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September 13, 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. 040527-TP (NuVox)

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion for Summary Disposition, which we ask that you file in the captioned 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 /pn
Nancy White

Enclosures

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

550146

CERTIFICATE OF SERVICE
Docket No. 040527-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 13th day of September, 2004 to the following:

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Nancy B. White/RH
Nancy B. White

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.	)	Docket No. 040527-TP

BELLSOUTH TELECOMMUNICATIONS, INC.'s MOTION FOR SUMMARY DISPOSITION

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, respectfully files this Motion for Summary Disposition of its Complaint to enforce the audit provisions in BellSouth's Interconnection Agreement ("Florida Agreement" or "Agreement") with NuVox Communications, Inc. ("NuVox"), pursuant to Rule 28-106.204(4). Under the Florida Agreement, BellSouth is entitled, upon 30 days' notice, to audit NuVox's records to verify the type of traffic being placed over combinations of loop and transport network elements. BellSouth gave NuVox the required notice of its intent to conduct such an audit and to seek appropriate relief as the audit results may dictate, in accordance with the Florida Agreement. NuVox has refused to permit the audit, in breach of the Florida Agreement. As is demonstrated below, there are no genuine issues as to any material fact and BellSouth is entitled to judgment as a matter of law in these proceedings.

INTRODUCTION

In this case, BellSouth seeks to exercise its right to audit records associated with NuVox's conversion of nearly 1000 circuits from special access to combinations of loop and transport network elements called "EELs" (enhanced extended links). A precise twelve-line clause in the Florida Agreement grants BellSouth specifically that right. No ambiguity is involved.

BellSouth has sought to audit NuVox's EELs in strict accordance with the language of that clause, but NuVox has refused the audit. Despite the clarity of its obligation, NuVox has blocked the audit because BellSouth has not *first*: (1) "demonstrated a concern" regarding circuit non-compliance with the self-certification NuVox provided in order to qualify for the conversions under the Florida Agreement; (2) linked its "concern" or "concerns" to each and every converted circuit to be audited; (3) confirmed that it seeks to audit only those circuits for which such linkage is demonstrated; and (4) hired a [suitably] "independent auditor" to conduct the audit "in accordance with AICPA standards." None of this language, as NuVox must admit, appears in the Florida Agreement's EELs audit provision, or anywhere else in the contract. But, this has not stopped NuVox from blocking the audit anyway.

NuVox says it is merely construing the Agreement in the fashion the Parties intended. It presumably wishes to introduce evidence to support this position in these proceedings, through one device or another. NuVox's inspiration comes from certain language in a 2002 Federal Communications Commission ("FCC") "clarification" of a previously issued order that addressed the subject of EELs provisioning to CLECs for local exchange use and post-provisioning audits by ILECs of those circuits. NuVox seeks to import its self-serving interpretation of the clarification order into the Parties' Florida Agreement. The avenue for NuVox's re-

draftsmanship is a generic "compliance with all laws" clause found in the General Terms & Conditions section of the Agreement.

NuVox's unilateral attempt to re-write the Florida Agreement must fail. The Florida Agreement governs the issues, not the unincorporated, aspirational language of the FCC's clarification order, and that Agreement does not impose the hurdles that NuVox wants BellSouth to clear. Under the express language of the Parties' voluntarily negotiated, integrated Agreement, however, NuVox has never had any valid legal option but to permit the audit BellSouth proposes.

NuVox's intransigence has now caused BellSouth to seek enforcement of its audit rights in five states. It is time for NuVox's Florida EELs to be audited as expressly agreed. In Florida, this will only happen upon order of this Commission which BellSouth, accordingly, seeks.

As demonstrated below, this case is perfectly suited for summary disposition[1] by the Commission on a paper record without a hearing. The question before the Commission is a straightforward question of contract interpretation: (1) the parties entered into a voluntarily negotiated Agreement; (2) the Agreement provides BellSouth an unqualified right to audit NuVox's EELs on 30 days' notice and at BellSouth's expense; (3) BellSouth provided such notice to NuVox on March 15, 2002 (and continuing); and (4) NuVox refused (and refuses) to permit BellSouth to undertake the audit, thereby breaching the Florida Agreement. The Commission does not need to conduct a hearing to rule in this matter, and this Complaint should be addressed efficiently and expeditiously on a paper record.

