

**BellSouth Telecommunications, Inc.**  
601 W. Chestnut Street  
Room 407  
Louisville, KY 40203

Mary.Keyer@BellSouth.com

**Mary K. Keyer**  
General Counsel/Kentucky

502 582 8219  
Fax 502 582 1573

September 5, 2006

Ms. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
P. O. Box 615  
Frankfort, KY 40602

**RECEIVED**

SEP 05 2006

PUBLIC SERVICE  
COMMISSION

Re: *Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of An Interconnection Agreement With BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended PSC 2004-00044*

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Proposed Language for Issues 12 and 51.

Sincerely,

  
for Mary K. Keyer

Enclosure

cc: Parties of Record

648147

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the Matter of:

SEP 05 2006

JOINT PETITION FOR ARBITRATION OF )
NEWSOUTH COMMUNICATIONS CORP., )
NUVOX COMMUNICATIONS, INC., KMC )
TELECOM V, INC., KMC TELECOM III LLC, )
AND XSPEDIUS COMMUNICATIONS, LLC )
ON BEHALF OF ITS OPERATING SUBSIDIARIES )
XSPEDIUS MANAGEMENT CO. SWITCHED )
SERVICES, LLC AND XSPEDIUS MANAGEMENT )
CO. OF LEXINGTON, LLC, AND XSPEDIUS )
MANAGEMENT CO. OF LOUISVILLE, LLC )

PUBLIC SERVICE COMMISSION

CASE NO. 2004-00044

BELLSOUTH TELECOMMUNICATIONS, INC.'S PROPOSED LANGUAGE FOR ISSUES 12 AND 51

Pursuant to the Commission's Order dated August 4, 2006, BellSouth Telecommunications, Inc. ("BellSouth") herein submits its proposed interconnection agreement language for Issues 12 and 51. As explained below, BellSouth's proposed language for both issues is completely consistent with the Commission's arbitration order dated September 26, 2005 ("Arbitration Order") and the Commission's order dated March 14, 2006, wherein the Commission disposed of the parties' respective motions for rehearing/reconsideration ("Recon Order"). Accordingly, the Commission should adopt BellSouth's proposed language for both issues and require the parties to include such language in the Joint Petitioners' interconnection agreements.

Issue 12 -- Should the Agreement state that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties?

In resolving Issue 12, the Commission expressly adopted BellSouth's proposed language. Additionally, in rejecting the Joint Petitioners' proposed language, the

Commission correctly concluded that the Joint Petitioners' proposed language would "lead to a lack of understanding in the interconnection agreement."<sup>1</sup> Specifically, the Commission stated:

Joint Petitioners seek a section in their interconnection agreement which states that all existing state and federal laws, rules, regulations, and decisions apply unless otherwise specifically agreed to by the parties. . . .

The Commission is concerned that adopting the Joint Petitioners' contract term would lead to a lack of understanding in the interconnection agreement. Both parties agree that applicable law is to be followed. However, the Commission wants to encourage actual meeting of the minds regarding the contracts. *Accordingly, BellSouth's proposed language should be adopted.* Applicable law should be followed, but any disputes regarding the same should be brought before this Commission rather than presuming that they are automatically incorporated in the existing contract.<sup>2</sup>

In denying the Joint Petitioners' motion for reconsideration for Issue 12, the Commission reaffirmed its initial decision:

[T]he Joint Petitioners assert that the Commission erred in adopting BellSouth's language. The Joint Petitioners have not addressed the Commission's concern that adoption of their proposal would result in one party's interpretation of applicable law being deemed incorporated into the contract without the other party having an opportunity to dispute its application. *The Commission is not persuaded that it should change its original decision.*<sup>3</sup>

Despite the Commission's crystal clear ruling on Issue 12, the Joint Petitioners' continue to reject BellSouth's proposed language – language that is completely consistent with the Commission's ruling on this issue. Specifically, BellSouth has proposed the following language for Issue 12:

This Agreement is intended to memorialize the Parties' mutual agreement with respect to their obligations under the Act and applicable FCC and Commission rules and orders. To the extent that either Party asserts that an obligation, right or

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<sup>1</sup> *Arbitration Order* at 8.

<sup>2</sup> *Arbitration Order* at 8 (emphasis added).

<sup>3</sup> *Recon Order* at 6 (emphasis added).

other requirement, not expressly memorialized herein, is applicable under this Agreement by virtue of a reference to an FCC or Commission rule or order or, with respect to substantive Telecommunications law only, Applicable Law, and such obligation, right or other requirement is disputed by the other Party, the Party asserting that such obligation, right or other requirement is applicable shall petition the Commission for resolution of the dispute. and the Parties agree that any finding by the Commission that such obligation, right or other requirement exists shall be applied prospectively by the Parties upon amendment of the Agreement to include such obligation, right or other requirement and any necessary rates, terms and conditions, and the Party that failed to perform such obligation, right or other requirement shall be held harmless from any liability for such failure until the obligation, right or other requirement is expressly included in this Agreement by amendment hereto.

Inexplicably, the Joint Petitioners refuse to agree to the above contract language and have unreasonably insisted on adding the following language to language quoted above:

*Except to the extent expressly set forth otherwise herein, all FCC rules and orders (in effect as of the Effective Date) relating to the subject matter contained in the Agreement are deemed incorporated as though expressly set forth herein and <<customer\_short\_name>> does not waive any right to require BellSouth's compliance with such federal rules and orders.*

To state the obvious, the Joint Petitioners' proposed additional language undermines and guts the Commission's clear ruling on Issue 12 – a ruling that flatly rejected the Joint Petitioners' position that unless otherwise agreed to, all existing law relating to the subject matter of the Agreement is deemed incorporated into the Agreement. Accordingly, the Commission should reject for a third time the Joint Petitioners' proposal and specifically adopt BellSouth's proposed language for Issue 12.

