox”) joined with Cbeyond Communications, Grande Communications, New Edge Networks, Supra Telecom, Talk America, XO Communications and Xspedius to show that the proposed RBOC-RBOC merger between AT&T, Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) would have profoundly negative effects on telecommunications consumers, by, among other things:

- Removing an actual significant participant in the wholesale business market in the BellSouth region;
- Removing a significant actual purchaser of wholesale services in the BellSouth and AT&T regions;
- Frustrating the ability of regulators to use comparative oversight to implement and police the market opening provisions of the 1996 Act; and

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- Increasing the incentive and ability of the larger merged entity to discriminate against rivals while decreasing the ability of regulators to police this discrimination.<sup>1</sup>

Joint Commenters urged the Federal Communications Commission (“Commission” or “FCC”) to deny the application as antithetical to competition. If the FCC does not deny the application outright, however, Joint Commenters proposed a set of conditions that are tailored to offset – to the fullest extent reasonably possible – the enormous anticompetitive effects of the proposed transaction. While all of the conditions proposed in the Joint Comments are critical to address the negative impact of the proposed merger, Competitive Carriers of the South, Inc. (“CompSouth”)<sup>2</sup> submits this ex parte presentation to focus on the following merger condition relating to the availability of UNE combinations known as enhanced extended links or EELs:

**Eliminate EEL Eligibility Criteria – The merged AT&T/BellSouth entity shall not subject EELs to any requirements or restrictions other than those that apply to individual section 251(c)(3) UNEs. The merged AT&T/BellSouth entity shall cease all ongoing or threatened audits and terminate all audit rights, regardless of whether an audit or audit right relates to current EEL restrictions or restrictions that pre-date the Commission’s current high capacity EEL eligibility criteria.**

While numerous CompSouth members have been targeted by BellSouth’s EEL audit initiative, the experience of CompSouth member NuVox is perhaps most illustrative of why approval of this merger condition is essential, in the event the Commission were to approve the proposed AT&T/BellSouth merger. NuVox operates in all nine BellSouth states and in seven states in the AT&T region. In May 2004, NuVox merged with NewSouth Communications (“NewSouth”), another competitive local exchange carrier serving the BellSouth region. NuVox knows from experience that the EEL eligibility rules and associated auditing requirements have been a drag on competitive entry in the BellSouth region. As explained below, BellSouth has routinely sought to expand and abuse the limited EEL audit rights granted to it under the long-retired *Supplemental Order Clarification*.<sup>3</sup> Throughout its legacy service territory, BellSouth has

<sup>1</sup> Joint Comments of Cbeyond Communications, *et al.*, at 96-97, WC Docket 06-74 (filed June 5, 2006) (“Joint Comments”).

<sup>2</sup> Formed in 2002, CompSouth is a non-profit association of CLECs serving business and residential customers in the southeastern United States. CompSouth members include Access Integrated Networks, Access Point, Cbeyond, Cinergy, DeltaCom, Dialog Telecommunications, FDN, Momentum, Network Telephone/Talk America, NuVox, Supra, Trinsic, XO and Xspedius.

<sup>3</sup> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) (“*Supplemental Order Clarification*”).

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for more than four years harassed CLECs with overly expansive audit requests, for which it has often sought to use a biased ILEC consulting shop as an auditor. As BellSouth contemplates a merger with AT&T, the risk that the merged AT&T/BellSouth entity will find it advantageous to expand the abusive EEL audit strategy to a combined regional service territory is a significant competitive harm stemming from the proposed merger. The Commission needs to exercise the oversight authority it reserved in the *Supplemental Order Clarification* to condition the merger on the cessation of BellSouth's abusive audits and to preclude the expansion of the strategy to a broader AT&T/BellSouth region.

Further, the Commission should condition the merger on AT&T and BellSouth providing access to EELs without restriction other than the impairment findings relating to the underlying section 251(c)(3) UNEs that comprise the EEL. This condition is necessary to ensure the full availability of EELs which the Commission has repeatedly acknowledged as being efficient, pro-competitive, and a means of promoting facilities-based competition.<sup>4</sup> Elimination of unnecessary barriers to the use of EELs is critical to combat the loss of actual and potential competitive options in the two regions. EELs must be widely available without restriction in order for competitive providers to overcome the harms to competition from the elimination of AT&T as a competitive alternative in the BellSouth region.

