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January 12, 2004

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850


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

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Complaint and Request for Summary Disposition Against NewSouth Communications, Corp., which we ask that you file in the captioned *new* docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


Nancy B. White (BA)

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

DOCUMENT # 040028-TP

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FPSC-COMMISSION CLERK

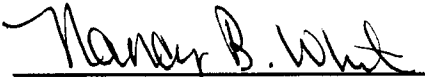
CERTIFICATE OF SERVICE
Complaint and Request for Summary Disposition
BellSouth Telecommunications, Inc. Against NewSouth
Communications, Corp. to Enforce Contract Audit Provisions

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Federal Express this 12th day of January, 2004 to the following:

Beth Keating
Staff Counsel
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Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6212

NewSouth Communications, Corp.
Two North Main Street
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Tel. No.: (864) 672-5877

Michael Pryor
Mintz, Levin, Cohn, Ferris, Glovsky and
Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004



Nancy B. White (VA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint and Request for Summary Disposition) Docket No.: _____
BellSouth Telecommunications, Inc. Against)
NewSouth Communications, Corp. to Enforce)
Contract Audit Provisions)
_____) Filed: January 12, 2004

BELLSOUTH TELECOMMUNICATIONS, INC.'S COMPLAINT AND REQUEST FOR SUMMARY DISPOSITION AGAINST NEWSOUTH COMMUNICATIONS, CORP.

Pursuant to Rule 28-22.036, Florida Administrative Code, BellSouth Telecommunications, Inc. ("BellSouth") files this Complaint and Request for Summary Disposition to enforce the audit provision in Attachment 2, Section 4.5.1.5 of BellSouth's Interconnection Agreement (the "Agreement") with NewSouth Communications Corp. ("NewSouth"), which provides BellSouth the right to audit NewSouth's EELs.

SUMMARY

BellSouth is entitled to audit NewSouth's loop and transport combinations (EELs), whether new or converted at NewSouth's request from special access circuits to UNEs. Amendments to the Agreement dated September 24, 2001, November 14, 2001, and January 16, 2003, afford NewSouth the right to order new EELs. Amendments to Agreement, Exh. A. Section 4 of Attachment 2 of the Agreement affords NewSouth the right to seek conversion of special access circuits to EEL UNE combinations provided that NewSouth self-certifies that the circuits are used to provide a "significant amount of local exchange traffic." *See* Agreement, Att. 2, § 4.5 *Et seq*, Exh. A. Section 4.5.1.5 specifically affords BellSouth the right to audit NewSouth's loop and transport combinations to verify the amount of local exchange traffic on the circuit. *See* Agreement, Att. 2, § 4.5.1.5, Exh. A. Section 4.5.1.5 provides as follows:

BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once 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. If, based on the audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

Agreement, Att. 2, § 4.5.1.5, Exh. A. Pursuant to that provision, BellSouth is entitled to audit NewSouth's records to verify the type of traffic being placed over combinations of loop and transport network elements. *See id.* BellSouth has given NewSouth repeated notice of its intent to conduct such an audit, and to seek the appropriate relief as dictated by the results of such audit. *See Letter from Jerry Hendrix to Jake Jennings, 4/26/02, Exh. B.* NewSouth has failed and refused to allow such audit and therefore has breached its Agreement with BellSouth.

NewSouth has refused to allow such an audit, citing BellSouth's alleged non-compliance with the requirements for audits under the *Supplemental Order Clarification*.¹ Although BellSouth has fully complied with the audit requirements of the *Supplemental Order Clarification*, BellSouth's right to audit NewSouth's records is governed by the terms of the voluntarily negotiated Agreement. 47 U.S.C. § 252(a)(1); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *cert.*

¹ See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

granted, 123 S.Ct. 1480 (2003) (refusing to allow a requesting carrier to “end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251”); *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, “the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)” and that a party “may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts...”).

Attachment 2, Section 4.5.1.5 of the Agreement unequivocally allows BellSouth, upon 30 days’ notice and at BellSouth’s expense, to conduct an audit of NewSouth’s records to verify that NewSouth is providing a significant amount of local exchange traffic over combinations of loop and transport network elements. Agreement, Att. 2, Sec. § 4.5.1.5, Exh. A. The Agreement does not require that BellSouth meet *any* additional conditions.

To the extent NewSouth was interested in adding audit conditions from the *Supplemental Order Clarification*, NewSouth could have asked during negotiations that the specific audit language from the *Supplemental Order Clarification* be incorporated into the Parties’ Agreement. NewSouth did just that with respect to the separate audit provision in the Agreement for the so-called Option 4 conversions. Agreement, Att. 2, § 4.5.2.2, Exh. A (“[a]n audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order...”). However, with respect to audit rights for loop and transport combinations not falling under Option 4, the Parties did not incorporate the *Supplemental Order Clarification’s* audit requirements, whether by reference or by including specific language from the *Order*. This

omission was intentional, as other sections of the Parties' Agreement specifically mention the Order. *See e.g.*, Agreement, Att. 2, § 4.5.2.2, Exh. A. Section 4.5.1.5 is unambiguous in describing BellSouth's audit rights, and there is no valid theory under Georgia law (the governing law for the Agreement) by which the *Supplemental Order Clarification* can be both an express contract term (for Option 4 audit purposes) and an implied contract term (for EEL audit purposes) in the same section of a contract. *See e.g.*, *Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*, 256 Ga. App. 58, 567 S.E.2d 697 (2002) ("Where contract language is unambiguous, construction is unnecessary and the court simply enforces the contract according to its clear terms"); *Sosebee v. McCrimmon*, 228 Ga. App. 705, 492 S.E.2d 584 (1997) ("Courts are not at liberty to revise contracts while professing to construe them").

REQUEST FOR SUMMARY DISPOSITION

This case is perfectly suited for summary disposition by the Commission on a paper record without a hearing. The question before the Commission is a straightforward question of contract interpretation: the parties entered into a voluntarily negotiated Agreement; the Agreement provides BellSouth an unqualified right to audit NewSouth's EELs on 30 days notice and at BellSouth's expense; NewSouth has breached the Agreement by refusing to undertake the audit. Although BellSouth has discussed its compliance with the *Supplemental Order Clarification* in this Complaint in anticipation of NewSouth's response, the Commission does not need to conduct a hearing to rule in this matter, and thus this Complaint should be addressed efficiently and expeditiously on a paper record.

In support of its Complaint, BellSouth shows as follows:

PARTIES

1. Complainant BellSouth, a wholly-owned subsidiary of BellSouth Corp., is a Georgia corporation with its principal place of business located at 675 W. Peachtree Street, N.E., Atlanta, Georgia, 30375. Padgett Affidavit, ¶ 1, Exh. C. BellSouth is an incumbent local exchange carrier providing telecommunications services in a nine-state region (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee). Padgett Affidavit ¶ 3, Exh. C. BellSouth's address for Service of Process is 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301.

2. NewSouth is a Delaware corporation with its principal place of business at Two North Main Street, Greenville, South Carolina, 29601, (864) 672-5877. Padgett Affidavit ¶ 4, Exh. C.

3. NewSouth is a competitive local exchange carrier providing local and long distance voice and data services throughout BellSouth's service territory. Padgett Affidavit ¶ 5, Exh. C.

JURISDICTION

4. The Commission has jurisdiction over this matter under section 252 of the Act.

SUMMARY OF THE ACTION

5. BellSouth seeks a determination from this Commission that pursuant to the Parties' Agreement, BellSouth is entitled to audit any of NewSouth's EELs. Agreement, Att. 2, § 4.5.1.5, Exh. A; *Supplemental Order Clarification* ¶¶ 29-32.

6. NewSouth has consistently refused BellSouth's repeated requests to conduct a post-conversion audit for the purpose of determining the types of traffic traveling over

NewSouth's EELs. *See Letter from Jake Jennings to Jerry Hendrix, 5/3/02.* Exh. D. NewSouth's refusal to allow BellSouth to conduct such audits violates the Parties' Agreement and leaves BellSouth without recourse to validate the self-certifications provided by NewSouth. Agreement, Att. 2, § 4.5.1.5, Exh. A; *Supplemental Order Clarification* ¶¶ 29-32.

7. BellSouth on numerous occasions has notified NewSouth of BellSouth's intent to exercise its audit rights under the Agreement. Hendrix Affidavit ¶¶ 6 -14, Exh. E.

8. In each instance, NewSouth has declined and thereby breached the Agreement. Hendrix Affidavit ¶¶ 6-15, Exh. E.

FACTS

The Parties' Interconnection Agreement

9. On May 18, 2001, BellSouth and NewSouth entered into a voluntarily negotiated Interconnection Agreement ("Agreement") that covers all nine of BellSouth's states. Agreement, GTC, § 2.1, Exh. A; *see Padgett Affidavit* ¶ 6, Exh. C. The Agreement specifically provides that NewSouth is entitled to have access to Enhanced Extended Links ("EELs"). Agreement, Att. 2, § 4 *et seq*, Exh. A. The Agreement provides:

Where necessary to comply with an effective Commission and/or State Commission order, or as otherwise mutually agreed by the Parties, BellSouth shall offer access to loop and transport combinations, also known as the Enhanced Extended Link ("EEL") as defined in Section 4.3 below [which describes the various types of EELs combinations].

Agreement, Att. 2, § 4.2, Exh. A.

