BellSouth D.C., Inc.
Legal Department
Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036-3351

bennett.ross@bellsouth.com

Bennett L. Ross
General Counsel-D.C.

202 463 4113
Fax 202 463 4195

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EX PARTE

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

Re: *AT&T, Inc. and BellSouth Corporation Applications for Approval of Transfer of Control,* WC Docket No. 06-74

Dear Ms. Dortch:

In complete disregard of the Commission's admonition that a merger review "is limited to consideration of merger-specific effects"[1] and "is not an opportunity to correct any and all perceived imbalances in the industry,"[2] NuVox Communications ("NuVox") and other members of the Competitive Carriers of the South, Inc. ("CompSouth") urge the Commission to condition this merger on the elimination of the eligibility criteria for Enhanced Extended Links ("EELs"). Pointing to NuVox's alleged experiences with BellSouth, CompSouth proposes that the Commission require the merged company not to subject EELs "to any requirements or restrictions" other than those that apply to individual unbundled network elements and to "cease all ongoing or threatened audits and terminate all audit rights" relating to EELs.[3]

CompSouth's proposal has nothing to do with the merger. Rather, it is a transparent attempt by NuVox in particular to avoid a term in its current interconnection agreement with BellSouth that entitles BellSouth, upon 30 days' notice and at its own cost, to conduct an audit of NuVox's EEL circuits to ensure compliance with the safeguards set out in the *Supplemental*

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[1] *In re: Application for Consent to the Transfer of Control of Licenses from Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast, Transferee,* Memorandum Opinion and Order, 17 FCC Rcd 22633, 22637 ¶ 11 (2002) ("*AT&T/Comcast Merger Order*").

[2] *In re: General Motors Corp. and Hughes Electronics Corp. and News Corp. Ltd. for Authority to Transfer Control,* Memorandum Opinion and Order, 19 FCC Rcd 473, 534 ¶ 131 (2004) ("*GM/Hughes Merger Order*").

[3] Ex Parte Letter from Brad Mutschelknaus, Counsel, CompSouth, to Marlene H. Dortch, Secretary, FCC (Sept. 14, 2006) ("*CompSouth Ex Parte*").

Order Clarification.[4] Because this transaction will occur solely at the holding company level, BellSouth and NuVox will continue to have the same rights and duties under their interconnection agreement after the merger as they had prior to the merger. If NuVox (or any other member of CompSouth) wants to avoid future audits for ongoing compliance with the EEL safeguards in the *Supplemental Order Clarification*, it can amend its interconnection agreement to incorporate all of the requirements of the *Triennial Review Order*[5] and the *Triennial Review Remand Order.*[6] Alternatively, the parties can elect, as NuVox has done, to adhere to the terms of their existing agreements, in which case they should not be heard to complain about an audit to ensure compliance with such terms. In either case, the merger has no effect on the resolution of this issue, and, accordingly, the issue should not be considered here.[7]

Furthermore, the issues about which CompSouth complains – the EEL usage restrictions adopted by the Commission in the *Triennial Review Order* and the scope of BellSouth's audit rights – are already pending in other proceedings. Specifically, in March 2005 various CLECs, including several members of CompSouth, filed petitions with the Commission requesting the elimination of its EEL usage restrictions -- petitions that remain pending before the agency.[8] Similarly, the dispute concerning the scope of BellSouth's audit rights is being litigated before various state commissions and federal courts, as CompSouth readily admits. Under well-established precedent, the Commission should decline to consider such issues in the context of

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[4] *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, 15 FCC Rcd 95587 (2000), *affd Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*Supplemental Order Clarification*").

[5] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17351 ¶ 591 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA II*"), *cert. denied* 125 S. Ct. 313 (2004).

