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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 their most recent filing, NuVox Communications (“NuVox”) and the other members of the Competitive Carriers of the South, Inc. (“CompSouth”) continue their litany of BellSouth’s alleged “history of abusive EEL audits” and its purported “policy of harassing CLECs with illegitimate audit requests.”¹ In so doing, NuVox and CompSouth continue to overlook several critical facts.

First, BellSouth has a contractual right to conduct EEL audits. In the case of NuVox, as the United States District Court for the Northern District of Georgia recently confirmed, BellSouth is entitled to audit NuVox’s EEL usage upon giving 30 days’ advance notice and by paying for the cost of the audit.² It is hardly “abusive” or “illegitimate” for BellSouth to seek to exercise or enforce the terms of its contract with NuVox.

Second, CLECs such as NuVox have a significant financial self-interest in preventing EEL audits from taking place. For example, on September 22, 2006, BellSouth filed a complaint against NuVox in North Carolina based upon an audit that revealed noncompliance of applicable

¹ Ex Parte Letter from Brad Mutschelknaus, Counsel, CompSouth, to Marlene H. Dortch, Secretary, FCC (Oct. 4, 2006) (“*CompSouth Ex Parte*”).

² *BellSouth Telecommunications Inc. v. NuVox Communications Inc.*, 2006 U.S. Dist. LEXIS 65029 (N.D. Ga. Sept. 12, 2006).

EEL usage requirements by a company acquired by NuVox.³ The complaint asks the North Carolina Utilities Commission to award BellSouth damages, which amount is confidential. However, in a pending, related federal court proceeding between NuVox and BellSouth in North Carolina, the public record reflects that the damages sought are likely in the millions of dollars⁴ Faced with such exposure, it is hardly surprising that NuVox and its ilk are seeking to have the Commission “abolish” EEL audits as a condition to approval of the merger.⁵

Third, while anxious to use this merger as a means to avoid the financial fallout associated with the improper use of EELs, NuVox and CompSouth utterly fail to demonstrate that their proposed condition – the “abolishment” of EEL audits – would “remedy harms that arise from the transaction (i.e., transaction-specific harms).”⁶ CompSouth’s insistence that the condition is necessary to prevent EEL audit requests from “spread[ing] to the vast service territory of the ‘new’ AT&T” is frivolous.⁷ The audit rights of AT&T and BellSouth are spelled out in their respective interconnection agreements. Because this transaction will occur solely at the holding company level, the parties to these interconnection agreements will have the same rights and duties after the merger as they had prior to the merger. Thus, the “harm” that NuVox and CompSouth seek to remedy is no harm at all.

CompSouth also argues that abolishing EEL audits is “directly related to the merger” because, according to CompSouth, the merger will result in AT&T becoming “an affiliate of BellSouth, meaning that no audit of AT&T’s EELs will ever be conducted, even as AT&T’s CLEC competitors ... continue to be subjected to such audits.”⁸ This argument ignores that

³ See *BellSouth Telecommunications, Inc. v. NuVox Communications, Inc., and its Merged Entity f/k/a NewSouth Communications Corp.*, Docket No. P-1341, Sub 1, Order Serving Complaint (N.C.U.C. Sept. 26, 2006).

⁴ See BellSouth Telecommunications, Inc.’s Memorandum in Opposition to Motion for Temporary Restraining Order, Civil Action No. 5:05-CV-207-BR(3) (E.D.N.C. filed March 31, 2005), Supporting Affidavit of Shelley Padgett ¶ 7 (stating that “if all of NuVox’s converted EELs are audited and found non-compliant, the difference between the higher special access (SPA) rates and the lower EEL rates consequently owed to BellSouth would be approximately \$28.9 million. In North Carolina, this equates to over \$4.5M”).

⁵ CompSouth attempts to denigrate the North Carolina audit by claiming that the Georgia Public Service Commission “previously rejected” the firm that conducted the audit in North Carolina. *CompSouth Ex Parte* at 3, n.9. This claim is untrue, as the Georgia Commission made no findings concerning the auditor, merely indicating that “NuVox raised serious questions about the auditor’s independence” and concluding that it “would not afford any weight to findings from an audit that was not conducted in compliance with [American Institute of Certified Public Accountants] standards.” See *In re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Order Adopting in Part and Modifying In Part the Hearing Officer’s Recommendation, Docket No. 12778-U, at 13-14 (June 30, 2004). In any event, it is not clear why CompSouth seeks to continue to rely upon the Georgia Commission’s order when: (i) the federal district court reversed this order in relevant part and enjoined either the Georgia Commission or NuVox from seeking to enforce it; and (ii) the auditor has represented that its audit in North Carolina was conducted in accordance with AICPA standards.