EEL Audits. First and foremost, the Commission should exercise its oversight authority to stop BellSouth's abusive EEL audits under the outdated *Supplemental Order Clarification*. Since 2002, BellSouth has used EEL audits or threats of EEL audits to mire CLECs in endless litigation that has nothing to do with the original purpose of its long-retired "significant local use" requirement.<sup>5</sup> These audits have consumed countless hours of NuVox personnel time, occupied its senior management and diverted significant resources from the company's efforts to bring innovative and cost-effective packages of communications services to small and medium sized businesses. Continuation or expansion of these audits in a post-merger environment would exacerbate the harms created by a merged AT&T/BellSouth entity.

Importantly, in the *Supplemental Order Clarification*, the Commission only authorized ILECs to conduct limited post-conversion audits of EEL circuits that initially had been provisioned as special access. The Commission permitted an ILEC to initiate an audit only to the extent "reasonably necessary" to ensure compliance with the *Supplemental Order*

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<sup>4</sup> E.g., *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, ¶ 576 (2003) ("Triennial Review Order" or "TRO").

<sup>5</sup> To date, BellSouth has initiated EEL audit related litigation against NuVox and NewSouth, DeltaCom and XO.

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*Clarification's* significant local use requirement.<sup>6</sup> ILECs could request such audits only if they had cause to challenge a CLEC's conversion certification of compliance with the significant local use requirement for converting special access circuits to EELs.<sup>7</sup> Indeed, the Commission made clear that (1) audits will not be routine practice and may only be conducted when the ILEC has a reasonable concern;<sup>8</sup> and (2) that such an audit must be performed by an independent third party hired and paid for by the ILEC.<sup>9</sup> The Commission stated that it would maintain oversight of the ILEC audits, and required ILECs to notify the Commission of any audits it intended to conduct.<sup>10</sup>

In early 2002, BellSouth began an aggressive campaign to audit EEL circuits ordered within its region. It initiated at least thirteen audit requests within a short time frame, principally to CLECs that were competing head to head with BellSouth for local service customers.<sup>11</sup> In the case of NuVox and NewSouth, BellSouth made regional (multi-state) audit requests without demonstrating that it had a legitimate concerns that supported its requests and without retaining a truly independent auditor. Although BellSouth initially agreed with NuVox that the *Supplemental Order Clarification* required it to disclose to NuVox the "concern" that prompted its request for the audit, BellSouth first refused to do so unless NuVox agreed it would not disclose the information provided publicly. NuVox refused to accept the condition. BellSouth then cited undisclosed traffic measurements in Tennessee and Florida that, by its own admission, did not even estimate traffic carried over the EELs in those states or in any other.<sup>12</sup> Moreover, since NuVox certified under the first safe harbor option – that the requesting carrier is

<sup>6</sup> *Supplemental Order Clarification* ¶ 29 ("we also find that incumbent LECs may conduct limited audits only to the extent reasonably necessary to determine a requesting carrier's compliance with the local usage options").

<sup>7</sup> *Id.* ¶ 31 & n. 86; *see also*, *TRO* ¶¶ 621-22.

<sup>8</sup> *Id.* ¶ 31, n.86.

<sup>9</sup> *Supplemental Order Clarification* ¶ 31.

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

<sup>11</sup> In June 2002, BellSouth notified the Commission that it intended to conduct audits of thirteen CLECs. Letter from W.W. Jordan, BellSouth, to Marlene Dortch, Secretary, FCC, CC Docket No. 96-98 (filed June 20, 2002) (identifying audits of NuVox, XO, NewSouth Communications, Intermedia, Florida Digital Network, Madison River, Cbeyond, IDS, MCI, mpower, e.spire, Allegiance, and DeltaCom). Upon information and belief, BellSouth has pursued additional audits without providing the requisite notice to the Commission.

<sup>12</sup> BellSouth's assertion of high levels of intrastate access traffic in these two states contradicts NuVox's records. NuVox made several formal and informal requests for documentation supporting BellSouth's assertion. BellSouth, however, refused to supply the requested information.

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the exclusive local service provider to the customer – the undisclosed traffic measurements did not articulate a reasonable concern justifying an audit.

In addition, NuVox objected to the consulting shop selected by BellSouth to perform the audit. NuVox questioned whether the proposed auditor could be neutral given that: (a) the consulting shop was staffed almost exclusively by former ILEC personnel; (b) it conducted almost all of its work as consultants for ILECs; and (c) it touted its bias by claiming “success” in audits identifying “millions of dollars” in additional revenue for its ILEC clients.