**Issue 51 – Should there be a notice requirement for BellSouth to conduct an audit and who should conduct the audit?**

In resolving Issue 51 regarding BellSouth's right to conduct an EEL audit, the Commission initially reaffirmed its previous EEL audit orders in a case involving

NuVox, BellSouth, and the Commission.<sup>4</sup> In doing so, the Commission declined to address the matter further in this arbitration.<sup>5</sup> In its *Recon Order*, however, the Commission explained its ruling on Issue 51 as follows:

BellSouth need only state that it has a concern and give reasons why it has concern. It is unnecessary for BellSouth to provide actual documentation of that concern prior to initiating an audit. The CLEC may object to the audit after it has been performed but may not prevent its initiation once BellSouth asserts that it has adequate documentation to support an audit. BellSouth must merely state its cause for conducting the audit, but need not further justify the matter to the CLEC. BellSouth has a right to audit EELs to verify a CLEC's compliance with the significant local usage requirements pursuant to FCC order. Once BellSouth notifies a CLEC of its concern over the appropriate usage of the EELs, the CLEC should not be permitted to interfere with BellSouth's right to conduct the audit before the audit ever occurs. The audit should be limited to those circuits over which BellSouth initially raised concern. The findings of the audit, if disputed, probably will have to be addressed by the Commission. At that point, if the parties cannot agree, the Commission can determine the next appropriate steps to address additional concerns which may surface during the audit. *Language incorporating the Commission's determinations should be included in the parties' interconnection agreements.*<sup>6</sup>

Despite the Commission's ruling on this Issue, the parties have been unable to agree upon language that incorporates the Commission's EEL audit ruling. To resolve the issue, BellSouth proposes the following EEL audit language:

To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer\_short\_name>> identifying the cause upon which BellSouth rests its allegations. Such Notice of Audit will be delivered to <<customer\_short\_name>> no less than thirty (30) calendar days prior to the date upon which BellSouth seeks to commence an audit. BellSouth need only state that it has a concern and give reasons why it has concern. It is unnecessary for BellSouth to provide actual documentation of that concern prior to initiating an audit. The CLEC may object to the audit after it has been performed but may not prevent its initiation once BellSouth asserts that it has adequate documentation to support an audit. BellSouth must merely state its cause for conducting the audit, but need not further justify the matter to the CLEC. BellSouth has a right to audit

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<sup>4</sup> *Arbitration Order* at 14.

<sup>5</sup> *Id.*

<sup>6</sup> *Recon Order* at 17 (emphasis added).

EELs to verify a CLEC's compliance with the significant local usage requirements pursuant to FCC order. Once BellSouth notifies a CLEC of its concern over the appropriate usage of the EELs, the CLEC should not be permitted to interfere with BellSouth's right to conduct the audit before the audit ever occurs. The audit should be limited to those circuits over which BellSouth initially raised concern. The findings of the audit, if disputed, probably will have to be addressed by the Commission. At that point, if the parties cannot agree, the Commission can determine the next appropriate steps to address additional concerns which may surface during the audit.

With the exception of the first two sentences of the above quoted proposed language, the remaining portion of BellSouth's proposed language tracks word-for-word the language found on page 17 of the Commission's *Recon Order*. Despite proposing language that strictly adheres to the Commission's *Recon Order*, the Joint Petitioners have rejected such language. Similar to the dispute regarding the language for Issue 12, the Joint Petitioners have no rational basis for objecting to BellSouth's proposed language. Accordingly, the Commission should disregard such objections and specifically order the inclusion of BellSouth's proposed language in the parties' interconnection agreements.

#### CONCLUSION

For the reasons stated herein, the Commission should adopt BellSouth's proposed language for Issue 12 and 51.

Respectfully submitted,



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Mary K. Keyer  
Cheryl R. Winn  
601 W. Chestnut Street, Room 407  
P. O. Box 32410  
Louisville, KY 40232  
(502) 582-8219

Robert A. Culpepper  
Suite 4300, BellSouth Center  
675 W. Peachtree Street, N.E.  
Atlanta, GA 30375

COUNSEL FOR BELLSOUTH  
TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the individuals on the attached service list by mailing a copy thereof, this 5th day of September 2006.

*for Cheryl R. Wynn*  
\_\_\_\_\_  
Mary K. Keyer



**SERVICE LIST – PSC 2004-00044**

Jake E. Jennings  
NewSouth  
Two North Main Street  
Greenville, SC 29601

Mary Campbell  
NuVox Communications, Inc.  
301 North Main Street, Suite 5000  
Greenville, SC 29601

Riley Murphy, Esq.  
NuVox Communications, Inc.  
301 North Main Street, Suite 5000  
Greenville, SC 29601

Marva Brown Johnson  
KMC Telecom  
1755 North Brown Road  
Lawrenceville, GA 30043

James C. Falvey  
Xspedius  
14405 Laurel Pl., Ste. 200  
Laurel, MD 20707-6102

John J. Heitmann  
Enrico C. Soriano  
Heather T. Hendrickson  
Kelley Drye & Warren LLP  
1200 19th Street, N.W., Suite 500  
Washington, DC 20036

John E. Selent  
Dinsmore & Shohl LLP  
1400 PNC Plaza  
500 W. Jefferson Street  
Louisville, KY 40202