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October 4, 2006

BY ECFS

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

Re: In the Matter of AT&T Inc. and BellSouth Corporation
Applications for Approval of Transfer of Control, WC Docket No. 06-74
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

The Competitive Carriers of the South ("CompSouth"), by their attorneys, hereby submit a redacted version of an *ex parte* letter ("Ex Parte Letter") for filing in the above-referenced docket. An unredacted version of the Ex Parte Letter is being filed today, under seal and by hand delivery, with the Federal Communications Commission.

Please contact the undersigned at (202) 342-8614 if you have any questions about this letter.

Respectfully submitted,

Denise N. Smith

Enclosures

DC01/SMITD/254071.1

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October 4, 2006

VIA 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
REDACTED – FOR PUBLIC INSPECTION

Dear Ms. Dortch:

CompSouth, through its undersigned counsel, herein responds to BellSouth's September 20, 2006 ex parte letter[1] in which BellSouth falsely argues that the proposed merger condition relating EELs audits and EEL-specific eligibility criteria "has nothing to do with the merger" and erroneously describes CompSouth's September 14, 2006 ex parte letter regarding the same subject matter as being "replete with half-truths and untruths".[2] BellSouth provides neither a coherent nor compelling legal or factual response to CompSouth's demonstration that: (1) BellSouth has used and continues to use EELs audits to harass competitors, and (2) the legal justification for the EEL-specific eligibility criteria is mooted by, among other things, the proposed merger.

CompSouth's September 14, 2006 ex parte contained no half-truths or untruths, as BellSouth erroneously asserts without any credible support. Actually, it is BellSouth that goes to great lengths to draw the Commission's attention away from the true facts. For example,

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1 Ex Parte Letter from Bennett Ross, Counsel, BellSouth to Marlene H. Dortch, Secretary, FCC (Sept. 20, 2006)("*BellSouth Ex Parte*").

2 *BellSouth Ex Parte* at 1 and 4.

BellSouth refers to "the preliminary results of an audit" in Georgia".[3] *BellSouth intentionally – and materially – omits any reference to the letter it received from the auditor itself (on file with the Georgia Public Service Commission ("GPSC")) admonishing that those results are incomplete and are not to be relied on by any party (including BellSouth).*[4] Why would BellSouth rely on – and ask this Commission to rely on – preliminary results that the auditor itself admonished were incomplete and unreliable (so much so, that the auditor scrapped the report and replaced the audit team[5])? The answer to this question is obvious.

To further defer attention from the true facts, BellSouth erroneously describes the CompSouth proposal on EELs (supported by CompTel as well) as "a transparent attempt by NuVox in particular to avoid a term in its current interconnection agreement." The September 14, 2006 ex parte was filed on behalf of CompSouth, a 13 member CLEC association based in the Southeast and not on behalf of only NuVox.[6] Multiple CLECs have been noticed by BellSouth for similar audits and the concerns about this harassing practice extend well beyond NuVox and the other CLECs that have been at the receiving end of all manner of BellSouth litigation and attacks.[7] The bottom line is that a group of the largest CLECs operating in the Southeast (and elsewhere) have identified BellSouth's EEL audit campaign as a significant "worst practice" that must be abolished.

Accordingly, BellSouth's claim that the proposed condition has nothing to do with the merger is baseless. BellSouth is the only ILEC with a history of abusive EEL audits. The condition is directly related to the merger as it is designed to ensure that BellSouth's policy of harassing CLECs with illegitimate audit requests does not spread to the vast service territory

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3 *Id.* at 6.

4 NuVox was required by the GPSC to verify those preliminary results and its verification (on file under seal in the form of an attestation with the GPSC) found that **[BEGIN CONFIDENTIAL]**
.[END CONFIDENTIAL]

5 Any blame for the extended duration of the Georgia audit lies with BellSouth and its selected auditor.

6 CompSouth members include, but are not limited to: ACCESS Integrated Networks, Inc., Access Point Inc.. Cinergy Communications Company, Cbeyond Communications, Dialog Telecommunications, Inc., DeltaCom, FDN Communications, Momentum Telecom, Inc., Network Telephone -- a Talk America Company, NuVox, XO Communications, and Xspedius Communications.