BellSouth nevertheless persisted with its audit requests. Over the course of the next two years, BellSouth filed ten separate complaints in six states against NuVox and/or NewSouth. In each of these cases, BellSouth sought to audit every EEL that NuVox had converted from special access. In some of these cases, BellSouth sought to audit essentially all EELs, regardless of whether the EEL was converted from special access under the *Supplemental Order Clarification* or was ordered as a new EEL under the parties’ interconnection agreements (new EELs were not subject to the *Supplemental Order Clarification*’s special access conversion certification, significant local use and associated audit requirements). NuVox opposed these unlimited audit requests, arguing, among other things, that the requests failed to satisfy the Commission’s reasonable concern and independent auditor requirements.

Most of these complaints remain pending at this time.<sup>13</sup> Notably, however, two states appropriately limited BellSouth’s audit requests. Georgia, for example, after a full evidentiary hearing, and several administrative law judge and staff recommendations, issued an order agreeing with NuVox’s interpretation of BellSouth’s audit rights. It permitted BellSouth to proceed with audits only of circuits where it found BellSouth to have demonstrated a reasonable concern. BellSouth did so with respect to only 44 circuits out of approximately 400 EELs that NuVox had converted from special access in Georgia.<sup>14</sup> Similarly, Kentucky permitted BellSouth to proceed with an audit, but only of the 15 circuits (out of more than 150 EELs NuVox converted from special access) where the PSC accepted BellSouth’s representation that it had a reasonable concern.<sup>15</sup> Audit litigation dockets remain open in three additional states and

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<sup>13</sup> In addition, three federal court appeals and one state court appeal have been filed challenging various orders in the audit cases. An appeal to the Fourth Circuit remains pending and an appeal to the Eleventh Circuit is forthcoming.

<sup>14</sup> BellSouth’s effort to manufacture a reasonable concern to justify its audit request (more than a year after the request had been made) appears to have involved conduct that violated section 222 of the Act.

<sup>15</sup> The Kentucky PSC’s decision was upheld in federal district court, while the Georgia PSC’s decision was partially vacated and remanded earlier this week in an order that NuVox will appeal to the Eleventh Circuit.

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audit-related litigation from yet another is pending before the Fourth Circuit (that appeal involves subject matter jurisdiction).

In the course of these limited audits, a number of issues and disputes have arisen. In several instances, determining the standard for evaluating compliance has itself proven to be very difficult. The *Supplemental Order Clarification* is ambiguous in key respects, requiring interpretation in light of the policy context in which the Order was adopted. As a result, the auditor is not acting as a neutral investigator testing compliance with objective criteria. Instead, it is being asked inappropriately to assume the role of a policymaker, choosing “sides” in interpreting the intent and purpose of the *Supplemental Order Clarification*. For example, in the case of non-primary lines such as alarm monitoring lines, the auditor is being asked to determine whether these types of lines qualify as “local services” within the meaning of the exclusive provider safe harbor. That is, when the Commission established a safe harbor for being the customer’s exclusive provider of local service, did it intend to require that the provider serve alarm monitoring lines and other lines that may be used for specialized purposes other than traditional local voice service? Even if it did, would that make the provision of local voice services somehow less than significant? These are just a few of the vexing issues encountered in the audits.

In addition, disputes have arisen concerning the conduct of the auditors, including one auditor’s contacts with BellSouth during the audit process. In Georgia, NuVox cooperated with the second auditor retained by BellSouth (the Georgia Commission had determined that it would give no weight to any findings of the ILEC consultants BellSouth initially selected to conduct the audit) and provided the records and information requested by the auditor. In March 2005, the auditor provided a preliminary audit report to NuVox and requested that NuVox review the report for inaccuracies and errors, and to provide other information that may be relevant to the audit. In the course of this verification, NuVox discovered a hidden column of data in the auditor’s preliminary report revealing that the auditor received and considered numerous records from BellSouth (despite the Georgia Commission’s refusal to approve BellSouth’s request to provide certain records to the auditor). It is unknown why the auditor had these records, how it came into possession of the records, or even precisely what the records were. What is known is that the auditor intentionally tried to cover-up the fact that it had obtained certain customer information from BellSouth by deleting the hidden column in a revised version of its preliminary report.<sup>16</sup> It remains unknown how the auditor considered or used these customer records. In addition, NuVox discovered that the auditor had at least several improper *ex parte* conversations with BellSouth about the audit and that it improperly released

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<sup>16</sup> Here, too, BellSouth’s conduct may have violated section 222 or other sections of the Act.

