BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint and Request for Summary Disposition BellSouth Telecommunications, Inc. Against NewSouth Communications Corp., to Enforce Contract Audit Provisions.	Docket No: 040028-TP
	Filed March 23, 2004

NEWSOUTH COMMUNICATIONS CORP.'S RESPONSE TO THE COMMISSION'S FEBRUARY 23, 2004 REQUEST FOR BRIEFING

NewSouth Communications ("NewSouth") hereby responds to the Florida Public Service Commission's ("Commission") February 23, 2004 Order ("*Briefing Order*") in the above-captioned proceeding directing the Parties to submit additional briefing regarding the correct law to be applied in determining BellSouth Telecommunications, Inc.'s ("BellSouth's") audit rights. The Commission requested that the Parties discuss the applicability, if any, of the *Triennial Review Order*,[1/] the *Supplemental Order Clarification*,[2/] the prevailing interconnection agreement, the change-in-law provisions of that agreement, and any other documents the Parties believe to be controlling in this matter.[3/]

INTRODUCTION AND SUMMARY

As the Commission notes in its *Briefing Order*, BellSouth claims that its audit rights are based solely on the language of the Parties' Interconnection Agreement

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1/ *In the Matter of Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 18 FCC Rcd 16978, ¶¶ 595-619 (2003) ("*Triennial Review Order*"), *vacated and remanded in part by U.S. Telecom Ass'n v. FCC,* __ F.3d __, 2004 WL 374262 (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

2/ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*"), *aff'd sub nom. CompTel v. FCC,* 309 F.3d 3 (D.C. Cir. 2002).

3/ *Briefing Order* at 1.

("Agreement"), which BellSouth contends establish an unqualified right to audit NewSouth's enhanced extended loops ("EELs"), subject only to a thirty-day notice requirement. NewSouth contends that BellSouth's audit rights are not unqualified, but rather are subject to certain conditions set forth in the *Supplemental Order Clarification*, conditions that BellSouth has failed to meet.

BellSouth's audit rights are governed by and subject to the conditions set forth in the *Supplemental Order Clarification* for two reasons. First, the Agreement, both by its express terms and by operation of law, incorporates the requirements of the *Supplemental Order Clarification.* Thus, even if Bellsouth were correct that the Agreement solely governs BellSouth's audit rights, the Agreement requires BellSouth to comply with the audit limitations set forth in the *Supplemental Order Clarification.* Second, under established FCC precedent, incumbent local exchange carriers ("ILECs") must comply with the requirements of Section 251(c) of the Telecommunications Act of 1996 ("Act") and the FCC's implementing regulations – such as those set forth in the *Supplemental Order Clarification* – apart from the provisions contained in the Parties' Agreement.

The *Briefing Order* also requested briefing on the effect of the *Triennial Review Order.* The *Triennial Review Order* carried over the audit conditions set forth in the *Supplemental Order Clarification* and included certain amplifications of those conditions, for example, clarifying that audits must be conducted in accordance with American Institute for Certified Public Accountants ("AICPA") standards.[4/] Perhaps most important for purposes of this case, the *Triennial Review Order* continued the critical

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4/ The *Triennial Review Order's* clarification that audits must be conducted pursuant to the AICPA standards was NewSouth's only reference to the *Triennial Review Order.* NewSouth Answer at 46, ¶ 28 n.3, ¶ 48. The *Triennial Review Order's* audit provisions were not challenged on appeal.

requirement of the *Supplemental Order Clarification* that ILECs may only seek EEL audits for cause, *i.e.*, if they have a concern that the EELs are not in compliance with the relevant eligibility criteria. *Triennial Review Order* ¶ 622. Thus, on the critical point of whether BellSouth must have a concern in order to obtain an audit, there has been no change of law.[5/]

DISCUSSION

I. THE AGREEMENT INCORPORATES THE *SUPPLEMENTAL ORDER CLARIFICATION'S* AUDIT REQUIREMENTS

Even assuming BellSouth is correct that its audit rights are based solely on the Agreement, BellSouth must still have a concern that NewSouth's EELs do not meet the requisite eligibility criteria. This is because the Agreement incorporates the requirements of the *Supplemental Order Clarification*.