Amendments to the Agreement dated September 24, 2001, November 14, 2001, and January 16, 2003 provide NewSouth access to new EELs. Amendments to Agreement, Exh. A. The Agreement also specifically addresses the conversion of special access circuits to EELs. Agreement, Att. 2, § 4.5 *et seq*, Exh. A. Pursuant to the Agreement, "NewSouth may not convert

special access services to combinations of loop and transport network elements ... unless NewSouth uses the combination to provide ‘a significant amount of local exchange service’ (as described in Section 4.5.2 below), in addition to exchange access service, to a particular customer.” Agreement, Att. 2, § 4.5.1, Exh. A. The term “significant amount of local exchange service” is “as defined in the Commission's June 2, 2000 Order.” Agreement, Att. 2, § 4.5.1.2, Exh. A. In particular, the Agreement incorporates by reference Paragraph 22 of the *Supplemental Order Clarification*, which provides three scenarios under which a CLEC may self-certify compliance with the “significant amount of local exchange service” requirement. Agreement, Att. 2, § 4.5.1.2, Exh. A (citing *Supplemental Order Clarification* ¶ 22).

10. The Agreement provides that NewSouth must self-certify compliance with the “significant amount of local exchange service” criteria prior to converting a special access circuit to an EEL. Agreement, Att. 2, § 4.5.1.2, Exh. A.

11. In addition to the three self-certification options set forth in the *Supplemental Order Clarification* and incorporated into the Agreement by reference, the Agreement states that “[i]n addition to the circumstances under which NewSouth may identify special access circuits that qualify for conversions to EELs (referenced in Section 4.5.1.2 above), NewSouth also shall be entitled to convert special access circuits to unbundled network elements pursuant to the terms of this section 4.5.2 *et seq.*” Agreement, Att. 2, § 4.5.2, Exh. A.

12. More specifically, the Agreement states that NewSouth could “convert special access circuits to combinations of an unbundled loop connected to special access transport provided that: (1) the combination terminates to a NewSouth collocation arrangement; and (2) NewSouth certifies, in the manner set forth in Section 4.5.2 above, that at least 75% of the unbundled network element(s) component of the facility is used to provide originating and

terminating local voice traffic.” Agreement, Att. 2, § 4.5.2.1, Exh. A. Conversions under this option are referred to as “Option 4 conversions.”

13. Under Sections 4.5.2 and 4.5.2.1, therefore, NewSouth had a total of four conversion options in the Agreement, and therefore four scenarios under which it could self-certify to the transmission of a “significant amount of local exchange service” over the affected circuits. Agreement, Att. 2, § 4.5.1.2, § 4.5.2.1, Exh. A. With respect to Option 4 conversions, the Agreement states “that the conversion option described in Section 4.5.2 . . . constitute[s] a reasonable negotiated alternative to those developed by the Commission in June 2, 2000 Order.” Agreement, Att. 2, § 4.5.5, Exh. A.

14. The Agreement provides BellSouth audit rights with respect to new EELs and circuits converted under each of the four conversion options. Agreement, Att. 2, § 4.5.1.5; § 4.5.2.2, Exh. A. With respect to EELs, the Agreement provides BellSouth an unqualified right to audit at BellSouth’s expense and upon thirty (30) days notice to NewSouth. Agreement, Att. 2, § 4.5.1.5, Exh. A. Specifically, with regard to loop and transport combinations, the Agreement provides:

BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once 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 elements. If, based on its audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate [State] Commission, pursuant to the dispute resolution process set forth in the Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

Agreement, Att. 2, § 4.5.1.5, Exh. A.

15. With respect to combinations of unbundled loops and special access transport under “Option 4,” the Agreement provides:

Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5.2. An audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order, except as expressly modified herein.

Agreement, Att. 2, § 4.5.2.2, Exh. A. Notably, while BellSouth's audit rights with respect to Option 4 conversions are explicitly qualified by the criteria set forth in the *Supplemental Order Clarification*, see Agreement, Att. 2, § 4.5.2.2, Exh. A, BellSouth's audit right with respect to loop and transport combinations is absolute - there are no qualifications on BellSouth's right to audit, whether set forth in the *Supplemental Order Clarification* or elsewhere, other than that BellSouth provide 30 days notice and that BellSouth incur the cost of the audit. Agreement, Att. 2, § 4.5.1.5, Exh. A.

The Supplemental Order Clarification

16. On June 2, 2000, the Commission issued its *Supplemental Order Clarification*, addressing three issues arising out of the *Supplemental Order*,² which had addressed the “ability of requesting carriers to use combinations of unbundled network elements to provide local exchange and exchange access service prior to our resolution of the *Fourth FNPRM*.” *Supplemental Order Clarification* ¶ 1.

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, Commission 99-370 (rel. Nov. 24, 1999).

17. In the *Supplemental Order Clarification*, the Commission specifically held that while CLECs have the right to self-certify compliance with the requirement that they are providing significant amounts of local exchange service over EEL combinations, ILECs have the right to conduct audits of those circuits after conversion. *Supplemental Order Clarification* ¶ 1.

18. In paragraph 29 of the *Supplemental Order Clarification*, the Commission held that “[i]n order to confirm reasonable compliance with the local usage requirements in this Order, we also find that incumbent LECs may conduct limited audits only to the extent necessary to determine a requesting carrier’s compliance with the local usage options.” *Supplemental Order Clarification* ¶ 29. The Commission went on to hold that although it stated in the original Supplemental Order that it did “not believe it was necessary to allow auditing because the temporary constraint on combinations of unbundled loop and transport elements was so limited in duration,” it recognized the necessity of the audits in the *Supplemental Order Clarification* when it extended the temporary constraint. *Supplemental Order Clarification* ¶ 29.

19. While the Commission noted in a footnote that audits should not be “routine,” it also held, in recognition that audits would occur, “that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification.” *Supplemental Order Clarification* ¶ 32, n.86.

20. Finally, and importantly, the Commission specifically noted the existence of audit rights in interconnection agreements, and held that “[w]e do not believe that we should restrict parties from relying on these agreements.” *Supplemental Order Clarification* ¶ 32.

NewSouth's Loop and Transport Combinations

21. Pursuant to Amendments to the Agreement dated September 24, 2001, November 14, 2001, and January 16, 2003, NewSouth is entitled to order new loop and transport

combinations. NewSouth has ordered approximately 1700 new EELs pursuant to the Parties' Agreement. Padgett Affidavit, ¶ 7, Exh. C.

22. In the late summer 2001, pursuant to the conversion process set forth in the Agreement, NewSouth began to submit requests to BellSouth via e-mail to convert special access circuits to UNEs. Padgett Affidavit ¶ 7, Exh. C. According to the procedures agreed to by the parties, the e-mails were to attach one or more spreadsheets, using a particular format. Padgett Affidavit ¶ 7, Exh. C. The spreadsheets were to identify the circuits to be converted and which of the four safe harbor options applied to that circuit. Padgett Affidavit ¶ 7, Exh. C. Since 2001, NewSouth has requested conversion of thousands of circuits from special access services to UNEs. Padgett Affidavit ¶ 7, Exh. C.

23. Pursuant to the terms of the Agreement, BellSouth processed both orders for new EELs and the conversions from special access circuits to UNEs based on NewSouth's self-certifications. Padgett Affidavit ¶ 8, Exh. C. At no time did BellSouth demand or request an audit of any NewSouth circuits prior to the provisioning of those circuits. Padgett Affidavit ¶ 8, Exh. C. With respect to the Option 4 conversions, BellSouth did not invoke its right to audit the circuits prior to conversion in a good-faith effort to process the conversions as expeditiously as possible. Padgett Affidavit ¶ 8, Exh. C.

BellSouth's Requests for An Audit and NewSouth's Refusal

24. On April 26, 2002, in accordance with the terms of the Agreement, BellSouth sent NewSouth a letter notifying NewSouth of BellSouth's intent to conduct an audit thirty days hence "to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the Commission Supplemental Order." *Letter from Jerry Hendrix to Jake Jennings, 4/26/02, Exh. B.* BellSouth informed NewSouth that it had selected an independent

auditor to conduct the audit, and that BellSouth would incur the costs of the audit (unless the auditors found NewSouth's circuits to be non-compliant). *Id.* Simultaneously with the transmittal of this letter to NewSouth, BellSouth forwarded a copy of the letter to the FCC. *Id.*

25. On May 3, 2002, NewSouth responded to BellSouth's request for an audit and stated that "NewSouth is willing to work with BellSouth in order to facilitate the audit of NewSouth's special access circuits converted to EELs subject to the requirements set forth in the Federal Communications Commission's *Supplemental Order Clarification...*" *Letter from Jake Jennings to Jerry Hendrix, 5/3/02, Exh. D.* While NewSouth disputed BellSouth's characterization of NewSouth's obligation to pay for the audit based on a finding of non-compliance, NewSouth agreed to go forward with the audit and address the compensation issue if it arose. *Id.* Moreover, NewSouth indicated that "NewSouth will provide the BellSouth audit team with only those records that are kept in the normal course of business." *Id.* Finally, Mr. Jennings stated that "in order to facilitate the audit of NewSouth's special access circuits 'converted' to EELs, I have assigned John Fury, Manager of Carrier Relations to act as a single point of contact for the BellSouth audit team... [w]e will contact BellSouth to schedule a pre-audit conference call." *Id.*

26. On May 23, 2002, approximately three weeks after it agreed to the audit, NewSouth wrote again to BellSouth, this time stating that "[b]ased upon new information and further consideration, NewSouth formally disputes BellSouth's request to audit special access circuits that have been converted to unbundled loop/transport combinations . . ." *Letter from Jake Jennings to Jerry Hendrix, 5/23/02, Exh. F.* In its letter, NewSouth cited the following two reasons as the basis for refusing BellSouth's audit request, assertedly relying on the *Supplemental Clarification Order*: "(1) audits may not be routine and only be conducted under

limited circumstances; and (2) audit must be performed by an independent third party hired and paid for by the incumbent local exchange company.” *Id.* NewSouth’s letter did not discuss or in any way address the terms of the Parties’ Agreement, which clearly permitted the requested audit. *Id.*; Agreement, Att. 2, § 4.5.1.5, Exh. A.

