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September 5, 2006

**via Hand Delivery**  
Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
P. O. Box 615  
Frankfort, KY 40601

**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, Case No. 2004-00044***

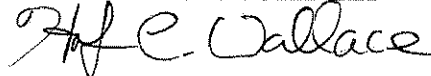
Dear Ms. O'Donnell:

Enclosed for filing in the above-styled case are the original and ten copies of the Joint Petitioners' Identification and Motion in Support of Disputed Conforming Language Proposals.

Thank you, and if you have any questions with regard to this matter, please call me.

Very truly yours,

DINSMORE & SHOHL LLP



Holly C. Wallace

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32138-1

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

**RECEIVED**

In the Matter of:

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 )

SEP 05 2006

PUBLIC SERVICE  
COMMISSION

CASE NO.  
2004-00044

**JOINT PETITIONERS' IDENTIFICATION AND MOTION IN SUPPORT OF  
DISPUTED CONFORMING LANGUAGE PROPOSALS**

Pursuant to Kentucky Public Service Commission Order dated August 4, 2005, NuVox Communications, Inc. (including the former NewSouth Communications Corp.) and Xspedius Communications, LLC on behalf of its operating subsidiaries (collectively referred to as "Joint Petitioners") hereby submit this pleading to identify those issues for which Joint Petitioners have been unable to resolve with BellSouth Telecommunications, Inc. ("BellSouth") the appropriate language to incorporate the Commission's arbitration decisions in the above-captioned docket. The contract language which remains in dispute pertains to **Issues 12 (Applicable Law) and 51 (EELs Audits)**. The disputed language proposed by the parties is set forth below along with Joint Petitioners' rationale to support adoption of their proposed language. Proposed language in regular type signifies the parties agree on that language. Proposed language in **bold** signifies language proposed solely by Joint Petitioners. Proposed language in **bold and underlined** signifies language proposed solely by BellSouth. Joint Petitioners respectfully request that the

Commission approve the language proposed by Joint Petitioners for use in the parties' interconnection agreements.

### Issue 12

#### Joint Petitioners' Proposed Conforming Language:

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 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. **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 this 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.**

#### BellSouth's Proposed Conforming Language:

Bellsouth agrees with the proposed conforming language above that is in regular type only. BellSouth disagrees with the language in bold. BellSouth has not proposed any additional language.

#### Joint Petitioners' Rationale:

Section 252(a) provides that parties *may* negotiate without regard to the requirements of Sections 251(b) and (c). Consistent with basic principles of contracting, when the parties elected to do that – to negotiate provisions that differed from the requirements of Sections 251(b) and (c) – they were explicit. Section 252(c) provides that interconnection agreements arrived at through compulsory arbitration – such as those at issue here – *must* meet the requirements and conform to

the regulations prescribed by the FCC pursuant to Section 251. A state Commission *may not* impose a result that deviates from Section 251. As the record in this proceeding makes clear, Joint Petitioners do not voluntarily agree to any other result. Yet, that is what the Commission's proposed adoption of BellSouth's proposed contract language would do by giving BellSouth an opportunity to refuse to comply with an applicable Section 251 requirement until such requirement was replicated in the agreement. Even a temporary waiver from any requirement of Section 251 is impermissible under Section 252(c).<sup>1</sup>

There is *no meeting of the minds* with respect to deviations from applicable law not already expressly set forth in the interconnection agreement. Joint Petitioners' proposed language memorializes this fact. Further, it recognizes the impossibility and impracticality of replicating each and every Section 251 requirement verbatim in the parties' interconnection agreements. Joint Petitioners' proposed additional language (in bold above) corrects the unlawful result that would be reached if BellSouth's language and its provision for temporary indemnity from liability for failure to comply with certain Section 251 requirements were adopted without change. The Commission should approve Joint Petitioners' proposed language as it corrects a result that otherwise would violate Section 252 and it provides no party with an exception from any requirements of Section 251 that was not negotiated and for which there was no meeting of the minds.

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<sup>1</sup> Every state commission that has decided this issue to date has rejected the prospective compliance only aspect of BellSouth's proposed contract language. By contrast, the language ordered by the Commission (BellSouth's proposal), reflected above, states that "**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" (emphasis added). **Joint Petitioners have never agreed to this proposal** and only include it in their proposed language because the Commission has ordered adoption of BellSouth's proposed contract language for this issue.