A. *Supplemental Order Clarification* Audit Requirements

The fundamental framework set up in the *Supplemental Order Clarification* is that competitive carriers were entitled promptly to convert special access circuits to EELs subject to limited post-conversion audit rights if the ILEC had a concern that the EELs were not in compliance with relevant eligibility criteria.[6/] The FCC required ILECs immediately to convert circuits that were used to provide a significant amount of local

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[5/] The *Triennial Review Order* did alter the eligibility criteria with respect to which the audit seeks to determine compliance. The *Supplemental Order Clarification* established usage-based eligibility criteria designed to demonstrate that the requesting carrier was providing a significant amount of local service over special access circuits converted to EELs. The *Triennial Review Order* found that these criteria were unworkable and onerous and would invariably lead to burdensome audits. *See Triennial Review Order* ¶¶ 596, 614. The FCC thus jettisoned those requirements and replaced them with architectural-based criteria that the FCC found were far superior in preventing gaming yet still capable of ensuring reasonable access to EELs. *Triennial Review Order* ¶¶ 597, 614. The *Triennial Review Order's* superior eligibility criteria were upheld by the DC Circuit. *USTA II*, 2004 WL 374262 , *38.

[6/] *Supplemental Order Clarification* ¶¶ 29-31.

usage.[7/] The *Supplemental Order Clarification* established three "safe harbor" options to demonstrate compliance with this local usage requirement.[8/] In order to ensure the prompt conversion of qualifying circuits, the *Supplemental Order Clarification* required ILECs immediately to convert the billing of such circuits from special access rates to unbundled network element ("UNE") rates.[9/] To facilitate the FCC's contemplated prompt conversion, incumbent carriers were required to undertake the conversion upon receipt of a certification by the requesting carrier of compliance with the one or more of the three safe harbor options.[10/] Incumbent carriers were not permitted to delay conversions in order to conduct compliance audits prior to the conversion.[11/]

Instead, the *Supplemental Order Clarification* permitted ILECs to conduct "limited," post-conversion audits of EELs in order to verify compliance with the *Supplemental Order Clarification's* local usage requirements.[12/] The FCC stated that the

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7/ *Supplemental Order Clarification* ¶¶ 30-31.

8/ *Supplemental Order Clarification* ¶ 22.

9/ *Supplemental Order Clarification* ¶¶ 30-31

10/ *Supplemental Order Clarification* ¶ 30 ("once a requesting carrier certifies that it is providing a significant amount of local exchange service, the process by which special access circuits are converted to unbundled loop-transport combinations should be simple and accomplished without delay); *id.* ¶ 31 ("upon receiving a conversion request that indicates that the circuits involved meet one of the three thresholds for significant local usage that the incumbent LEC should immediately process the conversion . . . . incumbent LECs may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements."). BellSouth's failure to convert qualifying special access services "immediately" as required by the *Supplemental Order Clarification* prompted NewSouth to file a complaint at the FCC. *In the Matter of NewSouth Communications Corp. v. BellSouth Telecommunications, Inc.*, File No. EB-03-MD-012. This complaint is pending. During the course of this complaint, BellSouth conceded that it often took hundreds of day following receipt of a qualifying order to complete the billing change, and stipulated to a payment of more than $850,000.00 for those circuits that took longer than 37 days to convert, which is BellSouth's "internal target" to complete conversions.

11/ *Supplemental Order Clarification* ¶ 31.

12/ *Supplemental Order Clarification* ¶ 29 ("In order to confirm reasonable compliance with the local usage requirements . . . incumbent LECs may conduct limited audits only to the extent

"only time" an ILEC should request an audit is if the ILEC "has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service." *See Supplemental Order Clarification* at n.86. The FCC also required ILECs to hire and pay for an independent auditor to conduct the audits.[13/]