27. On June 6, 2002, BellSouth responded to NewSouth’s May 23, 2002 letter and stated that BellSouth intended to pursue its audit rights. Although not relevant to BellSouth’s audit rights, which arise out of the parties’ voluntarily-negotiated Agreement, BellSouth addressed NewSouth’s purported reliance on the *Supplemental Order Clarification*. Specifically, BellSouth confirmed that it did not conduct routine audits, and stated that it was only conducting such audits “when it believes such an audit is warranted due to a concern that the local usage options may not be met.” BellSouth also pointed out that BellSouth had not conducted any audits in the two years since the release of the *Supplemental Order Clarification*. Finally, BellSouth explained that its selected auditor was an independent third party, with no affiliation with BellSouth.

28. Some three weeks later, on June 27, 2002, BellSouth sent a follow-up letter to NewSouth stating that as NewSouth had not responded to BellSouth’s letter of June 6, 2002, BellSouth “assume[s] that NewSouth is agreeable to proceeding with the audit immediately. ACA’s audit team will commence the audit at NewSouth’s offices in Greenville on July 15.”

29. On June 29, 2002, NewSouth responded to BellSouth’s June 27, 2002 letter, once again refusing to submit to the audit. For the next year, the parties exchanged correspondence and verbal communications --- BellSouth trying to exercise its contractual right to an audit, and NewSouth continuing to breach the Agreement by refusing to conduct the audit. *See e.g.* Hendrix Affidavit ¶¶ 6-15, Exh. E.

30. Thus, after over a year of delay, NewSouth remains in breach of the Agreement by refusing to consent to an audit of EEL circuits. Under the clear terms of the Interconnection Agreement, BellSouth is entitled to conduct such an audit.

**BellSouth Is Entitled To An Audit Pursuant Either
To The Agreement Or the *Supplemental Order Clarification***

31. BellSouth is entitled to conduct an audit of NewSouth's converted EELs under the terms of the Agreement. Section 4.5.1.5 of the Agreement is explicit that BellSouth is entitled to audit the EELs (loop and transport combinations) with 30 days notice and at BellSouth's cost. Agreement, Att. 2, § 4.5.1.5, Exh. A. BellSouth has met both of those criteria. Hendrix Affidavit ¶ 4, Exh. B.

32. In letters to BellSouth, NewSouth has argued that the *Supplemental Order Clarification* supersedes the Agreement and that BellSouth must comply with terms allegedly set forth in the *Supplemental Order Clarification* that are nowhere to be found in the Agreement. See, e.g., *Letter from Jake Jennings to Jerry Hendrix, 5/23/02*, Exh. F. This position is legally flawed. The terms of the Agreement are unambiguous and must be accorded their plain meaning. *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 794 (Ga. 2001) ("whenever the language of a contract is plain, unambiguous and capable of only one reasonable interpretation, *no construction is required or even permissible*, and the contractual language used by the parties must be afforded its literal meaning") (emphasis added).

33. Section 4.5.1.5 of the Agreement governs audits of loop and transport combinations and provides that "BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once 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.” Agreement, Att. 2, § 4.5.1.5, Exh. A. The language provides BellSouth an unqualified right to audit NewSouth’s circuits provided BellSouth gives 30 days notice and assumes the cost of the audit. *Id.*

34. Section 4.5.1.5 stands in stark contrast with Section 4.5.2.2, which governs audits of Option 4 loop and special access transport combinations. Agreement, Att. 2, § 4.5.2.2, Exh. A. Section 4.5.2.2 provides that “[a]n audit conducted pursuant to this Section ... *shall be subject to the requirements for audits as set forth in the June 2, 2000 Order*, except as expressly modified herein.” *Id.* (emphasis added). Section 4.5.1.5, in contrast, does not incorporate the *Supplemental Order Clarification* and instead defines BellSouth’s audit rights without reference to anything in that *Order*. Agreement, Att. 2, §§ 4.5.1.5 and 4.5.2.2, Exh. A.

35. Second, the Agreement contains an integration clause. Agreement, GTC, § 29, Exh. A. The integration clause provides that:

This Agreement and its Attachments, incorporated herein by reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein and merges all prior discussions between them, and neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

Agreement, GTC, § 29, Exh. A.

Under Georgia law, a merger or integration clause in a contract provides the parties with a substantive, contractual right against a tribunal’s use of extraneous material to “construe” the contract in contradiction of its terms. *GE Life and Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 2d 1348, 1357 (M.D. Ga. 2002) (under Georgia law, “a contract containing a ‘merger’

clause indicates a complete agreement between the parties that may not be contradicted by extraneous material”).

36. Third, the audit provision was voluntarily negotiated by BellSouth and NewSouth pursuant to Section 252(a)(1) of the Act. Hendrix Affidavit ¶ 3, Exh. E. When parties negotiate and enter into an interconnection agreement voluntarily, they may do so “without regard to the standards set forth in subsections (b) and (c) of Section 251.” 47 U.S.C. § 252(a). This means that parties can bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c) and any implementing Commission rules and orders. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that “an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)”); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) (“[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)”).

37. The ability of carriers to negotiate an interconnection agreement “without regard to subsections (b) and (c) of Section 251” extends to rules and orders of the Commission - such as the *Supplemental Order Clarification. Iowa Utilities Board v. Commission*, 120 F.3d 753, n. 9 (8th Cir. 1997), *aff’d in part, rev’d in part on other grounds, AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (“[t]he FCC’s rules and regulations have direct effect only in the context of state-run arbitrations, because an incumbent LEC is not bound by the Act’s substantive standards in conducting voluntary negotiations”). The Commission itself has acknowledged this fact, holding that “parties that voluntarily negotiate agreements need not comply with the requirements we establish under Sections 251(b) and (c), including any pricing

rules we adopt.” First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15527-30 ¶¶ 54, 58 (1996).

38. Because the Parties voluntarily negotiated an audit provision, BellSouth’s right to audit is governed solely by the Agreement. That the terms of the Agreement govern this dispute is clear from various court decisions which have refused to impose obligations under Sections 251(b) and (c) on parties to a voluntarily negotiated interconnection agreement. For example, in *Law Offices of Curtis v. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003), the Second Circuit Court of Appeals considered the extent to which an end-user customer could bring a claim for alleged violations of Section 251 of the 1996 Act based on conduct that breached the interconnection agreement between the ILEC and the end user’s carrier. In dismissing such claims, the Second Circuit noted: “Once the ILEC ‘fulfills the duties’ enumerated in subsection (b) and (c) by entering into an interconnection agreement in accordance with section 252, it is then regulated directly by the interconnection agreement.” *Id.* Moreover, as the Second Circuit noted in *Trinko*, the fact that parties may negotiate interconnection agreements without regard to Section 251(b) and (c) clearly contemplates that the negotiated parts of the interconnection agreement could result in a different set of duties than those defined by the statute. *Id.* To read the Act in a way such that ILECs are governed exclusively by the broadly worded language of Section 251 would make superfluous the option of negotiating interconnection agreements without regard to subsections (b) and (c). *Id.* at 322 (citations omitted). The court of appeals refused to allow a requesting carrier to “end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251.” *Id.*

39. Similarly, in *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002), the federal district court refused to impose obligations under Section 251(b) and (c) upon an ILEC that had voluntarily negotiated an interconnection agreement. In that case, the plaintiff alleged that Verizon had failed to fulfill its duties under Section 251 by providing poor service, failing to provide pricing information, and intentionally causing a loss of phone service to the plaintiff's customers. In rejecting such claims, the district court noted that Verizon had negotiated with the plaintiff and had agreed upon the terms of interconnection agreements that had been approved by the state commission. According to the court, "upon the approval of the agreements, the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)." The court held that the plaintiff "may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts..." *Id.*

40. No dispute exists that the Commission issued its *Supplemental Order Clarification* in connection with the adoption of rules establishing the network elements that an ILEC must unbundle under Section 251(c). *See Supplemental Order Clarification* ¶ 1. But that fact is irrelevant, because the Parties voluntarily negotiated the terms and conditions governing the audit of EELs, as reflected in Section 4.5.1.5 of the Agreement. Hendrix Affidavit ¶¶ 3-4, Exh. E. Because NewSouth and BellSouth were negotiating a voluntary agreement, they were free to agree to terms that were different from the audit requirements in the *Supplemental Order Clarification*, and that is precisely what they did. Agreement, Att. 2, § 4.5.1.5, Exh. A.

41. For example, Section 4.5.1.5 of the Agreement contains no requirement that BellSouth have or articulate a "concern" before conducting an audit. Agreement, Att. 2, § 4.5.1.5, Exh. A; *see, in contrast, Supplemental Order Clarification* ¶ 31, n.86. Further, Section

4.5.1.5 states that BellSouth must pay the cost of any audit regardless of what the audit uncovers (*Id.*), whereas the *Supplemental Order Clarification* states that the competitive LEC must reimburse the ILEC for the cost of the audit “if the audit uncovers non-compliance with the local usage options.” *Supplemental Order Clarification* ¶ 31. Allowing NewSouth to now receive the benefits of the *Supplemental Order Clarification* would render superfluous the Parties’ ability to negotiate an interconnection agreement “without regard to the standards set forth in” Section 251(c). 47 U.S.C. § 252(a)(1). Furthermore, it would allow NewSouth to “end run” the carefully negotiated audit language in the Parties’ Agreement, a result that is at odds with federal law. *Law Offices of Curtis V. Trinko LLP*, 294 F.3d at 322; *Ntegrity*, 2002 U.S. Dist. LEXIS 1471.

42. Fourth, NewSouth’s theory that the *Supplemental Order Clarification* somehow “trumps” the Agreement also is inconsistent with the Order itself. In declining to adopt certain auditing guidelines, the Commission noted that many “interconnection agreements already contain audit rights.” *Supplemental Order Clarification* ¶ 32. In the words of the Commission: “We do not believe that we should restrict parties from relying on these agreements.” *Id.* However, that is precisely what would happen here because, if the Commission were to adopt NewSouth’s position, BellSouth would be restricted from relying on the express audit language in the Agreement.