⁶ *SBC-AT&T Merger Order*, 20 FCC Rcd 18290 ¶ 19 (2005).

⁷ *CompSouth Ex Parte* at 2-3.

⁸ *Id.* at 3.

BellSouth has not had any reason to audit AT&T's EELs, a fact that will not change with the merger. Furthermore, that BellSouth has not conducted an audit of AT&T's EELs belies CompSouth's argument that BellSouth is using EEL audits in an attempt to "harass" CLECs.

CompSouth criticizes BellSouth for referring to preliminary results of the Georgia audit, without disclosing that such results were "incomplete" and that the auditor had not produced any findings or conclusions upon which the parties may rely.⁹ This criticism is without merit as BellSouth made clear in its September 20, 2006 *ex parte* that the results of the Georgia audit were "preliminary" and that the auditor had "subsequently suspended work on the audit and has not issued any findings or conclusions"¹⁰

Finally, CompSouth's claim that BellSouth is "keeping CLECs trapped in agreements with the *Supplemental Order Clarification* use restriction the Commission rejected three years ago" by delaying the change-of-law process is untrue and completely disingenuous.¹¹ In NuVox's case, it filed for arbitration of a successor interconnection agreement in February 2004.¹² Thereafter, NuVox significantly contributed to any delay in amending the existing interconnection agreement to incorporate *USTA II* and the Commission's interim unbundling rules. Specifically, in July 2004, following the issuance of the Interim Rules order, the parties filed a joint procedural motion in the various arbitration proceedings which simply requested a 90-day delay in arbitration activity (known as the "Abeyance Agreement") while the parties continued negotiations. Since the filing of such procedural motions, NuVox has argued that BellSouth made a contractual commitment to forego amending NuVox's existing interconnection agreement in light of *USTA II* while the parties were negotiating the successor agreement. In fact, NuVox has attempted to distort the intent of the Abeyance Agreement by insisting that NuVox had no obligation to comply with the "no new add" requirements of the *Triennial Review Remand Order* or to amend its existing interconnection agreement to implement the *Triennial Review Remand Order*.¹³

⁹ *Id.* at 2.

¹⁰ Ex Parte Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene H. Dortch, Secretary, FCC (Sept. 20, 2006). CompSouth falsely claims that "[a]ny blame for the extended duration of the Georgia audit lies with BellSouth and its selected auditor." *CompSouth Ex Parte* at 2. However, the auditor in question -- KPMG -- was initially suggested and expressly endorsed by NuVox. See Transcript of Oral Argument, *In re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications and NuVox Communications*, Docket No. 12778-U, at 27 & 52-53 (August 13, 2002) (stating that Nuvox "would not ... object to the independence of KPMG") (statement of John Heitmann). However, after receiving the preliminary audit results from KPMG, NuVox promptly filed suit against KPMG, alleging breach of contract, professional negligence, negligence, breach of fiduciary duty, and defamation. NuVox's lawsuit seriously delayed competition of the audit -- a fact CompSouth conveniently fails to mention.

¹¹ *CompSouth Ex Parte* at 4.

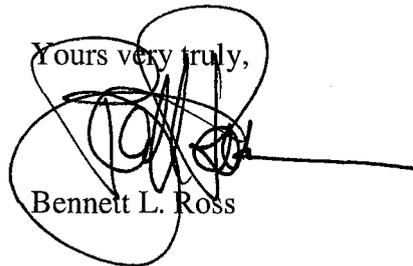
¹² NuVox filed a joint arbitration with two other CLECs (Xspedius and KMC).

¹³ *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).

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BellSouth has worked diligently since 2003 to enter into a new interconnection agreement with NuVox that complies with all of the requirements of the *Triennial Review Remand Order* as well as the *Triennial Review Order*.¹⁴ BellSouth meets with Nuvox regularly to review the numerous redlines and changes that NuVox has submitted to BellSouth in the course of negotiations. Furthermore, notwithstanding CompSouth's suggestion to the contrary, BellSouth and NuVox have actually entered into successor agreements in North Carolina and Florida, both of which contain the new EEL eligibility and audit requirements. Under the circumstances, any claim that BellSouth is guilty of "trapping" CLECs in outdated interconnection agreements is simply untrue.

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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¹⁴ *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).