B. The Agreement Incorporates the *Supplemental Order Clarification's* Audit Requirements

1. The Agreement Expressly Incorporates the FCC's UNE Rules

The Agreement by its terms expressly incorporates applicable law, including the requirements of *Supplemental Order Clarification.* This is most plainly expressed in provisions of Attachment 2 of the Agreement, which contains the UNE provisions. Section 1.1 of Attachment 2 provides that it "sets forth the unbundled network elements and combinations of unbundled network elements that BellSouth agrees to offer to NewSouth *in accordance with the obligations under section 251(c)(3) of the Act.*" § 1.1, Attachment 2, Agreement, NewSouth Answer, Exh. A (emphasis added). Section 1.5 of Attachment 2 more specifically provides that "*[s]ubject to applicable and effective FCC*

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reasonably necessary to determine a requesting carrier's compliance with the local usage options."); *Supplemental Order Clarification* n.86 (concluding that audits shall "not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service"; *Supplemental Order Clarification* ¶¶ 30-31.

13/ *Supplemental Order Clarification* ¶ 31. The *Supplemental Order Clarification* established additional requirements concerning these audits. It provided that "the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options." *Supplemental Order Clarification* ¶ 31. The ILEC must give 30 days' written notice, not conduct an audit more than once a year (unless an audit finds non-compliance) and the ILEC must copy the FCC on audit notices. *Supplemental Order Clarification* ¶ 31. The notices "will allow [the FCC] to monitor implementation of the interim requirements." *Supplemental Order Clarification* ¶ 31. Finally, CLECs are to "maintain appropriate records that they can rely upon to support their local usage certification." *Supplemental Order Clarification* ¶ 32. In order not to impose undue financial burden on smaller carriers that may not keep extensive records, the *Supplemental Order Clarification* requires ILECs to verify compliance "using the records that the carriers keep in the normal course of business." *Supplemental Order Clarification* ¶ 32.

Rules and Orders as well as effective State Commission Orders, BellSouth will offer combinations of network elements *pursuant to such orders.*" § 1.5, Attachment 2, Agreement, NewSouth Answer, Exh. A.(emphasis added). There is no dispute that one such applicable order is the *Supplemental Order Clarification.* Similar language is found in Section 4 of Attachment 2, which addresses EELs generally. Section 4.2 of that Attachment states that "[w]here necessary to comply with an effective FCC and/or State Commission order, or as otherwise agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL")." § 4.2., Attachment 2, Agreement, NewSouth Answer, Exh. A.[14/]

The language in Attachment 2 plainly reflects the Parties' intent to provide UNEs, and UNE combinations such as EELs in particular, in conformance with effective and applicable FCC orders, such as the *Supplemental Order Clarification.* The Agreement thus does not grant BellSouth an unqualified right to audit. Rather, the Agreement expressly subjects BellSouth audit rights to the requirements of the *Supplemental Order Clarification.*

[14/] The language in Attachment 2 echoes provisions found in the general terms and conditions section of the Parties' Agreement that further demonstrate the Parties' intent to comply and conform with the requirements of Section 251(c). For example, the Agreement's Preamble states that the Parties desire to "interconnect their facilities, purchase network elements and other services, and exchange traffic specifically for the purpose of fulfilling their applicable obligations pursuant to Sections 251 and 252 of the Telecommunications Act of 1996." Preamble, Agreement, NewSouth Answer, Exh. A. Additionally, Section 1 of the Agreement states that "the Parties agree that the rates, terms and conditions contained within this Agreement, including all Attachments, *comply* and conform with each Parties' obligations under Sections 251 and 252 of the Act." § 1, General Terms and Conditions, Agreement, NewSouth Answer, Exh. A (emphasis added).

2. The Agreement Incorporates the *Supplemental Order Clarification's* Audit Requirements as a Matter of Law

a. Georgia Law Presumes Incorporation of Existing Law

Under Georgia law, which governs the interconnection agreement, parties are presumed to have incorporated existing law into their contracts, and to have negotiated with regard to existing law, unless the Parties explicitly state otherwise. *See, e.g.,* NewSouth Answer at 31-33. Nothing in the audit language of the Agreement overcomes this presumption. Indeed, the Agreement language quoted above stating that BellSouth will provide UNE combinations, such as EELs, pursuant to FCC orders, dictates the conclusion that, rather than explicitly excluding *Supplemental Order Clarification* requirements, the Parties explicitly included them.