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[1] In Florida, summary judgment is proper when "there is no issue of material fact and the movant is entitled to judgment as a matter of law." *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126, 130 (Fla. 2000). *See* (Fla. Admin. Code R. 28-106.204(4).

SUMMARY OF ACTION

BellSouth is entitled to audit NuVox's EELs. Section 10 of Attachment 2 of the Florida Agreement affords NuVox the right to convert special access circuits to EEL UNE combinations provided that the circuits are used to provide a "significant amount of local exchange traffic," which NuVox must self-certify. *See* Agreement, Att. 2, §§ 10.5.1, 10.5.2, Exh. A.

Section 10.5.4 specifically affords BellSouth the right to audit those EELs after conversion in order to verify the amount of local exchange traffic on the circuit. *See* Agreement, Att. 2, § 10.5.4, Exh. A. Section 10.5.4 provides:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one 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 [NuVox] 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 as 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 [NuVox].

Agreement, Att. 2, § 10.5.4, Exh. A. BellSouth has given NuVox 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 Hamilton E. Russell, III*, March 15, 2002, Exh. D. NuVox has failed and refused to allow such audit and therefore has breached the Florida Agreement.

NuVox has based its refusal on BellSouth's alleged non-compliance with alleged requirements for audits under the *Supplemental Order Clarification.*[2] BellSouth's request has been fully consistent with the *Supplemental Order Clarification.* More significantly, however,

under the Telecommunications Act of 1996 (the "Act") and the *Supplemental Order Clarification*, BellSouth's right to audit NuVox's records is governed by the terms of the voluntarily negotiated Florida Agreement, not FCC rules, orders and pronouncements -- *e.g.*, the *Supplemental Order Clarification* – that the Parties did not incorporate in the 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. 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 10.5.4 of the Florida Agreement unambiguously allows BellSouth, upon 30 days' notice and at BellSouth's expense, to conduct an audit of NuVox's records to verify that NuVox is providing a significant amount of local exchange traffic over combinations of loop and transport network elements. Agreement, Att. 2, § 10.5.4, Exh. A. The Florida Agreement does not require that BellSouth meet *any* additional conditions. To the extent NuVox was interested in adding audit conditions from the FCC's *Supplemental Order Clarification*,

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[2] *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*").

NuVox could have asked during negotiations that the specific audit language from the *Supplemental Order Clarification* be incorporated into the Parties' Agreement. The Parties did not incorporate the *Supplemental Order Clarification's* audit requirements, putting aside issues about what those requirements might be, whether by reference or by including specific language from the *Order*. This omission was presumably intentional, as other sections or provisions of the Parties' Agreement specifically reference the *Order* with respect to specific issues. *See e.g.*, Agreement, Att. 2, §§ 10.5.2, 10.5.4, Exh. A.

Section 10.5.4 is unambiguous in describing BellSouth's audit rights, and there is no valid theory under Georgia law (the governing law for the Agreement -- GTC § 23, Exh. A) that supports the superimposition of the *Supplemental Order Clarification* onto the Florida Agreement to re-write the contract's express terms. *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").[3] Moreover, the Florida Agreement's integration or "merger" clause would bar such a construction, even if there were an argument to support it.

Finally, NuVox's "independent auditor" protestations are unfounded. The contract expressly requires NuVox to raise its issues on the back-end, *i.e.*, post-audit, not on the front end, and certainly not in order to bar the audit. Agreement, Att. 2, § 10.5.4, Exh. A. Moreover,

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[3] Florida law on this subject is substantially similar to the controlling Georgia law cited above. *Garcia v. Tarmac American, Inc.*, ___ So. 2d___, 2004 WL 17999731 (Fla. 5th DCA 2004) (clear, unambiguous contract terms should be enforced as written). *See also V&M Erectors, Inc. v. Middlesex Corporation*, 867 So. 2d 1252 (Fla. 4th DCA 2004) (absent ambiguity in the contract, the four corners of the instrument control).

NuVox's auditor independence and AICPA concerns are frivolous upon inspection, and should not be credited by this Commission.