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the preliminary, erroneous and unverified audit results to BellSouth, prompting NuVox to pursue legal remedies.<sup>17</sup>

CompSouth provides this lengthy description of NuVox's experience with BellSouth's EEL audit requests not for the Commission to resolve any of the specific substantive disputes that have arisen or allegations raised. Instead, CompSouth provides this description so that the Commission can carry out its responsibilities to "monitor implementation of the [*Supplemental Order Clarification*] requirements"<sup>18</sup> and resolve the greater issue of BellSouth's audit abuse by ending it through adoption of the proposed merger condition. BellSouth's aggressive – and abusive—audit strategy has mired NuVox in litigation for over four years. As of this date, more than four years after BellSouth embarked on its scheme to harass competitors with unlawful audit requests, multiple complaints, federal and state court cases, and audits remain pending and not a dollar of damages has been paid or found to be owed to BellSouth.

In the *Supplemental Order Clarification*, the Commission emphasized that audits should not impose undue financial burdens on competitive carriers.<sup>19</sup> Yet, as is shown above, that is precisely what has occurred in the case of BellSouth's audit strategy. Recognizing a fundamental resource disparity in its own favor, BellSouth is aggressively trying to litigate NuVox into submission regarding its unlawful EEL audit requests. NuVox has spent countless hours and significant resources in responding to BellSouth's unspecified audit requests, preparing testimony and providing information to auditors. It also has expended considerable amounts on outside counsel and occupied significant amounts of its senior management's time in addressing BellSouth's harassing tactics. Unless the Commission exercises its monitoring authority to curtail these audits, harm to facilities-based CLECs such as NuVox will continue, and potentially expand under a merged AT&T/BellSouth entity.

Moreover, the audit requests have long outlived the order upon which they were based. In the *Triennial Review Order*, the Commission found that the *Supplemental Order Clarification*'s safe harbors and auditing procedures "proved to be unworkable and susceptible to abuse by the incumbent LECs."<sup>20</sup> These restrictions were characterized by the Commission as

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<sup>17</sup> In fact, BellSouth made numerous, inaccurate statements related to the unverified and erroneous preliminary audit results in CC Docket 04-313 and in various state and federal court cases, based on illicit discussions between the auditor and BellSouth. See Reply Declaration of Riley M. Murphy on behalf of NuVox Communications, Inc., attached to Birch Telecom, Inc. *et al.*, Reply to Oppositions, CC Docket No. 04-313, filed June 16, 2005.

<sup>18</sup> *Supplemental Order Clarification* ¶ 31.

<sup>19</sup> *Id.* ¶ 32.

<sup>20</sup> *TRO* ¶ 596.

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“overly intrusive”, “onerous” and “a drag on competitive entry”.<sup>21</sup> Three years later, while the parties are *still* in the process of replacing the safe harbors in their interconnection agreements,<sup>22</sup> BellSouth is perpetuating these restrictions through its abusive audit strategy.

It is time for the Commission to shut-down BellSouth’s abusive EEL audit initiative and to ensure that a combined AT&T/BellSouth entity can never again seek to stymie competitors and competition within its service territory through the use of unlawful EEL audit requests and related predatory litigation. CLECs like NuVox, Cbeyond, DeltaCom, XO and Xspedius should not have to respond to non-specific, routine and unlimited audit requests seeking to expand and extend a failed interim regime. BellSouth, and by extension, a merged AT&T/BellSouth entity should be prohibited from continuing any ongoing audits or from initiating new audits relating to the *Supplemental Order Clarification* restrictions which the FCC itself disposed of three years ago as being “overly intrusive”, “onerous” and “a drag on competitive entry”.<sup>23</sup>

EEL Eligibility Criteria. The Commission has long recognized that EELs provide substantial benefits to competition by enabling facilities-based local competitors to expand their footprint to bring the benefits of competition to more businesses and consumers more rapidly.<sup>24</sup> All parties, the ILECs included, agreed that EELs were appropriately used by carriers competing in the local market. Even BellSouth initially supported the broad availability of EELs, arguing only for a use restriction similar to current section 51.309(b) of the Commission’s rules.<sup>25</sup> BellSouth initially argued that the only purpose of a restriction would be to “prevent the wholesale change over of special access loops and transport *that go to IXC POPs.*”<sup>26</sup> With

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<sup>21</sup> *Id.*

<sup>22</sup> BellSouth refuses to amend interconnection agreements to incorporate changes of law – even those such as the new EEL eligibility criteria for which the parties have no dispute – until all disputes regarding changes of law are resolved. Through this practice, it has defied the Commission by illegitimately extending the life of restrictions the Commission discarded as unnecessary and unworkable three years ago.