Recently, a hearing officer of the Georgia Public Service Commission applying Georgia law held that an identical audit provision to the one at issue in this case incorporated the audit requirements of the *Supplemental Order Clarification.*[15/] BellSouth had argued before the Georgia Commission, just as it has here, that the audit provision of the interconnection agreement does not incorporate any of the *Supplemental*

15/ *In re Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Public Service Commission, Docket No. 12778-U, 7-9 (Feb. 11, 2004) ("*NuVox*"); *see also* NewSouth Notice of Supplemental Authority, Docket No. 040028-TP (Mar. 9, 2004). In that case, BellSouth sued a company called NuVox for violating the interconnection agreement by refusing BellSouth's audit request. The audit provision in that contract provided that "BellSouth may, at its sole expense, and upon thirty (30) days notice to [Nuvox], audit [NuVox's] record[s] not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements." *NuVox* at 7-8 (citing § 10.5.4, BellSouth/NuVox Agreement, Attachment 2). Except for the name of company, the clause is identical to the audit provision in the NewSouth/BellSouth Agreement. § 4.5.1.5, Attachment 2, Agreement, NewSouth Answer, Exh. A. Although the hearing officer concluded in that case, after a hearing, that BellSouth had a concern sufficient to warrant an audit, the facts of the instant case are completely different.

Order Clarification's audit requirements. The hearing officer rejected these arguments and found that:

> Under Georgia law, contracting parties are presumed to have incorporated the laws that existed when they entered into the contract, unless they explicitly excluded those obligations from the contract. There is nothing in the Agreement that carves-out the exemption BellSouth claims from the *Supplemental Order Clarification's* requirements regarding 'concern' and an independent auditor." Therefore, by operation of Georgia law, the *Supplemental Order Clarification* is incorporated into the Agreement. .... In addition, we find that the parties did not exclude the requirements set forth in the *Supplemental Order Clarification* from the Agreement. Under Georgia law, the parties are presumed to have contracted with regard to existing law, unless the contract explicitly states to the contrary. *NuVox* at 8.

Moreover, the hearing officer held that language in the general terms and conditions section of the agreement at issue in that case requiring the parties to comply with applicable law also incorporated the *Supplemental Order Clarification* into that agreement.[16/] In doing so, the hearing officer rejected the BellSouth argument – also made here – that under Georgia law, general language must give way to the more specific audit language of the audit provision.

If anything, language in the NewSouth interconnection agreement more clearly incorporates applicable law than the language in the NuVox interconnection agreement.

16/ *NuVox* at 8 (stating that "under the language of the Agreement, BellSouth is required to comply with all applicable law, including the *Supplemental Order Clarification*"). The NuVox Agreement provides:

> Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other party for compliance with the Order to the extent required or permitted by the term of such Order. *NuVox* at 8 (citing Section 35.1 of the General Terms and Conditions of the NuVox/BellSouth Agreement).

As noted above, provisions in the Agreement here expressly require BellSouth to provide UNE combinations pursuant to applicable and effective FCC Orders.

b. Contract Language That Plainly Tracks Controlling Law Is Presumed To Have Been Negotiated with Regard to Controlling Law

BellSouth's primary contention is that parties that voluntarily negotiate an interconnection agreement may agree to provisions "without regard" to the requirements of Section 251(c)(3) and the implementing orders. *See, e.g.,* BellSouth Complaint at 2, 16-17, 19, 26. Although this may be true as an abstract proposition, in this particular case, the Parties negotiated the EELs provisions, including the audit provisions, with regard to controlling law. This is because there is a "strong presumption" that negotiated provisions that plainly track controlling law were negotiated "with regard to the 1996 Act and controlling law." *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.,* 229 F.3d 457, 465 (4th Cir. 2000) (*"BellSouth Decision"*).

Although BellSouth cites cases in the Second Circuit (*Trinko*)[17/] and New Jersey (*Ntegrity*)[18/] for the proposition that the provisions of voluntary interconnection agreements do not mirror the requirements of the Act or the FCC or State implementing rules, *see e.g.*, BellSouth Complaint at 2-3, 17-19, 25, 35, BellSouth fails to cite or address the *BellSouth Decision*, which is cited in NewSouth's Answer (at n.4 and page 30) that held just the opposite. The *BellSouth Decision* is far more "on point" than any of the cases cited by BellSouth because, unlike *Trinko* and *Ntegrity*, the *BellSouth Decision*

17/ *Law Offices of Curtis V. Trinko LLP v. Bell Atlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *amended and superseded* 305 F.3d 89 (2d Cir. 2002), *rev'd sub nom. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872 (2004) (reversed on other grounds).