[6] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Remand, 20 FCC Rcd 2533, ¶ 230 (2005) ("*Triennial Review Remand Order*") *aff'd, Covad Communications Co. v. FCC,* 450 F.3d 528 (D.C. Cir. 2006). CompSouth erroneously insists that BellSouth "has defied the Commission" by refusing "to amend interconnection agreements to incorporate changes of law ... until all disputes regarding changes of law are resolved." *CompSouth Ex Parte* at 8, n.22. BellSouth is not obligated to amend its interconnection agreements on a piecemeal basis by acceding to CLEC requests to selectively incorporate beneficial provisions from the *Triennial Review Order* and the *Triennial Review Remand Order*, while omitting other related provisions that the CLECs may find less desirable. BellSouth's refusal to engage in a CLEC self-serving approach to the change-of-law process is reasonable and hardly constitutes "defiance" of any Commission order.

[7] *See, e.g., AT&T/Comcast Merger Order*, ¶165 (rejecting alleged harm as not merger-specific); *In re: Joint Applications of Global Crossing Ltd. & Citizens Communications Co.,* Memorandum Opinion and Order, 16 FCC Rcd 8507, 8511 ¶ 10 (2001) (rejecting alleged harms as insufficiently merger-specific).

[8] *See* Petition for Reconsideration of Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Inc., Eschelon Telecom, Inc., NuVox Communications, SNiP LiNK, LLC, Xspedius Communications LLC, and XO Communications, Inc., WC Docket No. 04-313 & CC Docket No. 01-338 (filed March 28, 2005); Petition for Reconsideration of CTC Communications Corp., Gilette Global Networks, Inc. d/b/a/ Eureka Networks, GlobalCom, Inc., Lightwave Communications, LLC; McLeodUSA, Inc., Mpower Communications Corp., PacWest Telecomm, Inc., TDS Metrocom, LLC, and US LEC Corp., WC Docket No. 04-313 & CC Docket No. 01-338 (filed March 28, 2005).

this merger as they are "better addressed in other Commission proceedings, or other legal fora,"[9] if at all.

CompSouth also has both its legal theories and facts wrong. With respect to the EEL eligibility criteria, CompSouth's argument that such criteria are "superfluous" in light of the *Triennial Review Remand Order* is without merit.[10] Although the Commission revisited the "qualifying services" approach to impairment in response to *USTA II*, its rationale for establishing the EEL eligibility criteria remains equally valid today. These criteria ensure that carriers not impaired without access to unbundled network elements – such as carriers providing exclusively long distance service – do not obtain such access by purchasing EELs or by being allowed to convert special access services to EELs.

Simply because the Commission has adopted a rule directly prohibiting carriers from using unbundled network elements solely to provide long distance services does not obviate the need for a test to determine whether that rule is being followed. Indeed, far from eliminating the need for the EEL eligibility criteria, the Commission's decision to deny unbundled network elements for interexchange services underscores the continued need for such safeguards to ensure that requesting carriers do not improperly circumvent the Commission's non-impairment determinations. If those safeguards were eliminated, requesting carriers could flout the Commission's prohibition on their using unbundled network elements exclusively for interexchange services with impunity and game the system by using EELs "in order to obtain favorable rates or to otherwise engage in regulatory arbitrage."[11]

Despite the change in the Commission's approach to ensuring that long distance carriers do not have access to unbundled network elements, the Commission's recognition of "the harms associated with gaming by long-distance providers" has remained constant.[12] The EEL

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[9] *In re: Applications of Craig O. McCaw & AT&T Co.*, Memorandum Opinion and Order, 9 FCC Rcd 5836, 5904 ¶ 123 (1994); *see also In re: SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 55, n.161 (2005) (rejecting "claims of commenters seeking special access conditions or raising concerns unrelated to the merger, many of which are the subject of pending rulemaking proceedings"); *In re: Applications of AT&T Wireless Services, Inc. & Cingular Wireless Corp., Memorandum Opinion and Order*, 19 FCC Rcd 21522, ¶¶ 39-51, 56, n.222 (2004); *GM/Hughes Order* ¶¶ 304-309, 313-314 (2004).