7 BellSouth's ex parte indicates that "only" six carriers still have outstanding audit requests of the eighty that purchase EELs from BellSouth. The undersigned is aware of most of these carriers and submits that, rather than being a group of which BellSouth has legitimate concerns, they simply appear to be among the largest CLECs doing business and the largest users of EELs in the BellSouth region.

of the "new" AT&T. Moreover, the EELs criteria and audit rights were originally designed to prevent large IXCs such as the former AT&T and MCI from converting their long distance special access circuits to EELs. With this merger, legacy AT&T will become an affiliate of BellSouth, meaning that no audit of AT&T's EELs will ever be conducted, even as AT&T's CLEC competitors unfairly and discriminatorily continue to be subjected to such audits.

Further, as CompSouth and others have explained, BellSouth's audit campaign has mired facilities-based CLECs which use large numbers of EELs in litigation and audits subject to manipulation and abuse. For example, BellSouth cites to an audit wherein it claims that "the audit determined none of the CLEC's EELs were in compliance with the applicable service criteria."[8] BellSouth fails to disclose that the auditor used was a group of ILEC consultants the GPSC had previously rejected by stating that it would give no weight to the findings of an audit conducted by such an auditor.[9] Indeed, the majority of circuits the auditor found to be non-compliant were neither subject to the audit nor the *Supplemental Order*

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[8] *BellSouth Ex Parte* at n.25.

[9] *Enforcement of Interconnection Agreement Between BellSouth Telecommunications Inc. and NuVox Communications, Inc.*, Commission Order, GPSC Docket No. 122778-U, at 12-14 (June 30, 2004)("NuVox raised serious concerns about the auditor's independence"). Indeed, the GPSC essentially rejected the firm, stating that it would give no weight to the findings of an audit conducted by such an auditor. *See id,* at 14 ("the Commission concludes that it would not afford any weight to findings from an audit that was not conducted in compliance with AICPA standards"). As CompSouth indicated in its ex parte, a federal court in Georgia has *partially vacated and remanded* the GPSC's decision. *See, e.g., BellSouth v. NuVox et. al,* 1:04-cv-2790-WSD, at n. 11 (noting that the Court's decision does not address "the issue of what requirements the Agreement, properly construed under Georgia law, might impose on BellSouth's audit rights")(N.D.G.A. Sept.12, 2006). Also, as CompSouth previously disclosed, NuVox will appeal that decision, which, for example, finds that the FCC did not adopt a concern requirement in the *Supplemental Order Clarification*, despite the FCC's having said the opposite. *Triennial Review Order*, ¶ 621 (responding to NuVox's Petition for Declaratory Ruling and indicating that in the *Supplemental Order Clarification* "the Commission concluded that 'audits will not be routine practice , but will only be undertaken when the incumbent LEC has a concern that the requesting carrier has not met the criteria for providing a significant amount of local exchange service.'" (citation omitted); *see also id.* ¶ 622 (describing the audit right as being limited to "later verification *based upon cause*")(emphasis added). To the contrary, a federal district court in Kentucky upheld a KPSC decision that limited BellSouth to an audit of only those circuits for which it had demonstrated a concern. *NuVox Communications, Inc. v. BellSouth Telecommunications, Inc. et al.*, Memorandum Opinion and Order, Case No. 3:05-41-JMH (E.D.K.Y. 2005). A different interpretation is presently under review in federal court litigation arising from decisions by the NCUC (BellSouth neglects to disclose that the decision it cites in note 22 of its ex parte is presently on appeal to the United States Court of Appeals for the Fourth Circuit. *See NuVox Communications, Inc. v. North Carolina Utilities Commission, et. al,* Case No. 06-1312 (4th Cir.). These divergent outcomes do not suggest that these issues are best resolved elsewhere. Instead, they suggest that the issues are best laid to rest by this Commission, which understands the policy implications of its past and present decisions, through adoption of the proposed merger condition.

Clarification's significant local use requirement. That, however, did not prevent the auditor from reaching its own (contrary) legal conclusions or from making factual findings of non-compliance based on no evidence whatsoever. The auditor, whose conduct and report have not yet been reviewed by any regulatory body, engaged in further inappropriate legal and policy decision-making to arrive at the result preferred by its client BellSouth. So that CLECs can dedicate resources necessary to replace the competitive presence of AT&T in the legacy BellSouth service territory, the FCC must, by adoption of the proposed EEL-related merger condition, declare an end to the sprawling and predatory BellSouth EEL audits and litigation.[10]