43. In addition to being inconsistent with the text of the Act and with every authority on the issue, adopting NewSouth’s position would undermine the entire negotiation and arbitration scheme under the Act. *See* 47 U.S.C. § 252. To the extent NewSouth was interested in having the *Supplemental Order Clarification* govern EELs audits, NewSouth could have negotiated such language into the Agreement, exactly as it did with respect to the provision governing audits of Option 4 circuits. Agreement, Att. 2, § 4.5.2.2, Exh. A. Failing that, it could

have sought arbitration on this issue. *See generally* 47 U.S.C. § 252(b). Having elected not to avail itself of these alternatives, NewSouth should not be permitted to achieve the same end indirectly through this litigation.

44. Even if the Commission determines that the *Supplemental Order Clarification* is somehow relevant to this dispute, which it is not, BellSouth has met the alleged criteria set forth in the *Order*. Hendrix Affidavit ¶¶ 16, Exh. E.

45. First, the Commission's passing reference that an audit could be undertaken only when the ILEC "has a concern that the requesting carrier is not meeting the qualifying criteria for providing a significant amount of locale exchange service" is not a "limitation," as NewSouth contends. In paragraph 31 of the *Supplemental Order Clarification*, the Commission was expressing its agreement with WorldCom that the provisioning of an unbundled loop and transport combination for a requesting carrier should occur upon request and should not be delayed by the ILEC requiring an audit prior to provisioning. What NewSouth claims is a "limitation" to the ILEC's audit rights is in fact found only in a footnote to the Commission's finding that an audit should not be required prior to provisioning an unbundled loop and transport combination for a requesting carrier. *Id.* In fact, the Commission merely acknowledged that the February 28, 2000 Joint Letter stated 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." *Id.* The Commission agreed that "this should be the only time that an incumbent LEC should request an audit." *Id.*

46. Thus, the "limitation" upon which NewSouth relies was merely a statement that audits could not be conducted prior to provisioning unbundled loop and transport combinations,

and that both ILECs and CLECs had previously stated that audits would not be routine. *Id.* The Commission's *Supplemental Order Clarification* puts in place a symmetrical process aimed at speeding the provisioning process while providing compliance safeguards; just as the ILEC is required to provision or convert the circuits upon request, the CLEC is required to allow an audit upon request. *Id.* The Commission clearly did not provide requesting carriers the right to obstruct the audit process by challenging the legitimacy of the ILEC's concerns leading to the audit request, nor did the Commission even require the ILEC to share its concern with the CLEC. *Id.* The Commission merely required the ILEC to provide notice to the Commission of audits, so that the Commission could monitor their use. *Id.* The Commission did not in any way require or suggest that any pre-approval of the audit request was necessary - not by the Commission, let alone by the CLEC whose records were subject to audit.

47. Second, even if BellSouth were required to articulate a "concern" before initiating an audit, BellSouth has done so. Hendrix Affidavit ¶¶ 12, 16, Exh. E. BellSouth has previously had issues with NewSouth regarding NewSouth's inability to appropriately jurisdictionalize traffic it sends to BellSouth. In addition, traffic studies show that the traffic NewSouth passes to BellSouth in several states is largely non-local. Yet NewSouth has certified that each of the thousands of circuits for which it has requested conversion meet one of the four safe harbors, and claims that the traffic mix on these circuits is substantially different than the traffic studies would suggest.

48. Finally, the auditor selected by BellSouth (American Consultants Alliance) is independent. Hendrix Affidavit ¶ 5, Exh. E. The firm is not related to BellSouth nor affiliated with BellSouth in any way. *Id.* The firm is not subject to the control or influence of BellSouth, nor is the firm dependent on BellSouth. *Id.*

CAUSES OF ACTION

Count I: NewSouth Has Breached The Interconnection Agreement.

49. BellSouth incorporates Paragraphs 1 - 49 by reference as if fully set forth herein.

50. NewSouth has violated its obligations under the Parties' Interconnection Agreement by refusing to submit to an audit of NewSouth's EELs at BellSouth's request. The Agreement specifically provides BellSouth an unqualified right to audit NewSouth's loop and transport combinations on 30 days' notice and at BellSouth's expense. By refusing to allow BellSouth to conduct such an audit, NewSouth has breached the terms of the Agreement.

51. As a direct and proximate result of NewSouth's actions, BellSouth has been harmed by its inability to verify NewSouth's compliance or non-compliance with the Agreement, Att. 2, § 4.5.1.5, Exh. A.

Count II: In the Alternative, NewSouth Has Violated The Supplemental Order

Clarification and Section 251 of the Act

52. BellSouth incorporates Paragraphs 1 - 52 by reference as if fully set forth herein.

53. Even were the *Supplemental Order Clarification* for some reason deemed applicable to this case, which BellSouth contends it is not, BellSouth has met the requirements set forth in the *Supplemental Order Clarification* to conduct an audit. BellSouth gave 30 days' written notice of its intention to conduct the audit, selected an independent auditor, and agreed to pay the entire cost of the audit. Further, although not a requirement of the *Supplemental Order Clarification*, BellSouth has articulated concerns in support of its audit request. Because BellSouth has met all of the requirements of the *Supplemental Order Clarification*, NewSouth has violated the *Supplemental Order Clarification* and Section 251 of the Act by refusing to allow BellSouth to conduct an audit of NewSouth's EELs.

54. As a direct and proximate result of NewSouth's violation, BellSouth has been harmed by its inability to verify NewSouth's compliance or non-compliance with the Agreement and the requirements of the *Supplemental Order Clarification*. Agreement, Att. 2, § 4.5.1.5, Exh. A.

PRAYER FOR RELIEF

55. Wherefore, for the reasons stated above, BellSouth respectfully requests that the Commission issue an Order;

56. Finding and concluding that NewSouth has breached its obligations under the Interconnection Agreement by refusing to allow BellSouth to conduct an audit of NewSouth's EEL circuits;

57. In the alternative, and only if deemed necessary by the Commission, finding and concluding that NewSouth has violated the terms of the *Supplemental Order Clarification* and Section 251 of the Act by refusing to allow BellSouth to conduct an audit of NewSouth's EEL circuits, despite BellSouth having complied with the requirements set forth in the *Supplemental Order Clarification*;

58. Compelling NewSouth to allow BellSouth's auditor to conduct the audit, within 30 days of the Commission's order in this matter, of NewSouth's EELs;

59. Granting such other and further relief as the Commission deems just and proper.

BELLSOUTH'S LEGAL ANALYSIS IN SUPPORT OF REQUEST FOR SUMMARY DISPOSITION

The Commission should grant BellSouth's Request for Summary Disposition and rule in BellSouth's favor because BellSouth is clearly entitled to conduct an audit of NewSouth's EEL combinations pursuant to the terms of the Parties' voluntarily negotiated Interconnection

Agreement (“Agreement”). The Agreement provides BellSouth with an unqualified right to audit NewSouth’s EEL combinations upon thirty days’ notice and at BellSouth’s expense. BellSouth has satisfied these requirements. NewSouth’s refusal to conduct such an audit violates the Agreement.

**BellSouth’s Right to Audit Is Governed by the Terms of the Parties’
Voluntarily Negotiated Agreement**

The audit provisions of the Agreement govern BellSouth’s right to audit NewSouth’s EEL combinations to verify the amount of local exchange traffic on the circuit. It is a fundamental principle under the Telecommunications Act of 1996 that “an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251.” 47 U.S.C. § 252(a)(1). This means that parties can bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c) and any implementing Commission rules. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that “an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)”); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) (“[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b) and 251(c)”). The Commission itself has acknowledged that “parties that voluntarily negotiate agreements need not comply with the requirements [it] establishes] under Sections 251(b) and (c), including any pricing rules [it] adopt[s].” First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Red 15499, 15527-28 ¶ 54 (1996).

This is precisely what BellSouth and NewSouth accomplished by entering into the Agreement. Having entered into a binding interconnection agreement whose provisions do not mirror the substantive obligations imposed by the statute and implementing rules and orders, neither party may “end run the carefully negotiated language in the interconnection agreement by bringing a lawsuit based on the generic language of section 251.” *Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003); *see also Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 2002 U.S. Dist. LEXIS 1471 (D.N.J., Aug. 12, 2002) (holding that upon approval of a negotiated interconnection agreement, “the duties of each party are defined by the parameters of their agreement rather than Section 251(b) and (c)” and that a party “may not rely upon the general duties imposed by Section 251 to litigate around the specific language provided in the negotiated contracts”). Yet this is precisely what NewSouth has done by repeatedly denying BellSouth’s numerous requests for an audit.

Although BellSouth has complied with all of the requirements of the *Supplemental Order Clarification* as they pertain to EELs audits, the Parties chose not to incorporate those requirements into the Agreement as it relates to audits of EEL combinations, whether new or combinations converted from special access. The terms of the Agreement regarding such audits are clear and unambiguous: BellSouth may conduct such an audit “at its sole expense, and upon thirty (30) days notice to NewSouth.” *See* Agreement, Att. 2, § 4.5.1.5, Exh. A. When, as in this case, the terms of an agreement are clear and unambiguous, construction is “unnecessary,” and the agreement must be enforced “according to its clear terms.”³ *Moore & Moore Plumbing, Inc.*

³ Pursuant to the Agreement’s governing law provision, Georgia law controls the construction and enforcement of the Agreement. *See* Agreement, Att. 2, § 18, Exh. A.

v. Tri-South Contractors, Inc., 567 S.E.2d 697, 699 (Ct. App. Ga. 2002); *see also Neely Dev. Corp. v. Service First Investments, Inc.*, 582 S.E.2d 200, 202 (Ct. App. Ga. 2003) (“Where ... the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties.”) (internal quotations omitted); *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 784 (Ga. 2001) (“whenever the language of a contract is plain, unambiguous and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning”).