FACTS

A. The Florida Agreement.

Pursuant to Sections 251 and 252 of the Act, NuVox and BellSouth entered into the Florida Agreement, effective June 30, 2000, to govern their relationship in Florida and each of the remaining eight states in BellSouth's operating territory. Complaint ¶ 5; Agreement, General Terms & Conditions § 2.1 *et seq.,* Exh. A; Padgett Affidavit ¶ 6, Exh. B. The Florida Agreement was approved by this Commission. The Florida Agreement is a voluntarily negotiated agreement; that is, the Parties arrived at a mutual understanding as to its terms, without compulsion. Hendrix Affidavit ¶ 3, Exh. C.

The Florida Agreement grants NuVox access to EELs. Agreement, Att. 2, § 10 *et seq.*, Exh. A. The Florida Agreement provides:

> Where facilities permit and where necessary to comply with an effective FCC and/or State Commission order, BellSouth shall offer access to loop and transport combinations, also known as Enhanced Extended Link ("EEL") as defined in Section 10.3 below [which describes the various types of EELs combinations].

Florida Agreement, Att. 2, § 10.2.1, Exh. A. The Florida Agreement also specifically provides for the conversion of NuVox's special access circuits to EELs, but only so long as NuVox uses the combination to provide a "'significant amount of local exchange service' (as described in Section 10.5.2 below), in addition to exchange access service, to a particular customer." Agreement, Att. 2, § 10.5.1, Exh. A.

The Florida Agreement uses the term, "significant amount of local exchange service," as that term is defined in the *Supplemental Order Clarification*. Agreement, Att. 2, § 10.5.2, Exh A. Specifically, the Florida Agreement incorporates by reference Paragraph 22 of the FCC's

Supplemental Order Clarification, which provides three scenarios under which a competitive local exchange carrier ("CLEC") may self-certify compliance with the "significant amount of local exchange service" requirement. Agreement, Att. 2, § 10.5.2, Exh. A (citing *Supplemental Order Clarification* ¶ 22). Thus, the Florida Agreement requires NuVox to self-certify compliance with the "significant amount of local exchange service" criteria prior to converting special access circuits to EELs. Agreement, Att. 2, § 10.5.2, Exh. A; Complaint ¶ 10.

The Florida Agreement affords BellSouth the right to audit any of NuVox's EELs. Florida Agreement, Att. 2, § 10.5.4, Exh. A; Hendrix Affidavit ¶ 4, Exh. C. Specifically, Section 10.5.4 of Attachment 2 to the Florida Agreement states:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one 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 [NuVox] 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 as 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 [NuVox].

Florida Agreement, Att. 2, § 10.5.4, Exh. A.; Hendrix Affidavit ¶ 4, Exh. C. The 30 days' notice, expense burden and audit frequency requirements, thus, are the only express qualifications of BellSouth's audit rights in the audit clause. Agreement, Att. 2, § 10.5.4, Exh. A.; Hendrix Affidavit ¶ 4, Exh. C.

B. The *Supplemental Order Clarification.*

The *Supplemental Order Clarification* clarified certain issues from the *Supplemental Order*[4] regarding 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.

In the *Supplemental Order Clarification*, the FCC balanced CLECs' and ILECs' interests by giving CLECs the ability to obtain EELs upon self-certification that a significant amount of local exchange service would be provided over the EEL combinations, while giving ILECs the power to audit the circuits after conversion to verify compliance. *Supplemental Order Clarification* ¶ 1. *See Supplemental Order Clarification*, ¶ 29 ("[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.")

Although, in the original *Supplemental Order,* the FCC 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.

The FCC observed (in a footnote) that audits should not be "routine." However, in so doing the FCC recognized that audits would occur and directed "requesting carriers [to] maintain appropriate records that they can rely upon to support their local usage certification." *Supplemental Order Clarification* ¶ 32, n.86. Importantly, the FCC acknowledged the existence

of audit rights in interconnection agreements, and specifically declined to "restrict parties from relying on these agreements." *Supplemental Order Clarification* ¶ 32.