[10] *CompSouth Ex Parte* at 11.

[11] *Triennial Review Order*, 18 FCC Rcd at 17351 ¶ 591.

[12] *Id.*, 18 FCC Rcd at 17355, ¶ 599; *see also* 17356-57, ¶¶ 604-05 (explaining that the collocation EEL eligibility requirement was adopted because collocation "is traditionally not used by interexchange carriers" and necessitates that the "collocation must be within the incumbent LEC network, and cannot be at an interexchange carrier POP or ISP POP"); *see also Triennial Review Remand Order*, 20 FCC Rcd at ¶ 230 (declining to adopt an across-the-board prohibition on special access conversions, in part, because "a significant percentage of the special access channel terminations that the BOCs sell to carriers are provided to interexchange carriers . . . and are therefore largely shielded already from potential conversion to UNEs") (citations omitted).

eligibility criteria were designed to prevent such gaming, and they are as essential today as when they were first adopted.[13]

With respect to the audit issue, CompSouth's accusation that BellSouth has "harass[ed] competitors with unlawful audit requests" and engaged in "abusive audits" is completely false, and its description of the events surrounding NuVox's determination to obstruct any meaningful audit of its EELs usage for the past four years is replete with half-truths and untruths.[14] However, because this issue has nothing to do with the merger, BellSouth will not take the Commission's time in refuting and correcting each of CompSouth's misstatements. Instead, BellSouth will focus on four primary points that are fatal to CompSouth's claims.[15]

First, notwithstanding CompSouth's suggestions to the contrary, BellSouth has only requested EEL audits of a limited number of competing carriers. Although approximately 80 CLECs purchase EELs from BellSouth, there are only six CLECs to which outstanding audit requests remain pending. BellSouth has conducted EEL audits of four other CLECs, and two CLECs entered into settlement agreements without the need for an audit. This limited number of EEL audits belies CompSouth's claim that BellSouth is seeking to forestall "competitive entry in the BellSouth region" by "miring" the CLEC industry in EEL audits.[16]

Second, while insisting that BellSouth's audit requests are "unlawful," CompSouth does not bother to advise the Commission of a federal court decision released two days before the *CompSouth Ex Parte* filing that expressly holds otherwise.[17] In that case the United States

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[13] CompSouth's argument that "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" is misleading. *CompSouth Ex Parte* at 8, n.25. The declaration filed by BellSouth seven years ago and cited by CompSouth makes clear BellSouth's position that CLECs should not be entitled to UNEs where they have "alternatives" to ILEC facilities, regardless of the uses to which they may seek to put such UNEs. *See* Declaration of Thomas E. Allen, Jr., attached to Letter from Robert Blau, BellSouth, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 96-98, at 6-7 (filed Sept. 8, 1999). Consistent with this position, BellSouth proposed that CLECs are not impaired and thus should not be entitled to unbundled transport between central offices where "there are two alternative entrance facilities and two collocators present." *Id.* at 9. This proposal hardly evidences BellSouth's support for "the broad availability of EELs," as CompSouth claims.

[14] *CompSouth Ex Parte* at 3-7.

[15] BellSouth cannot let go unanswered CompSouth's allegation that BellSouth "appears to have violated section 222 of the Act," which is not supported by any facts and is utterly baseless. *CompSouth Ex Parte* at 5, n.14. BellSouth has complied fully with its duties under section 222 and the Commission's rules to protect the confidentiality of customer proprietary network information.

[16] *CompSouth Ex Parte* at 2-3.

[17] *BellSouth Telecommunications Inc. v. NuVox Communications Inc.*, 2006 U.S. Dist. LEXIS 65029 (N.D. Ga. Sept. 12, 2006). The court's decision is particularly significant because it is the first federal court to interpret the parties' nine-state interconnection agreement under Georgia law, which is the governing law. However, one would never know from reading the *CompSouth Ex Parte,* which only mentions the Georgia district court's decision in passing in a footnote and instead focuses on the order of the Georgia Public Service Commission ("GPSC") that the district court reversed and enjoined both the GPSC and NuVox from enforcing. *CompSouth Ex Parte* at 5, n.15.