The integration clause in the Agreement, *see* Agreement, GTC, § 29, Exh. A, also precludes reading the audit provisions to incorporate extraneous terms. Under Georgia law, a merger or integration clause in a contract provides the parties with a substantive right not to have extraneous material used to “construe” the contract in contradiction of its express terms. *GE Life and Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 2d 1348, 1357 (M.D. Ga. 2002) (under Georgia law, “a contract containing a ‘merger’ clause indicates a complete agreement between the parties that may not be contradicted by extraneous material”); *see also McBride v. Life Ins. Co. of Virginia*, 190 F. Supp.2d 1366, 1376 (M.D. Ga. 2002) (“As a matter of general contract construction, a contract containing a ‘merger’ clause indicates a complete agreement between the parties that may not be contradicted by extraneous material.”); *GE Life and Annuity Assurance Co. v. Combs*, 191 F. Supp.2d 1364, 1373 (M.D. Ga. 2002) (same).

To the extent NewSouth was interested in having the *Supplemental Order Clarification* govern loop and transport combinations audits, NewSouth could have sought to negotiate such language into the Agreement, exactly as it did with respect to the provision governing audits of Option 4 circuits. *See* Agreement, Att. 2, § 4.5.2.2, Exh. A (incorporating “the requirements for audits as set forth in the June 2, 2000 Order” with respect to audits of EELs converted pursuant

to Option 4). Failing that, it could have sought arbitration on this issue. *See generally* 47 U.S.C. § 252(b). Having elected not to avail itself of these alternatives, NewSouth should not be permitted to achieve the same end indirectly through this litigation. BellSouth's right to audit NewSouth's EEL combinations is governed by the clear and unambiguous terms of the Agreement.

BellSouth has satisfied all prerequisites for conducting an audit pursuant to section 4.5.1.5 of the Agreement. Section 4.5.1.5 provides as follows:

BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once 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. If, based on the audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

Agreement, Att. 2, § 4.5.1.5, Exh. A.

BellSouth has satisfied all that section 4.5.1.5 requires to conduct an audit. BellSouth sent NewSouth a letter informing NewSouth that it had selected an independent auditor and intended to commence an audit, at BellSouth's expense, thirty days hence "to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the Commission Supplemental Order." *See Letter from Jerry Hendrix to Jake Jennings, 4/26/02, Exh. B.* Although NewSouth initially consented to an audit, *see Letter from Jake Jennings to Jerry Hendrix, 5/3/02, Exh. D,* NewSouth later revoked its consent and since that time has repeatedly refused to permit an audit despite BellSouth's satisfaction of the Agreement's audit requirements. *See e.g., Letter from Jake Jennings to Jerry Hendrix, 5/23/02, Exh. F.*

For the above reasons, the Commission should (1) grant BellSouth's request for summary disposition of this case; (2) find that the Agreement governs BellSouth's right to audit; (3) find that BellSouth is entitled to an immediate audit of NewSouth's EEL combinations under the terms of the Agreement; and (4) find that NewSouth's refusal to permit the audit violated the Agreement.

CONCLUSION

For all of the reasons set forth herein, BellSouth respectfully requests that the Commission issue (1) a determination that NewSouth's refusal to allow BellSouth to audit its EEL combinations violates the Parties' Agreement; (2) to the extent relevant to the Commission's consideration of this matter, a determination that NewSouth's refusal to submit to an audit violates the Commission's *Supplemental Order Clarification*; and (2) an order directing NewSouth to do all things reasonably necessary to permit the independent auditor selected by BellSouth to commence the audit immediately.

Respectfully submitted this 12th day of January, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White

Nancy B. White (CA)
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c/o Nancy H. Sims
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R. Douglas Lackey

R. Douglas Lackey (CA)
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(404) 335-0754

513605

EXHIBIT LIST

- EXHIBIT A Interconnection Agreement (General Terms and Conditions, Attachment 2, and Amendments)
- EXHIBIT B Letter to Jake Jennings from Jerry Hendrix, dated April 26, 2002
- EXHIBIT C Affidavit of Shelley Padgett
- EXHIBIT D Letter to Jerry Hendrix from Jake Jennings, dated May 3, 2003
- EXHIBIT E Affidavit of Jerry Hendrix
- EXHIBIT F Letter from Jake Jennings to Jerry Hendrix, dated May 23, 2002

EXHIBIT A

EXCERPTS FROM INTERCONNECTION AGREEMENT

identifying the circuits to be converted shall serve as a substitute for submission of a local service request (LSR), only until such time as the LSR process is modified to accommodate such requests.

- 4.5.1.5 BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth's records not more than once 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. If, based on its audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.
- 4.5.2 In addition to the circumstances under which NewSouth may identify special access circuits that qualify for conversions to EELs (referenced in Section 4.5.1.2 above), NewSouth also shall be entitled to convert special access circuits to unbundled network elements pursuant to the terms of this section 4.5.2 et seq.
- 4.5.2.1 Upon request by NewSouth, BellSouth will convert special access circuits to combinations of an unbundled loop connected to special access transport provided that: (1) the combination terminates to a NewSouth collocation arrangement; and (2) NewSouth certifies, in the manner set forth in Section 4.5.2 above, that at least 75% of the unbundled network element(s) component of the facility is used to provide originating and terminating local voice traffic. The recurring charges for such combinations shall be the sum of the recurring charge for the applicable UNE loop, as set forth in Exhibit C to this Attachment, and all applicable recurring charges for the special access transport facility, as set forth in the BellSouth tariff under which such facilities were ordered. The nonrecurring charges for such combinations shall be an amount equal to all applicable conversion charges set forth in Exhibit C to this Attachment for conversion of special access circuits to EELs, plus the applicable nonrecurring cross connect charges (set forth in Attachment 4 to this Agreement) required to connect the facility to NewSouth's collocation arrangement. Such combinations that terminate in NewSouth collocation arrangements may be connected by NewSouth via cross-connects to BellSouth services used by NewSouth to transport traffic between NewSouth's collocation space and NewSouth's POP.
- 4.5.2.2 Upon request from NewSouth to convert special access circuits pursuant to Section 4.5.2, BellSouth shall have the right, upon 10 business days notice, to conduct an audit prior to any such conversion to determine whether the subject facilities meet local usage requirements set forth in Section 4.5.2. An audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive

months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order, except as expressly modified herein.

- 4.5.3 In consideration of Section 4.5.2.1 above, and subject to Section 4.5.7 below, for those special access circuits identified by NewSouth in writing as of January 19, 2001 as being eligible for conversion pursuant to the terms of this Agreement, BellSouth will provide to NewSouth a credit in an amount equal to three times the difference between the monthly special access rates for such circuits and the monthly rates for the combinations to which those circuits are converted.
- 4.5.3.1 For circuits converted pursuant to one of the three options made available to NewSouth in Section 4.5.1, the credit will be in an amount equal to three times the difference between the monthly special access rates for such circuits and the monthly UNE recurring charges for the loop, transport and multiplexing (if applicable), as set forth in Exhibit C to this Attachment, that, in combination, form an EEL.
- 4.5.3.2 For circuits converted pursuant to the fourth option made available to NewSouth in Section 4.5.2, the credit will be in an amount equal to three times the difference between the monthly special access rates for such circuits and the sum of the monthly UNE recurring charges for the loop, as set forth in Exhibit C to this Attachment, and the monthly recurring charge for the special access transport facility, as set forth in the BellSouth tariff under which such facility was ordered.
- 4.5.3.3 Such credits will be applied to NewSouth's bill within sixty (60) days following execution of this Agreement.
- 4.5.3.4 Within ten (10) days following execution of this Agreement, NewSouth shall certify to BellSouth in writing that the circuits designated as of January 19, 2001 meet significant local use requirements of one of the four conversion options set forth above. Such certification shall include a designation by NewSouth of which of the particular four conversion options specified herein is applicable to each of the individual circuits designated as of January 19, 2001.
- 4.5.3.5 BellSouth shall assign a project management team and designate a project manager to facilitate the timely conversion of special access circuits. BellSouth and NewSouth will participate in a joint implementation meeting within fifteen (15) days following execution of this Agreement, or within 15 days of any subsequent request for conversion, to establish a schedule for conversion of the identified special access circuits. BellSouth shall complete conversions of all circuits identified by NewSouth as of January 19, 2001 within 3 months of the joint implementation meeting, unless an alternative completion date is agreed to by the Parties. For purposes of conversion of the circuits identified by NewSouth as of January 19, 2001, NewSouth's spreadsheet identifying the circuits to be converted shall serve as a substitute for submission of a local service request (LSR). For subsequent conversion requests pursuant to Sections 4.5.1 and 4.5.2 above, submission of a spreadsheet identifying the circuits to be

BST v. NewSouth Complaint

EXHIBIT B

**LETTER TO JAKE JENNINGS FROM JERRY HENDRIX,
DATED APRIL 26, 2002**



BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34891
Atlanta, GA 30075

Jerry D. Hendrix
Executive Director

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

April 26, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Jake Jennings
Vice President of Regulatory Affairs
NewSouth Communications, Corp.
NewSouth Center
Two N. Main Street
Greenville, SC 29601

Dear Jake:

NewSouth has requested BellSouth to convert numerous special access circuits to Unbundled Network Elements (UNEs). Pursuant to those request, BellSouth has converted many of those circuits in accordance with BellSouth procedures. Some of the circuits were not converted due to various reasons, (e.g., previously disconnected, duplicates, etc.).