18/ *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. Lexis 1471 (D.N.J. Aug. 12, 2002).

directly addresses the issue of how to interpret voluntarily negotiated language in an interconnection agreement.[19/] BellSouth's failure to cite the *BellSouth Decision* is remarkable given that BellSouth in that case was apparently advocating a position directly at odds with what it is advocating now. In the *BellSouth Decision*, BellSouth was advocating that voluntarily negotiated provisions in interconnection agreements must be read consistent with applicable law – and BellSouth's position prevailed.[20/]

The *BellSouth* Decision involved the interpretation of the AT&T/BellSouth interconnection agreement approved by the North Carolina Utilities Commission ("NCUC"). The Agreement had both negotiated and arbitrated provisions. A voluntarily negotiated provision required BellSouth to combine UNEs.

After the agreement was approved by the NCUC, AT&T filed suit in the Eastern District of North Carolina.[21/] The court struck the negotiated provision requiring BellSouth to combine UNEs because, at the time, ILECs were not required under 251(c)(3) to combine UNEs.[22/] The court rejected arguments, ironically made there by AT&T and opposed by BellSouth, that carriers may voluntarily negotiate agreements without regard to the requirements of 251(c)(3).[23/]

On appeal to the Fourth Circuit, AT&T again argued that the voluntarily negotiated provision requiring BellSouth to combine UNEs must be reinstated because parties can negotiate around the requirements of the Act. The Fourth Circuit disagreed:

19/ *BellSouth Decision* at 465.

20/ *BellSouth Decision* at 465-466.

21/ *BellSouth Decision* at 461-62.

22/ *BellSouth Decision* at 463-64.

23/ *BellSouth Decision* at 463-64.

> AT&T is correct that the 1996 Act permits parties to negotiate – rather than arbitrate – provisions of their interconnection agreement; however, provisions not arbitrated are also *not necessarily* negotiated 'without regard to the standards set forth in subsections (b) and (c) of section 251.' That is, the 1996 Act requires both the ILEC and the CLECs to negotiate in good faith. When the Parties are so negotiating, many of their disputes will have been resolved by, among other things, FCC Rules and interpretations, prior state commission rulings and interpretations, and agreements reached with other CLECs – all of which are a matter of public record. In this light, many so-called 'negotiated' provisions represent nothing more than an attempt to comply with the requirements of the 1996 Act. . . . Where a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated *with regard* to the 1996 Act and controlling law. *BellSouth Decision* at 465 (emphasis added) (citations omitted).

The Fourth Circuit thus concluded that the provision requiring Bellsouth to combine UNEs "although negotiated, may be reviewed by the district court for consistency with the 1996 Act and law thereunder." *BellSouth Decision* at 466.

The EELs conversion and related audit provisions of the Agreement here "plainly track[s]" the *Supplemental Order Clarification*, and thus, under the *BellSouth Decision*, are presumed to have been negotiated with regard to the 1996 Act and controlling law, *i.e.*, the *Supplemental Order Clarificatio*n. Section 4.5 of the UNE Attachment addresses EEL conversions. § 4.5 Attachment 2, Agreement, NewSouth Answer, Exh. A. It tracks the requirements of the *Supplemental Order Clarification.* First, it provides that NewSouth may not convert special access combinations unless it uses the combination to provide a "significant amount of local exchange service." *Compare* § 4.5.1, Attachment 2, Agreement, NewSouth Answer, Exh. A with *Supplemental Order Clarification* ¶¶ 21-22. Next, it defines "significant amount of local exchange service" with reference to the *Supplemental Order Clarification* and incorporates the *Supplemental Order Clarification's* safe harbors. *Compare* § 4.5.1.2, Attachment 2, Agreement, NewSouth