**Issue 51: (B) Should there be a notice requirement for BellSouth to conduct an audit and what should the notice include? (C) Who should conduct the audit and how should the audit be performed?**

Joint Petitioners' Proposed Conforming Language:

To invoke its limited right to audit, BellSouth will send a Notice of Audit to <<customer\_short\_name>> identifying the cause **(and the reasons therefore)** 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. <customer\_short\_name> may object to the audit after it has been performed but may not prevent its initiation once BellSouth asserts it has adequate documentation to support an audit. Such audit shall be limited to those circuits over which BellSouth initially raised concern **and for which it asserts it has adequate documentation to support an audit.** The findings of the audit, if disputed, will have to be addressed by the Commission **or other body with competent jurisdiction.** **Notwithstanding the foregoing, <<customer\_short\_name>> neither waives nor relinquishes any of its rights to invoke or enforce EEL audit limitations and requirements provided for under federal law.**

BellSouth Proposed Conforming 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.** <<customer\_short\_name>> 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 <<customer short name>>. BellSouth has a right to audit EELs to verify <<customer short name>>'s compliance with the significant local usage requirements pursuant to FCC order. Once BellSouth notifies <<customer short name>> of its concern over the appropriate usage of the EELs, <<customer short name>>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.**

Joint Petitioner Rationale:

Joint Petitioners' proposal memorializes their right to claim the full extent of the protections made available to them under the FCC's Section 251 EEL audit regulations set forth in the FCC's *Triennial Review Order*. Joint Petitioners do not voluntarily waive the right to avail themselves of the full extent of such protections and the Commission may not consistent with Section 252(c) impose a different result. The Commission's decision in the BellSouth-NuVox EEL Audit complaint case properly limited BellSouth to an audit of 15 of the 159 circuits that BellSouth sought to audit. In that case, the Commission effectively rejected BellSouth's assertion of cause to audit 144 additional circuits. Consistent with that result, which was affirmed in federal district court, Joint Petitioners' proposed language seeks to preserve the role of the Commission in resolving legitimate disputes over the proper scope of any future audits.

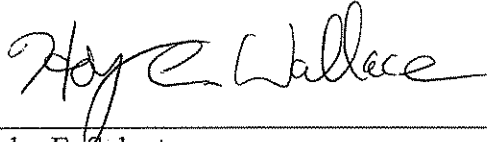
Binding federal law provides that BellSouth may only seek to audit circuits for which it has cause to believe are not being used with the FCC's high capacity EEL eligibility criteria. *TRO*, ¶ 622. If BellSouth once again seeks to engage in an audit of a broader scope than that which it is entitled to, the Commission should preside over a dispute concerning the scope of a proposed audit. Consistent with the Commission's Order on Reconsideration, such a dispute would not prevent initiation of an audit of those EELs for which BellSouth claims and has documentation to support a proper allegation of cause.<sup>2</sup>

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<sup>2</sup> Joint Petitioners submit that much of the disputed language proposed by BellSouth is unnecessary. For example, BellSouth's proposal sets forth three times in three different ways that BellSouth must state the cause upon which it bases its audit request. Worse, some of the proposed language is dangerously vague. For example, the FCC replaced the "significant local usage" requirement referred to in BellSouth's proposal three years ago. Presumably, the Commission's reference was intended to refer to the newer high capacity EELs eligibility criteria adopted by the FCC in its *2003 TRO*. Joint Petitioners object to any language referring to FCC requirements that the FCC has abandoned. In sum, it is not likely that the Commission expected to have its discussion pasted into an

This filing accurately sets forth the conforming language proposals disputed by the parties. Joint Petitioners' conforming language proposals present a practical and sound resolution to Issues 12 and 51, and the Commission therefore should adopt Joint Petitioners' language proposals described herein.

Respectfully submitted,



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*Counsel for Joint Petitioners*

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interconnection agreement in between already agreed-upon language pertaining to EEL audits.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following party by first-class United States mail, sufficient postage prepaid, this 5th day of September, 2006.

Cheryl R. Winn  
BellSouth Corporation  
P.O. Box 32410  
601 W. Chestnut Street, Room 407  
Louisville, KY 40232-2410

Robert Culpepper  
BellSouth Telecommunications, Inc.  
675 W. Peachtree Street, N.E.  
Suite 4300  
Atlanta, Georgia 30375

  
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Counsel to Joint Petitioners