BellSouth's claim that CLECs have a way out of its audit web is disingenuous and misleading. BellSouth claims that if CompSouth members want to avoid "future audits" for compliance with the seven-year-old and three-years-ago discarded *Supplemental Order Clarification* EEL use and auditing provisions, they can amend their interconnection agreements.[11] First, BellSouth's response sets forth its position with respect to future audits for compliance with the *Supplemental Order Clarification's* significant local use requirement. It says nothing of the audits BellSouth is *currently* using to harass competitors. From all indications, it appears BellSouth intends to continue or even accelerate its harassment of CLECs with pending (non-future) requests to audit for *Supplemental Order Clarification* compliance long after interconnection agreements have been amended. Moreover, BellSouth's claim that CLECs have attempted to take beneficial provisions while omitting less favorable provisions in the change-of-law amendment process is baseless. In fact, BellSouth declared all of its interconnection agreements "deemed amended" to include favorable-to-BellSouth provisions of the *Triennial Review Remand Order* while further delaying on amendments to incorporate favorable-to-CLEC provisions of the now three-year-old *Triennial Review Order.* The result has been that BellSouth has enjoyed all the ILEC-favorable changes of law included in the *Triennial Review Remand Order* as it continues to stave off CLEC-favorable changes of law included in the much older *Triennial Review Order.* Even after a state commission has decided all disputed change-of-law issues, BellSouth delays even further (nearly seven months and counting, in some cases) – keeping CLECs trapped in agreements with the *Supplemental Order Clarification* use restriction the Commission rejected three years ago.

Finally, BellSouth provides no coherent legal argument as to why any EEL-specific eligibility criteria different from the "not solely for long distance" requirement that

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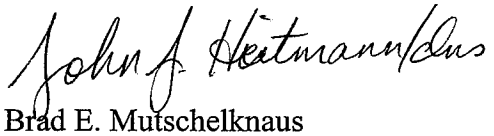
[10] Although BellSouth claims to have complied fully with section 222 of the Act, *BellSouth Ex Parte* at 15, it is difficult to conceive how BellSouth's practice of comparing CLEC proprietary information, including customer proprietary network information ("CPNI") provided by the CLEC for the purpose of ordering UNEs, with its own retail customers' CPNI – without anybody's knowledge or consent and for the sole purpose of manufacturing cause to justify its EEL audit requests – could be found to be in compliance with section 222 and the Commission's rules implementing that section.

[11] *BellSouth Ex Parte* at 2.

attaches to all UNEs remain necessary and are not otherwise "superfluous".[12] BellSouth argues that the EEL eligibility criteria are needed to ensure that "carriers that are 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."[13] The FCC's finding that CLECs are not impaired and may not use UNEs exclusively to provide long distance service accomplishes that goal. Moreover, the long distance carriers that were of primary concern at the time have since been subsumed by Bell companies – one of which is an applicant now seeking to gain control of BellSouth.[14]

For the reasons discussed above, the Commission should put an end to BellSouth's harassment of competitors with abusive audits under the outdated *Supplemental Order Clarification*. In addition, it should remove the current superfluous EEL eligibility criteria in the AT&T/BellSouth regions as a condition to any approval of the application. These conditions are necessary to guard against the spread of anticompetitive "worst practices" from the BellSouth legacy serving territory into the proposed serving territory for the newer AT&T. They are also necessary to ensure that CLECs resources now dedicated to defending against predatory BellSouth EEL audit requests, audits and related litigation can be more beneficially put to use in replacing the competitive presence of AT&T which applicants so desperately want to remove from the legacy BellSouth serving territory.

Respectfully submitted,



Brad E. Mutschelknaus
John J. Heitmann

Counsel for Competitive Carriers of the South

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12 *Id.* at 3.

13 *Id.*.

14 BellSouth's argument that CLECs, in the absence of superfluous EEL eligibility criteria, "could flout the Commission's prohibition on their using unbundled network elements exclusively for interexchange services with impunity and game the system..." is the same makeweight argument. *See id.* at 3. Any carrier "could flout" any given FCC rule on any given day. And on those days, enforcement should be both expected and effective. The EEL eligibility criteria do not serve any purpose not already served by the Commission's rule regarding non-impairment for the exclusive provision of long distance service. The proposed merger makes this conclusion starker than ever as the carriers that were of primary concern to both the Bells and the Commission have since been swallowed whole by the Bells and now BellSouth proposes to be in turn swallowed by what was the very largest of the legacy interexchange carriers.

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