Consistent with the FCC Supplemental Order Clarification, Docket No. 96-98, BellSouth has selected an independent third party, American Consultants Alliance (ACA), to conduct an audit. The purpose of this audit is to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order.

In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated:

"We clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and 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."

Accompanying this letter, please find a Confidentiality and Non-Disclosure Agreement on proprietary information and Attachment A, which provides a list of the information ACA needs from NewSouth.

NewSouth is required to maintain appropriate records to support local usage and self-certification. ACA will audit NewSouth's supporting records to determine compliance of

each circuit converted with the significant local usage requirements of the Supplemental Order.

In order to minimize disruption of NewSouth's daily operations and conduct an efficient audit, ACA has assigned senior auditors who have expertise in auditing, special access circuit records and the associated facilities, minutes of use traffic studies, CDR records recorded at the switch for use in billing, and Unbundled Network Elements.

BellSouth will pay for American Consultants Alliance to perform the audit. 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 options on 20% or more of the circuits audited. This is consistent with established industry practice for jurisdictional report audits. BellSouth hopes that in the event circuits are found to be non-compliant, the parties can reach agreement as to the appropriate remedy; however, in the event that the parties cannot, in accordance with the interconnection agreements, BellSouth will seek dispute resolution from the appropriate Commission(s). BellSouth will seek reimbursement for the cost of the audit and will seek to convert the circuits back to special access for the appropriate non-recurring charges for the special access services. In addition, BellSouth will seek reimbursement for the difference between the UNE charges paid for those circuits since they were converted and the special access charges that should have applied.

Per the Supplemental Order, BellSouth is providing at least 30 days written notice that we desire the audit to commence on May 27, 2002 at NewSouth's office in Greenville or another NewSouth location as agreed to by both parties. Our experience in other audits has indicated that it typically takes two weeks to complete the review. Thus, we request that NewSouth plan for ACA to be on-site for two weeks. Our audit team will consist of 3 auditors and an ACA partner in charge.

NewSouth will need to supply conference room arrangements at your facility. Our auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.). It is desirable to have a pre-audit conference next week with your lead representative. Please have your representative call Shelley Walls at (404) 927-7511 to schedule a suitable time for the pre-audit planning call.

BellSouth has forwarded a copy of this notice to the FCC, as required in the Supplemental Order. This allows the FCC to monitor implementation of the interim requirements for the provision of unbundled loop-transport combinations.

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

Jerry D. Hendrix
Executive Director

Enclosures

cc: Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)
Larry Fowler, ACA (via electronic mail)
Sr. Vice President of Network Planning & Provisioning, NewSouth (via U.S. mail)

ATTACHMENT A

NewSouth
April 28, 2002

Audit to Determine the Compliance Of Circuits Converted by NewSouth From BellSouth's Special Access Tariff to Unbundled Network Elements With The FCC Supplemental Order Clarification, Docket No. 96-98

Information to be Available On-site May 27, 2002

Prior to the audit, ACA or BellSouth will provide NewSouth the circuit records as recorded by BellSouth for the circuits requested by NewSouth that have been converted from BellSouth's special access services to unbundled network elements. These records will include the option under which NewSouth self-certified that each circuit was providing a significant amount of local exchange service to a particular customer, in accordance with the FCC's Supplemental Order Clarification.

Please provide:

NewSouth's supporting records to determine compliance of each circuit converted with the significant local usage requirements of the Supplemental Order Clarification.

First Option: NewSouth is the end user's only local service provider.

- Please provide a Letter of Agency or other similar document signed by the end user, or
- Please provide other written documentation for support that NewSouth is the end user's only local service provider.

Second Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the total traffic and the local traffic separately identified and measured as a percent of total end user customer local dial tone lines.
- For DS1 circuits and above please provide total traffic and the local voice traffic separately identified individually on each of the activated channels on the loop portion of the loop-transport combination.
- Please provide the total traffic and the local voice traffic separately identified on the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Third Option: NewSouth provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the number of activated channels on a circuit that provide originating and terminating local dial tone service.

ATTACHMENT A

NewSouth
April 26, 2002

- Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.
- Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Depending on which one of the three circumstances NewSouth chose for self certification, other supporting information may be required.

THIS NONDISCLOSURE AGREEMENT (herein the "Agreement") is dated and effective as of _____ ("Effective Date"), between BellSouth Telecommunications, Inc., a Georgia corporation, with its corporate office located at 675 W. Peachtree, Atlanta, Georgia ("BellSouth"), and NewSouth Communications, Corp., a Delaware corporation, located at Greenville, South Carolina ("Discloser," "you" or "your").

RECITALS

A. BellSouth acknowledges that it may be necessary for you to provide BellSouth and its Affiliates with certain information, considered by you to be confidential, valuable and proprietary, which BellSouth and its Affiliates are receiving for the purpose of verifying your compliance with the significant local usage requirements of the FCC Supplemental Order Clarification, Docket No. 96-98 (the "Project"). "Affiliates" means any company owned in whole or in part, now or in the future, by BellSouth Corporation or by one or more of its direct or indirect subsidiaries controlled by BellSouth Corporation.

B. Such confidential and proprietary information may include, but is not limited to, your business, financial and technical information, proposed products and services and like information, and the results of or information contained in any audit conducted in connection with the Project (collectively your "Information").

IN CONSIDERATION of the mutual promises and obligations contained herein and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the parties agree as follows:

1. BellSouth will protect Information you provide to BellSouth, and Information that any auditor engaged in connection with the Project provides to BellSouth, from use, distribution or disclosure except in connection with the Project. BellSouth may disclose Information only to the Affiliates, employees, consultants, contractors and agents of BellSouth with a need to know such Information in connection with the Project. BellSouth will make copies of Information only as necessary for its use in connection with the Project. Notwithstanding the foregoing, BellSouth may disclose such Information to the extent reasonably necessary to enforce its rights under any interconnection agreements between you and BellSouth or under rules and orders of the Federal Communications Commission applicable to the Project. BellSouth will cooperate with you to protect the confidentiality of such Information in the event of disclosure pursuant to this paragraph.
2. All Information must be provided by you to BellSouth in written or other tangible or electronic form, marked by you with a confidential and proprietary notice. Information orally provided by you to BellSouth must be designated as confidential and proprietary prior to such oral disclosure and must be reduced by you to writing, marked with a confidential and proprietary notice, and provided to BellSouth within ten (10) calendar days after such oral disclosure.
3. Your Information does not include:
 - (a) any information you publicly disclose;
 - (b) any information you in writing authorize BellSouth or its Affiliates to disclose without restriction;
 - (c) any information already lawfully known to BellSouth or its Affiliates at the time you disclose it, without an obligation to keep it confidential;
 - (d) any information BellSouth or its Affiliates lawfully obtain from any source other than you, provided that such source lawfully disclosed such information;
 - (e) any information BellSouth or its Affiliates independently develop; or
 - (f) any information BellSouth or its Affiliates is required to disclose to any governmental agency or court by written order, subpoena, regulation or process of law, but only to the extent of such required disclosure.
4. You will not identify BellSouth or its Affiliates in any advertising, sales material, press release, public disclosure or publicity without prior written authorization of BellSouth. No license under any trademark, patent or copyright is either granted or implied by disclosure of Information to BellSouth.
5. The term of this Agreement and BellSouth's obligations hereunder will extend for a period of one (1) year after the Effective Date.
6. No forbearance, failure or delay by either party in exercising any right, power or privilege is waiver thereof, nor does any single or partial exercise thereof preclude any other or future exercise thereof, or the exercise of any other right, power or privilege.
7. If and to the extent any provision of this Agreement is held invalid or unenforceable at law, such provision will be deemed stricken from the Agreement and the remainder of the Agreement will continue in effect and be valid and enforceable to the fullest extent permitted by law.
8. This Agreement is binding upon and inures to the benefit of the parties and their heirs, executors, legal and personal representatives, successors and assigns, as the case may be.

PRIVATE/PROPRIETARY/LOCK

CONTAINS PRIVATE AND/OR PROPRIETARY INFORMATION. MAY NOT BE USED OR DISCLOSED OUTSIDE THE BELLSOUTH COMPANIES EXCEPT PURSUANT TO A WRITTEN AGREEMENT. MUST BE STORED IN LOCKED FILES WHEN NOT IN USE.



Nondisclosure Agreement

Incoming Information NDA (12/99)
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Page 2 of 3

You may not assign this Agreement except by prior written consent of BellSouth, and any attempted assignment without such authorization is void.

9. This Agreement shall be deemed executed in the State of Georgia, U.S.A., and is to be governed and construed by Georgia law, without regard to its choice of law provisions. The parties agree that exclusive jurisdiction and venue for any action to enforce this Agreement are properly in the applicable federal or state court for Georgia.

10. This Agreement is the entire agreement between the parties hereunder and may not be modified or amended except by a written instrument signed by both parties. Each party has read this Agreement, understands it and agrees to be bound by its terms and conditions. There are no understandings or representations with respect to the subject matter hereof, express or implied, that are not stated herein. This Agreement may be executed in counterparts, and signatures exchanged by facsimile or other electronic means are effective for all purposes hereunder to the same extent as original signatures.

PRIVATE/PROPRIETARY/LOCK

CONTAINS PRIVATE AND/OR PROPRIETARY INFORMATION. MAY NOT BE USED OR DISCLOSED OUTSIDE THE BELLSOUTH COMPANIES EXCEPT PURSUANT TO A WRITTEN AGREEMENT. MUST BE STORED IN LOCKED FILES WHEN NOT IN USE.