<sup>23</sup> *Id.*

<sup>24</sup> *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 288-289 (1999) (“*UNE Remand Order*”).

<sup>25</sup> Declaration of Thomas E. Allen, Jr., at 9 (arguing for a use restriction “prohibiting the use of unbundled network elements to provide special access”), attached to Letter from Robert Blau to Magalie Roman Salas, CC Docket No. 96-98, filed Sept. 08, 1999 (“*Allen Declaration*”).

<sup>26</sup> *Id.* at 10 (emphasis added).

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respect to CLEC access, BellSouth argued that “UNE combinations should be available to any CLEC (including those specializing in data) at TELRIC prices” and that “no restrictions on their use by these companies” should exist.<sup>27</sup>

Other RBOCs echoed BellSouth’s concerns that the “wholesale change” of IXC special access presented a risk to the Commission’s special access and universal service policies. Ultimately, the FCC adopted the “significant local use” rule restricting IXC use of EELs on an interim basis. Importantly, these restrictions were justified as a transitional measure, necessary to preserve the *status quo* while the CALLS access charge reform plan was being implemented.<sup>28</sup> As the Commission explained in the *Supplemental Order Clarification*:

Because of concerns that universal service could be harmed if we were to allow interexchange carriers (IXCs) to use the incumbent’s networks without paying their assigned share of the incumbent’s costs normally recovered through access charges, we agreed that we should further explore these considerations, recognizing that full implementation of access charge and universal service reform was still pending.<sup>29</sup>

The Commission defended the *Supplemental Order Clarification* as a temporary rule, necessary “to avoid disruption of its reform of access charge policies and of the implicit subsidies for universal service that remain embedded in access charges.”<sup>30</sup> The D.C. Circuit thus upheld the EEL restrictions as a temporary rule adopted to avoid market disruption pending implementation of the CALLS Order’s access charge reforms.<sup>31</sup>

In the almost seven years since EEL rules were first adopted, the rationale for *any* EEL-specific restrictions has diminished substantially if not disappeared altogether. The CALLS Order that formed the basis for the temporary criteria is now fully implemented.

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<sup>27</sup> *Id.*

<sup>28</sup> Then Commissioner Furchtgott-Roth described the relationship between the CALLS negotiations and the EEL-specific use restrictions as illegitimate and unlawful. *See Supplemental Order Clarification Dissenting Statement of Commissioner Harold Furchtgott-Roth.*

<sup>29</sup> *Supplemental Order Clarification* ¶ 2.

<sup>30</sup> *CompTel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002).

<sup>31</sup> *Id.*; *see Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (“*CALLS Order*”).

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In the *Triennial Review Order*, the Commission slightly shifted focus to support its new EEL-specific use restrictions. The Commission justified the new restrictions as prophylactic protections against “gaming” by providers of “non-qualifying services”.<sup>32</sup> The Commission explained that by “gaming” it meant “the case of a provider of exclusively non-qualifying service obtaining UNE access in order to obtain favorable rates or otherwise engage in regulatory arbitrage.”<sup>33</sup> However, as with the Commission’s initial rationale for the restrictions, the Commission’s sole concern related to an IXC’s use of an EEL solely for long distance service.

In response to the *USTA II* remand rejecting its distinction between “qualifying” and “non-qualifying” services, the Commission has now directly prohibited the use of any UNE to provide exclusively long distance service.<sup>34</sup> Rule 51.309(b) states that a requesting carrier may not use any unbundled network element (whether an EEL or a standalone UNE) to provide “exclusively long distance services.”<sup>35</sup> By prohibiting the use of any UNE, whether a UNE loop or a UNE combination, for exclusively long distance services, the Commission has fully addressed the concern that EELs might be used as a substitute for long distance special access. No requesting carrier is permitted to obtain an EEL that it will use solely for long distance service. Thus, no requesting carrier can suddenly convert special access circuits used exclusively for long distance services to UNE rates. In addition, if a requesting carrier were to attempt to order an EEL for this purpose, an ILEC would have recourse under its interconnection agreement and, to the extent not foreclosed by the agreement, pursuant to a section 208 complaint at the Commission.