District Court for the Northern District of Georgia affirmed BellSouth's contractual right to conduct an audit of NuVox's EELs, considering and rejecting NuVox's argument that the parties' interconnection agreement requires that BellSouth: (i) demonstrate a concern before it is allowed to conduct an audit; and (ii) use an independent auditor in performing the audit – the same argument that NuVox has offered for the past four years as part of its strategy to avoid an EELs audit and that CompSouth regurgitates in its *ex parte*.

In expressly rejecting NuVox's argument, which the Georgia Commission erroneously accepted, the court found that reading the "concern" and "independent auditor" requirements into the parties' interconnection agreement was "seriously flawed" and "disregards the Georgia law of contracts ...."[18] According to the court:

> Because the GPSC did not find any ambiguity in § 10.5.4, it was obligated to interpret the Agreement based on its plain, unambiguous language. Section 10.5.4 states two restrictions on BellSouth's ability to audit NuVox: (1) BellSouth must give NuVox 30 days notice; and (2) BellSouth must pay for the audit.
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> . . .
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> A plain language interpretation of § 10.5.4 does not impose a 'demonstrate a concern' or 'independent auditor' requirement on BellSouth's audit rights. Nothing in the provision indicates clearly that a condition precedent was meant to be implied. The GPSC's interpretation ignored the requirements of Georgia contract law, which constituted an important factor relevant to its decision. Accordingly, the GPSC's interpretation was arbitrary and capricious.[19]

Third, while there has been considerable litigation surrounding BellSouth's request to audit NuVox's EEL usage, NuVox, not BellSouth, is to blame. As the Georgia district court confirmed, BellSouth has a contractual right to audit NuVox's EEL usage by providing 30 days' advance notice and by paying for the cost of the audit. NuVox's refusal to abide by the terms of the parties' interconnection agreement and its insistence on audit conditions to which the parties did not agree are the cause of the "multiple complaints" and "federal and state court cases" about which CompSouth complains.[20]

Indeed, while citing with favor the federal court decision upholding the Kentucky Public Service Commission's ("KPSC") order recognizing BellSouth's right to conduct an audit of certain NuVox EEL circuits, CompSouth conveniently neglects to mention that NuVox appealed that order to federal court – an appeal NuVox lost.[21] Similarly, CompSouth fails to mention that

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[18] *Id.* at 12.

[19] *Id.*

[20] *CompSouth Ex Parte* at 7.

[21] *NuVox Communications, Inc. v. BellSouth Telecommunications, Inc.*, 3:05-CV-00041-JMH, slip op. (E.D. Ky. Nov. 1, 2005).

it was NuVox that appealed an order of the North Carolina Commission upholding BellSouth's right to audit NuVox's EELs – an appeal NuVox also lost (on jurisdictional grounds).[22]

Fourth, CompSouth's argument that no damages have "been paid or found to be owed to BellSouth" as a result of improper EEL usage is disingenuous.[23] Before recovering damages from NuVox as a result of improper EEL usage, the parties' interconnection agreement provides that BellSouth must "file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement," *after* the EEL audit has been completed and *if* the audit indicates that NuVox has not complied with the EEL eligibility criteria.[24] Of course, by refusing to consent to any EEL audit, NuVox has sought to prevent BellSouth from collecting damages to which it may be entitled.