Nondisclosure Agreement

Incoming Information NDA (12/99)
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Page 3 of 3

IN WITNESS WHEREOF, the parties' authorized representatives have signed this Agreement:

BELLSOUTH: _____ **DISCLOSER:** _____

By: _____ **By:** _____
(Authorized Signature) (Authorized Signature)

Name: _____ **Name:** _____
(Print or Type) (Print or Type)

Title: _____ **Title:** _____

BST v. NewSouth Complaint

EXHIBIT C

AFFIDAVIT OF SHELLEY PADGETT

In the Matter of:)	
)	
BellSouth Telecommunications, Inc.)	
)	
Complainant,)	
)	Case No. _____
v.)	
)	
NewSouth Communications Corp.)	
)	
Defendant.)	
_____)	

AFFIDAVIT OF SHELLEY PADGETT

ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS, INC.

Comes the affiant, Shelley Padgett, and being duly sworn, deposes and says:

1. My name is Shelley Padgett. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I currently am a Manager-Regulatory and Policy and Support for BellSouth Telecommunications, Inc. In that capacity I am responsible for transport issues, including EELs and EEL audits.

2. Complainant BellSouth, a wholly-owned subsidiary of BellSouth Corp., is a Georgia corporation with its principal place of business located at 675 W. Peachtree Street, N.E., Atlanta, Georgia, 30375.

3. BellSouth is an incumbent local exchange carrier providing telecommunications services in a nine-state region (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee).

4. Defendant NewSouth is a Delaware corporation with its principal place of business at Two North Main Street, Greenville, South Carolina, 29601, (864) 672-5877.

4. Defendant NewSouth is a Delaware corporation with its principal place of business at Two North Main Street, Greenville, South Carolina, 29601, (864) 672-5877.

5. NewSouth is a competitive local exchange carrier providing local and long distance voice and data services throughout BellSouth's service territory.

6. On May 18, 2001, the Parties entered into an interconnection agreement that afforded NewSouth the ability to order Enhanced Extended Links ("EELs") from BellSouth (the "Agreement"). The Agreement also afforded NewSouth the right to convert special access circuits to EELs so long as NewSouth was meeting one of three safe harbors set forth in the Agreement (and also set forth in the Supplemental Order Clarification) and so long as NewSouth provided a significant amount of local exchange traffic over the EEL. Agreement, Att. 2, § 4.5.1.2, Exh. A. The parties also agreed to a fourth conversion option, over and above those set forth in the Supplemental Order Clarification, that afforded NewSouth the right to convert special access circuits to a combination of a UNE loop and special access transport. Agreement, Att. 2, § 4.5.2 et seq., Exh. A.

7. In the late summer 2001, pursuant to the conversion process set forth in the Agreement, NewSouth began to submit requests to BellSouth via e-mail to convert special access circuits to UNEs. According to the procedures agreed to by the Parties, the e-mails were to attach one or more spreadsheets, using a particular format. The spreadsheets were to identify the circuits to be converted and which of the four safe harbor options applied to that circuit. Since 2001, NewSouth has requested conversion of thousands of circuits from special access services to UNEs. In addition, NewSouth has ordered approximately 1,700 new EELs from BellSouth as well.

8. Pursuant to the terms of the Agreement, BellSouth processed both orders for new EELs and the conversions from special access circuits to UNEs based on NewSouth's self-

certifications. At no time did BellSouth demand or request an audit of any NewSouth circuits prior to the conversion of those circuits from special access to EELs. With respect to the Option 4 conversions, BellSouth did not invoke its right to audit the circuits prior to conversion in a good-faith effort to process the conversions as expeditiously as possible.

9. This concludes my statement.

Shelley W. Padgett
Shelley Padgett

Affirmed to before me this 14th day
of October, 2003.

Micheale F. Boller
Notary Public

MICHEALE F. BOLLER
Notary Public, Douglas County, Georgia
My Commission Expires November 3, 2006

BST v. NewSouth Complaint

EXHIBIT D

**LETTER TO JERRY HENDRIX FROM JAKE JENNINGS,
DATED MAY 3, 2002**



May 3, 2002

Via Overnight Mail

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

RE: EEL Audit

Dear Jerry:

I am receipt of your April 26, 2002 letter notifying NewSouth of BellSouth's intent to audit special access circuits that have been converted to unbundled loop/transport combinations ("Enhanced Extended Links - EELs"). NewSouth is willing to work with BellSouth in order to facilitate the audit of NewSouth's special access circuits converted to EELs subject to the requirements set forth in the Federal Communications Commission's Supplemental Order Clarification, Docket No. 96-98, adopted May 19, 2000 and released, June 2, 2000 ("*Supplemental Order*").

As you point out in your April 26, 2002 letter, it is BellSouth's obligation to "*hire and pay for*" the independent auditor unless it is determined that NewSouth is non-compliant with the Supplemental Order. NewSouth disagrees with BellSouth's interpretation of the Supplement Order requiring NewSouth to pay for the audit if NewSouth is non-compliant with the "*local usage options on 20% or more of the audited circuits.*" There is no such requirement listed in the FCC's Supplemental Order. NewSouth is willing to discuss the cost of the audit based on a finding of non-compliance, if such discussions are warranted. To the extent that we are unable to reach agreement concerning the final disposition of the audit, NewSouth will seek appropriate relief through the Dispute Resolution Process of the BellSouth/NewSouth Interconnection Agreement, dated May 18, 2001.

In addition, in the Supplemental Order, order at para. 32 states the FCC "*emphasize(s) that an audit should not impose an undue financial burden on smaller requesting carriers that may not keep extensive records, and find that, in the event of an audit, the incumbent LEC should verify compliance for these carriers using the records that the carriers keep in the normal course of business.*" Therefore, NewSouth will provide the BellSouth audit team with only those records that are kept in the normal course of business. To the extent that BellSouth's audit places undue financial burden on NewSouth, we hereby notify BellSouth of our intent to seek reimbursement of reasonable costs and expenses imposed by this audit.

NewSouth Communications Corporation
Two North Main Street, Greenville, South Carolina 29601
Telephone: 864-672-5000 // Facsimile: 864-672-5105
www.newsouth.com



NewSouth sees no need to execute the proposed BellSouth Confidentiality and Non-Disclosure Agreement attached to your April 26, 2002 letter. Instead, NewSouth recommends that we utilize the confidentiality provisions set forth in Section 10, General Terms and Conditions – Part B of the BellSouth/NewSouth Interconnection Agreement dated May 18, 2002.

In order to facilitate the audit of NewSouth's special access circuits "converted" to EELs, I have assigned John Fury, Manager of Carrier Relations to act as a single point of contact for the BellSouth audit team. Mr. Fury can be reached at 864-672-5064 to discuss the audit. We will contact BellSouth to schedule a pre-audit conference call.

Sincerely,

A handwritten signature in black ink, appearing to read "Jake E. Jennings", with a stylized flourish at the end.

Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.

cc: Kyle D. Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Daniel Gonzalez, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May, FCC (via electronic mail)
Andrew Caldarello, BellSouth (via electronic mail)
Larry Fowler, BellSouth (via electronic mail)
John Fury, NewSouth (via electronic mail)
Amy Gardner, NewSouth (via electronic mail)

NewSouth Communications Corporation
Two North Main Street, Greenville, South Carolina 29601
Telephone: 864-672-5000 // Facsimile: 864-672-5105
www.newsouth.com

BST v. NewSouth Complaint

EXHIBIT E

AFFIDAVIT OF JERRY HENDRIX

In the Matter of:)	
)	
BellSouth Telecommunications, Inc.)	
)	
Complainant,)	
)	Case No. _____
v.)	
)	
NewSouth Communications Corp.)	
)	
Defendant.)	
_____)	

AFFIDAVIT OF JERRY D. HENDRIX

ON BEHALF OF BELL SOUTH TELECOMMUNICATIONS, INC.

Comes the affiant, Jerry Hendrix, and being duly sworn, deposes and says:

1. My name is Jerry Hendrix. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I currently am Assistant Vice President – Pricing at BellSouth Telecommunications, Inc. (“BellSouth”). I am responsible for overseeing the negotiation of Interconnection Agreements between BellSouth and Competitive Local Exchange Carriers (“CLECs”). Prior to assuming my present position, I held various positions in the Network Distribution Department and then joined the BellSouth Headquarters Regulatory Organization. I have been employed with BellSouth since 1979.

2. BellSouth Telecommunications, Inc. (“BellSouth”) is an incumbent local exchange carrier that provides local service in a nine-state region in the Southeast. NewSouth provides telecommunications services in each of BellSouth’s nine states.

3. I executed the Interconnection Agreement and Amendments to that Agreement with NewSouth on behalf of BellSouth. The Parties voluntarily negotiated the terms and conditions of the Agreement pursuant to Section 252(a)(1) of the Communications Act of 1996 (“Act”).

The Parties did not arbitrate any of the provisions in the Agreement before a state public service commission.

4. In Section 4.5.1.5 of the Agreement, the Parties agreed that BellSouth would have an unqualified right to audit NewSouth's EELs for compliance with the requirement that NewSouth provide a significant amount of local exchange traffic over the EELs upon 30 days notice and at BellSouth's expense. Agreement, Att. 2, § 4.5.1.5, Exh. A. The parties specifically did not incorporate the terms of the Supplemental Order Clarification into the audit provision. BellSouth is entitled to conduct an audit of NewSouth's EELs under these terms.

5. BellSouth selected American Consultants Alliance to audit NewSouth's EELs in accordance with the terms of the Agreement. This firm is not related to BellSouth nor affiliated with BellSouth in any way. Nor is the firm subject to the control or influence of BellSouth or dependent on BellSouth.

6. Pursuant to the Agreement, BellSouth requested an audit of NewSouth's EELs on April 26, 2002. On this date, I sent NewSouth a letter notifying NewSouth of BellSouth's intent to conduct an audit thirty days hence "to verify NewSouth's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order." My letter informed NewSouth that BellSouth had selected an independent auditor to conduct the audit, and that BellSouth would incur the costs of the audit (unless the auditors found NewSouth's circuits to be non-compliant). See *Letter from Jerry Hendrix to Jake Jennings*, 4/26/02, Exh. B.