Indeed, the Commission relied on the fact that section 51.309 applies to EEL conversions when it denied ILEC requests to prohibit all conversions of special access circuits.<sup>36</sup> In paragraph 230 of the *TRRO*, the Commission stated that “the rules we adopt today already prevent the use of UNEs...where carriers would use them *exclusively* to provide long distance services or mobile wireless services.”<sup>37</sup> This finding, the Commission ruled, means that the special access circuits that the ILECs cited “are therefore largely shielded already from potential

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<sup>32</sup> *TRO* ¶591.

<sup>33</sup> *Id.*

<sup>34</sup> 47 C.F.R. §51.309(b).

<sup>35</sup> *Id.*

<sup>36</sup> See *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 230 (2005) (“*TRRO*”).

<sup>37</sup> *Id.* (emphasis added).

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conversion to UNEs.”<sup>38</sup> These same conclusions show that the EEL eligibility criteria are superfluous in light of the Commission’s direct prohibition in 51.309.<sup>39</sup>

Moreover, the practical rationale for a restriction on EEL conversions has dissipated substantially in the AT&T and, if the merger is approved, BellSouth territories. At the time the EEL eligibility criteria were adopted, the two largest legacy IXCs, AT&T (Corp.) and MCI, had a substantial base of long distance special access circuits that the ILECs contended might improperly be converted to UNE arrangements without EEL-specific rules. In the over seven years since the first EEL use restrictions were adopted, circumstances have changed dramatically. Most notably, AT&T Corp. has been acquired by the RBOC SBC and now operates as a subsidiary of the renamed AT&T, Inc. Applicants cannot reasonably argue the continued necessity of the EEL eligibility criteria to prevent AT&T from converting its long distance special access circuits within the regions subject to this application. If the proposed merger is approved, AT&T would have no reason to convert its circuits (even if 51.309 permitted it), and even if it did, such conversions would simply be an intra-company transfer of revenues. Thus, the combined AT&T/BellSouth faces no threat of a net loss in special access revenues if such conversions occurred.<sup>40</sup> In light of these marketplace changes, any concern about the conversion of legacy IXC special access circuits in the AT&T or BellSouth regions is moot.

Finally, CompSouth notes that BellSouth has a long history of providing non-restricted access to EEL circuits without any record of “gaming” or the wholesale conversion of special access circuits. Several states in BellSouth’s region ordered BellSouth to provide new combinations of UNEs (*i.e.*, EELs) pursuant to federal and state unbundling requirements (without the need to first order the circuit as special access – a requirement the FCC found to be unjust, unreasonable and discriminatory<sup>41</sup>). The availability of “new EELs” was extended throughout the BellSouth legacy service territory with the complete restoration of the FCC’s UNE combination rules.<sup>42</sup> Thus, requesting carriers had the right to obtain new EELs without having to comply with the “significant local use” restriction the Commission adopted for

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<sup>38</sup> *Id.*

<sup>39</sup> Additionally, the new rule is sufficient to ward against any risk of gaming. If a requesting carrier violates the prohibition on the use of UNEs for exclusive long distance service, ILECs have available to them various enforcement mechanisms and associated remedies for such violations.

<sup>40</sup> Similarly, Verizon’s affiliate, the former MCI, has no real incentive to convert special access circuits in the regions, for if it did, AT&T could do the same within Verizon’s operating territories.

<sup>41</sup> *TRO* ¶ 577.

<sup>42</sup> *See id.* ¶ 573.

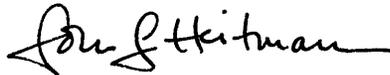
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conversions from special access to UNEs.<sup>43</sup> BellSouth has not shown any harm from this long history of unrestricted access to new EELs in its region. Any approval of the pending application should be conditioned on the combined entity agreeing to provide access to EELs without any requirements or restrictions other than those applicable to standalone UNEs under section 251(c)(3) of the Act.

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For the reasons discussed above, the Commission should put an end to BellSouth's attempts to harass competitors with abusive audits under the outdated *Supplemental Order Clarification*. In addition, it should remove the current EEL restrictions in the AT&T/BellSouth regions as a condition to any approval of the application.

Respectfully submitted,



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<sup>43</sup> It was not until the *TRO*, that the FCC extended the applicability of EEL-specific use restrictions to new EELs. *See id.* ¶ 577.

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