Answer, Exh. A with *Supplemental Order Clarification* ¶ 22. It then tracks the *Supplemental Order Clarification's* finding that conversion should not require a physical disconnect and reconnect "because only the billing information or other administrative information associated with the circuit will change." *Compare* § 4.5.1.4, Attachment 2, Agreement, NewSouth Answer, Exh. A with *Supplemental Order Clarification* ¶ 30. Finally it provides that for post-conversion audits on 30 days notice. *Compare* § 4.5.1.5, Attachment 2, Agreement, NewSouth Answer, Exh. A with *Supplemental Order Clarification* ¶ 31. Thus, the presumption established in the *BellSouth Decision* that provisions that plainly track controlling law are presumed to follow such law applies in this case. There is nothing in the Agreement or in the record to overcome this strong presumption.

3. BellSouth Issued Its Audit Request Pursuant to and Consistent with the *Supplemental Order Clarification*, Not the Agreement, and So Informed the FCC

Not only does the Agreement incorporate the requirements of the *Supplemental Order Clarification*, for the reasons stated above, but BellSouth's audit request was issued pursuant to the *Supplemental Order Clarification*, not the Agreement. *See* April 26, 2002 Letter at 2, NewSouth Answer, Exh. B ("*Per the Supplemental Order*, BellSouth is providing at least 30 days written notice...."). BellSouth cited the *Supplemental Order Clarification* as authority for requesting the audit, not the Parties' Agreement. Specifically, BellSouth's audit request states: "In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated '[. . .] we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements.'" April 26, 2002 Letter at 1,

NewSouth Answer, Exh. B. BellSouth's audit letter thus pointed to the *Supplemental Order Clarification* as authority to conduct the requested audit.

Additionally, the audit letter repeatedly cites the *Supplemental Order Clarification* requirements. The audit request letter stated that "[c]onsistent with the FCC Supplemental Order Clarification, . . . BellSouth has selected an independent third party . . . to conduct an audit." *See* April 26, 2002 Letter at 1, NewSouth Answer, Exh. B. As part of its audit demand, BellSouth also required, "[i]n accordance with the Supplemental Order, NewSouth is required to reimburse BellSouth for the audit uncovers noncompliance." *See* April 26, 2002 Letter at 2, NewSouth Answer, Exh. B. The letter concluded by stating that, as required by the Supplemental Order, a copy of the letter was being sent to the FCC so that it could "monitor implementation" of the *Supplemental Order Clarification*. *See* April 26, 2002 Letter at 2, NewSouth Answer, Exh. B. Thus, BellSouth clearly recognized that the *Supplemental Order Clarification* governed its audit request.

Moreover, BellSouth's audit request demanded that NewSouth agree to requirements that are contained in the *Supplemental Order Clarification*, but, under BellSouth's theory of the case, are nowhere to be found in the Agreement. The prime example is BellSouth's demand that NewSouth reimburse BellSouth for the cost of the audit if circuits fail the audit. BellSouth's Complaint claims that this requirement is not included in the Agreement and that the requirement is only found in the *Supplemental Order Clarification*. BellSouth Complaint ¶ 41. Yet, BellSouth's audit request, the rejection of which forms the basis of its breach of contract claim, demanded that NewSouth reimburse BellSouth. April 26, 2002 Letter at 2, NewSouth Answer, Exh. B

("In accordance with the Supplemental Order, NewSouth is required to reimburse BellSouth for the audit if the audit uncovers non-compliance with the local usage option . . . .").

Another example is BellSouth's demand in the audit request letter that "NewSouth is required to maintain appropriate records to support local usage and self-certification." June 26, 2002 Letter at 1-2, NewSouth Answer, Exh. B. The Agreement contains no express requirement that NewSouth *maintain* records, but such a requirement is set forth in the *Supplemental Order Clarification*, subject to caveat that smaller carriers like NewSouth must only maintain records kept in the normal course of business. *See Supplemental Order Clarification* ¶ 32 ("We expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification."). Under BellSouth's theory, this *Supplemental Order Clarification* requirement cannot be read into agreement, yet BellSouth seeks to impose it on NewSouth.