That BellSouth has not yet recovered any damages for improper EEL usage also is not evidence that CLECs are using EELs properly, as CompSouth falsely suggests. In fact, several of the EEL audits that are underway or have been completed indicate otherwise.[25] For example, according to a verbal report last year by the auditor concerning the preliminary results of an audit of 44 circuits that NuVox converted in Georgia (which is the limited audit resulting from the GPSC order that was recently reversed and remanded), nearly 60% of NuVox's circuits in the audit are either out of compliance or data was not available to demonstrate with certifiable confidence that the circuits were ever in compliance. The auditor also preliminarily concluded that NuVox's internal control and record-keeping practices (which are regional, not Georgia-specific) provided a poor to non-existent "control" structure that would not have permitted NuVox to make *any* of its certifications with the requisite confidence.[26]

The potential liability facing NuVox and other members of CompSouth readily explains why NuVox and CompSouth are desperate to put a stop to current or future EEL audits. Prior attempts by NuVox to obtain such relief from the state public service commissions and the courts have been unsuccessful. The same is true for NuVox's more recent request of several state commissions in BellSouth's region to condition their merger approval on the elimination of EEL

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[22] *NuVox Communications, Inc. v. North Carolina Utilities Comm'n*, 409 F. Supp. 2d 660 (E.D.N.C. 2006).

[23] *CompSouth Ex Parte* at 7.

[24] Attachment 2, Section 10.5.4.

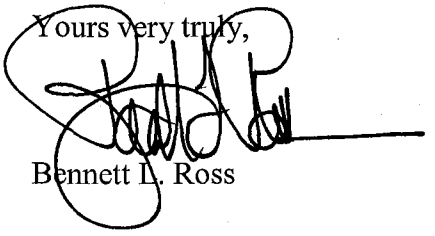
[25] BellSouth retained an auditor to audit 1,440 EEL circuits of a CLEC operating in North Carolina. The audit determined that none of the CLEC's EEL circuits was in compliance with applicable eligibility criteria.

[26] Reply Declaration of Jerry Hendrix, WC Docket No. 04-313 & 01-338, ¶¶ 4-9 (filed June 6, 2005). The auditor subsequently suspended work on the audit and has not issued any findings or conclusions after almost two years because NuVox sued the auditor and otherwise refused to cooperate in completing the audit. *See* May 27, 2005 Letter from Carl R. Geppert, KPMG LLP, to Jerry Hendrix, BellSouth.

audits – a request that was uniformly rejected.[27] Now, NuVox and CompSouth come to this Commission with the same request, which the Commission should likewise reject.

Please include a copy of this letter in the record in the above-referenced proceeding. Thank you for your attention to this matter.

Yours very truly,



Bennett L. Ross

BLR/dr

Cc: Nicholas Alexander
William Dever
Donald K. Stockdale, Jr.

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[27] *See, e.g.,* Order, *In the Matter of: Joint Application For Approval of the Indirect Transfer of Control Relating To The Merger of AT&T Inc. and BellSouth Corporation,* Case No. 2006-00136, at 4 (July 25, 2006) (rejecting condition proposed by NuVox and Xspedius to "eliminate audits associated with a provision of Enhanced Extended Links," finding that the condition was "not sufficiently related to the proposed merger of AT&T and BellSouth to be considered in this proceeding"); Order, *Joint Application of AT&T Inc. and BellSouth Corporation Together With Its Certificated Mississippi Subsidiaries For Approval of Merger,* Docket No. 2006-UA-164 ¶ 26 (July 25, 2006) (rejecting condition proposed by NuVox and Time Warner Telecom that BellSouth "forfeit[] its contractual right to audit CLEC compliance with FCC safeguards regarding the use of enhanced extended links ("EELs")," finding "that this matter is not an appropriate subject for this proceeding or a basis for imposing a condition on this merger"); Order, *AT&T Inc. and BellSouth Corporation, Ex Parte, In re Request For Approval And/Or Letter of Non-Opposition To The Indirect Change of Control Of Certain Certificated Entities Resulting From The Planned Merger,* Docket No. U-29427, at 9-10 (Aug. 2, 2006) (denying adoption of specific merger conditions and deciding instead to "open a global rulemaking docket to address a number of concerns raised by the 3 CLEC intervenors, particularly with respect to the creation of a 'fresh-look window', and other *force majeure* related concerns").