7. I received a response from Jake Jennings of NewSouth on May 3, 2002 in which NewSouth stated that "NewSouth is willing to work with BellSouth in order to facilitate the audit of NewSouth's special access circuits converted to EELs subject to the requirements set forth in the Federal Communications Commission's *Supplemental Order Clarification...*" *Letter from*

Jake Jennings to Jerry Hendrix, 5/3/02, Exh. D. While NewSouth disputed BellSouth's characterization of NewSouth's obligation to pay for the audit based on a finding of non-compliance, NewSouth agreed to go forward with the audit and address the compensation issue if it arose.

8. Approximately three weeks after NewSouth agreed to the audit, on May 23, 2002, NewSouth sent a second letter to BellSouth, this time stating that "[b]ased upon new information and further consideration, NewSouth formally disputes BellSouth's request to audit special access circuits that have been converted to unbundled loop/transport combinations..." *Letter from Jake Jennings to Jerry Hendrix, 5/23/02, Exh. F.* In its letter, NewSouth cited the following two reasons as the basis for refusing BellSouth's audit request, assertedly relying on the *Supplemental Clarification Order*: "(1) audits may not be routine and only be conducted under limited circumstances; and (2) audit must be performed by an independent third party hired and paid for by the incumbent local exchange company." *Id.* NewSouth's letter did not discuss or in any way address the terms of the parties' Agreement, which clearly permitted the requested audit.

9. On June 6, 2002, I responded to NewSouth's May 23, 2002 letter refusing an audit. Although not directly relevant to BellSouth's audit rights, my June 6, 2002 letter addressed NewSouth's purported reliance on the *Supplemental Order Clarification*. My letter confirmed that BellSouth did not conduct routine audits, but rather conducts such audits "when it believes such an audit is warranted due to a concern that the local usage options may not be met." My letter also pointed out that BellSouth had not conducted any audits in the two years since the release of the *Supplemental Order Clarification*. Finally, my letter explained that BellSouth's selected auditor was an independent third party, with no affiliation with BellSouth.

10. Having failed to receive a response from NewSouth for three weeks, I sent another letter on June 27, 2002. This letter stated that, because NewSouth had not responded to BellSouth's letter of June 6, 2002, BellSouth "assume[s] that NewSouth is agreeable to proceeding with the audit immediately. ACA's audit team will commence the audit at NewSouth's offices in Greenville on July 15."

11. On June 29, 2002, NewSouth responded to my June 27, 2002 letter, once again refusing to submit to the audit. In this letter, NewSouth continued to cite to its position that BellSouth was required to demonstrate a "reasonable concern" for the audit.

12. I responded to NewSouth's letter of June 27, 2002 on July 17, 2002. Among other things, my letter reiterated that BellSouth had the right to audit pursuant to the Agreement. In addition, although not required to explain our reasons for conducting an audit, I addressed the need for an audit in this letter. My letter noted that NewSouth "asks for substantiation of BellSouth's concerns." My letter then proceeded to set forth a number of concerns. In relevant part, my letter noted that "BellSouth has had issues with NewSouth in the past regarding its ability to appropriately jurisdictionalize traffic it sends to BellSouth. In light of those past difficulties, it is more than reasonable to question NewSouth's self-certification of the amount of local traffic on the circuits in question." Second, my letter noted that "traffic studies show that NewSouth's traffic in several states is largely non-local. In South Carolina, 75% of all NewSouth's traffic is local; in Louisiana, only 66% of NewSouth's and 0% of Universal Communications' traffic is local; in North Carolina, just 45% is local; and in Tennessee, only 38% of all NewSouth's traffic is local." My letter then noted that, despite the aforementioned traffic studies, "NewSouth is claiming that, on these circuits, the traffic mix is substantially different than the statewide average." My letter further reminded NewSouth that "your agreement is a nine-state, regional agreement. It does not require that the audits be conducted on

a state-by-state basis, nor do the Commission rules contain such a requirement.” Finally, my July 17, 2002 letter notified NewSouth that “[i]n the event that NewSouth does not begin to cooperate with the audit as required by the Interconnection Agreement, BellSouth will have no choice but to interpret it as a material breach of the contract and will be forced to take the appropriate steps.”

13. BellSouth received a response to my July 17, 2002 letter on August 7, 2002. Again, NewSouth stated that it would not submit to an audit, but did not address BellSouth’s right to conduct the audit pursuant to the clear terms of the Agreement.

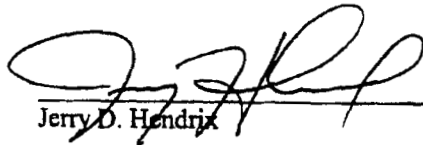
14. On September 18, 2002, I sent yet another letter to NewSouth requesting the audit. NewSouth did not respond to this letter. Consequently, on May 21, 2003, I sent NewSouth another letter stating that “[s]ince we have not received a response from you regarding our letter of September 18, 2002, BellSouth has scheduled an audit consistent with the terms of the Interconnection Agreement dated May 18, 2001.”

15. On May 27, 2003, NewSouth responded to BellSouth’s September 18 letter and reiterated that it would not consent to an audit pursuant to the terms of the Agreement. Throughout the remainder of 2002 and until the summer of 2003, I continued to exchange letters on the audit issue with Jake Jennings of NewSouth. Despite the fact that BellSouth satisfied all prerequisites for BellSouth to conduct an audit, NewSouth continued to refuse an audit.

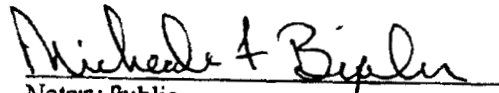
16. Even if the Commission determines that the *Supplemental Order Clarification* is somehow relevant to this dispute, which it is not, BellSouth has met the alleged criteria set forth in the *Order*. BellSouth hired an independent auditor and provided NewSouth with thirty days notice of its intent to audit. And even if BellSouth were required to articulate a “concern” before initiating an audit, BellSouth has done so, as evidenced by my July 17, 2002 letter setting forth BellSouth’s concerns.

17. The parties made extensive and good faith efforts to resolve this dispute prior to the filing of the Formal Complaint, including a face-to-face meeting on May 5, 2003.

18. This concludes my statement.


Jerry D. Hendrix

Affirmed to before me this 14th day
of October, 2003.


Notary Public

MICHEALE F. BOGLER
Notary Public, Douglas County, Georgia
My Commission Expires November 3, 2006

BST v. NewSouth Complaint

EXHIBIT F

**LETTER TO JERRY HENDRIX FROM JAKE JENNINGS,
DATED MAY 23, 2002**



May 23, 2002

Via overnight and Electronic Mail

Mr. Jerry Hendrix
BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30375

RE: EEL Audit

Dear Jerry:

Based upon new information and further consideration, NewSouth formally disputes BellSouth's request to audit special access circuits that have been converted to unbundled loop/transport combinations ("Enhanced Extended Links - EELs"). To the extent that we are unable to reach agreement concerning the final disposition of the audit, and BellSouth still insists on having one, BellSouth should seek appropriate relief through the Dispute Resolution Process of the BellSouth/NewSouth Interconnection Agreement, dated May 18, 2001. NewSouth, too, may seek regulatory agency involvement as a means of resolving this issue.

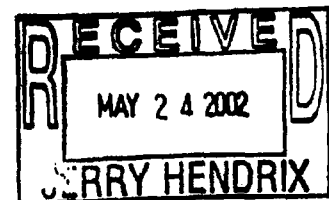
As you now may be aware, the Federal Communications Commission's Supplemental Order Clarification Order, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order") clearly stated that (1) audits may not be routine and only be conducted under limited circumstances;¹ and (2) audit must be performed by an independent third party hired and paid for by the incumbent local exchange company.² Based on information recently discovered by NewSouth - much of it included in the Petition for Declaratory Rulemaking of NuVox, Inc. filed in FCC Docket 96-98 on May 17, 2002, it is NewSouth's opinion that neither of these requirements has been met.

Indeed, just as BellSouth failed to state a reasonable "concern" regarding compliance with respect to NuVox, it also has failed to do so with NewSouth in its April 26, 2002 letter. Moreover, NewSouth understands that BellSouth's audit request to NewSouth is one of at least a dozen - demonstrating BellSouth's defiance of the FCC's directive (and its own prior commitment) that such audits will not be routine.

¹ Supplemental Order Clarification, para. 31, n. 86.

² Supplemental Order Clarification, para. 31.


NewSouth Communications
Two North Main Street
Greenville, SC 29601
864-672-5000



NewChoice. NewTechnology. NewValue.

Although I initially accepted BellSouth's assertion that its selected auditor is independent, the allegations in the NuVox petition compel me to reject that assertion now, as I have been able to confirm that the same auditor has been hired to conduct the audits of both NuVox's and NewSouth's records. If BellSouth wishes to renew its audit request, NewSouth insists that a new and truly independent auditor be selected if it is determined that such an audit is warranted. NewSouth remains willing to discuss these and several other unresolved issues regarding BellSouth's audit request. However, until these threshold issues are resolved to NewSouth's satisfaction or resolved by the FCC, NewSouth is unwilling to devote precious resources toward the proposed unauthorized audit of NewSouth's converted EEL circuits.

Sincerely,



Jake E. Jennings
Vice President - Regulatory Affairs
NewSouth Communications Corp.

cc: Kyle Dixon, FCC (via electronic mail)
Matthew Brill, FCC (via electronic mail)
Daniel Gonzalez, FCC (via electronic mail)
Jordan Goldstein, FCC (via electronic mail)
Dorothy Attwood, FCC (via electronic mail)
Michelle Carey, FCC (via electronic mail)
Jodie Donovan-May (via electronic mail)

NewSouth Communications
Two North Main Street
Greenville, SC 29601
864-672-5000