BellSouth cannot have it both ways. It cannot on the one hand claim exemption from the *Supplemental Order Clarification* audit requirements of having to show a concern because of the language of the Agreement, while on the other hand imposing on NewSouth requirements found only in the *Supplemental Order Clarification* and not, under Bellsouth's theory, in the Agreement. And it patently cannot be the case that NewSouth breached the Agreement for refusing to comply with an audit request that contains requirements that BellSouth contends are not in the Agreement.

II. FCC PRECEDENT REQUIRES COMPLIANCE WITH ITS RULES AND ORDERS, REGARDLESS OF WHETHER THOSE TERMS ARE INCORPORATED INTO AN AGREEMENT

Even if the Parties' interconnection agreement does not incorporate the audit limitations set forth in the *Supplemental Order Clarification*, established FCC precedent

requires BellSouth to comply with those limitations because they are set forth in an FCC order. *See In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 127 (1996) ("An aggrieved party could file a Section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of Sections 251 and 252, including Commission rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission.") (subsequent history omitted). Indeed, the Commission has enforced the obligations imposed by the Act even in the absence of any interconnection agreement governing the relationship of the parties. *See In the Matter of TSR Wireless, LLC v. U.S. West Communications, Inc.*, 15 FCC Rcd 11166 ¶¶ 27-29 (2000), *aff'd on other grounds, Qwest Corp. v. F.C.C.*, 252 F.3d 462, 464 (D.C. Cir. 2001). Thus, BellSouth cannot evade the strictures of the Act simply by asserting that such obligations are not expressly incorporated by the Parties' Agreement.

III. THE *TRIENNIAL REVIEW ORDER* CARRIED OVER THE *SUPPLEMENTAL ORDER CLARIFICATION* AUDITING REQUIREMENTS

The *Briefing Order* seeks comments on the applicability of the *Triennial Review Order*. The *Triennial Review Order* carried over the audit requirements established in the *Supplemental Order Clarification,* including the requirement that ILECs must have a concern in order to obtain an EELs audit. Thus, there has been no change of law with respect to the limitations imposed on ILECs seeking EELs audits.

In the *Triennial Review Order*, the FCC first reviewed the requirements established by the *Supplemental Order Clarification*. The FCC quoted the *Supplemental Order Clarification's* requirement that ILECs must have a concern. *Triennial Review Order* ¶ 621 ("Moreover, the Commission concluded [in the *Supplemental Order*

Clarification] that 'audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service.") (quoting *Supplemental Order Clarification* n.86). The *Triennial Review Order* carried over the requirement that ILECs cannot audit unless they have "cause," *i.e.*, a concern. *Triennial Review Order* ¶ 622 ("Although the bases and criteria for the service tests we impose in this Order differ from those of the *Supplemental Order Clarification*, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification *based upon cause*, [sic] are equally applicable.") (emphasis added). The FCC concluded again in the *Triennial Review Order*, as it had in the *Supplemental Order Clarification*, that ILECs' audit rights were necessarily "limited" so as to mitigate the risk of "illegitimate audits that impose costs" on carriers. *Triennial Review Order* ¶ 626. This is precisely the risk confronting NewSouth.

The *Triennial Review Order* also amplified that the audit must be performed in accordance with the standards of the AICPA and that, consistent with standard auditing practices, such audits require compliance testing based on an examination of a sample determined by the auditor. *Triennial Review Order* ¶ 626. The *Triennial Review Order* retained the *Supplemental Order Clarification's* requirement that the CLEC reimburse audit costs if there is a material audit failure, but also required the ILEC to reimburse the CLEC for costs incurred in complying with the audit request if there is material compliance. *Triennial Review Order* ¶¶ 627-28.

CONCLUSION

For the foregoing reasons, the Commission should conclude that BellSouth's audit rights are not unqualified but rather are subject to the limitation set forth originally in the *Supplemental Order Clarification* and carried over in the *Triennial Review Order,* including particularly that BellSouth must have a concern that NewSouth's EELs are not in compliance with relevant eligibility criteria before it can impose the costs and burdens of an audit.

Respectfully submitted,

NEWSOUTH COMMUNICATIONS CORP.

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March 23, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of March, 2004, a true and correct copy of the foregoing has been furnished by hand delivery* or by U.S. Mail to the following:

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