C. NuVox's EELs.

Pursuant to the Florida Agreement's conversion process, NuVox converted approximately 981 special access circuits to EELs in Florida, starting in 2000. Complaint ¶ 12; Padgett Affidavit ¶ 7, Exh. B. NuVox self-certified that the facilities were being used to provide a "significant amount of local exchange service." Complaint ¶¶ 10, 13; Padgett Affidavit ¶ 7, Exh. B. In support of its self-certification, NuVox stated that it was the "exclusive provider of local exchange service" for its Florida customers.[5] Complaint ¶ 14; Padgett Affidavit ¶ 7, Exh. B. At no time did BellSouth demand or request an audit of any NuVox circuits prior to provisioning the conversions. Padgett Affidavit ¶ 8, Exh. B.

D. BellSouth's Audit Requests and NuVox's Refusal.

On March 15, 2002, in accordance with the terms of the Florida Agreement, BellSouth sent NuVox a letter providing 30 days' notice of BellSouth's intent to audit NuVox's EELs. BellSouth advised in the letter that the purpose of the audit was to "verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC *Supplemental Order*." *Letter from Jerry Hendrix to Hamilton Russell, III*, March 15, 2002, Exh. D; Complaint ¶ 16. BellSouth informed NuVox 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

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[4] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Supplemental Order*, Commission 99-370 (1999).

[5] This particular option is one of the three potential options for NuVox to self-certify compliance with the "significant amount of local exchange service" requirement. Agreement, Att. 2, § 10.5.2, Exh. A (citing *Supplemental Order Clarification* ¶ 22).

NuVox's circuits to be non-compliant). *Letter from Jerry Hendrix to Hamilton Russell, III*, March 15, 2002, Exh. D. BellSouth forwarded a copy of the audit request letter to the FCC. *Id.*

NuVox refused to permit the audit. Complaint ¶ 17; Hendrix Affidavit ¶ 7, Exh. C. Since the March 15, 2002 audit notice, the parties have exchanged correspondence and verbal communications -- BellSouth seeking to audit the EELs, and NuVox refusing to permit the audit as sought. Hendrix Affidavit at ¶¶ 5-8, Exh. C; see Complaint ¶¶ 27-30. NuVox has refused on two principal grounds: (1) BellSouth must "demonstrate a concern" that warrants the audit; and (2) BellSouth's auditor (as identified in the March 15, 2002 Letter), is not "independent."

BellSouth has disagreed entirely with NuVox's positions, and has repeatedly stated that the Florida Agreement does not permit NuVox to block or delay the audit on any of NuVox's stated grounds. Hendrix Affidavit at ¶¶ 5-8, Exh. C.

ARGUMENT

A. BellSouth is Entitled to Audit NuVox's EELs Under the Agreement.

BellSouth seeks a determination from this Commission that pursuant to the Parties' Agreement, BellSouth is entitled to audit NuVox's EELs. BellSouth has met the audit clause's notice criteria. BellSouth is certainly prepared to pay for it once it occurs. The purpose of the audit is to verify NuVox's compliance with its self-certification. Nothing more is needed to conclude that NuVox's refusal to allow BellSouth to conduct the audit is a naked and continuing breach of the Florida Agreement.

1. The Agreement, not the *Supplemental Order Clarification*, controls the audit.

NuVox argues that BellSouth must comply with the requirements (as NuVox would interpret them) of the *Supplemental Order Clarification*. *See, e.g.*, NuVox's Motion to Dismiss

at 4-6. Such requirements are nowhere to be found in the Agreement. NuVox's position, thus, is utterly flawed.

a. The Agreement is unambiguous.

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).[6] Section 10.5.4's notice, expense and frequency of audit requirements are unambiguous and, thus, must be accorded their plain meaning. Conversely, the terms of Section 10.5.4 do not incorporate any supposed requirements of the *Supplemental Order Clarification*, and instead define BellSouth's audit rights without reference to anything in that *Order* (save only a definitional reference to "local usage options"). Agreement, Att. 2, § 10.5.4, Exh. A.

The unambiguous language of the Agreement, thus, provides BellSouth an unqualified right to audit NuVox's circuits provided BellSouth gives 30 days' notice and assumes the audit's expense. *Id.*

b. The Agreement reflects the Parties' entire understanding.

Second, the Florida Agreement contains an integration or "merger" clause. Agreement, GTC, § 45, Exh. A. Section 45 of the General Terms and Conditions provides:

> 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

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[6] *Accord Garcia v. Tarmac American, Inc.*, ____ So.2d __, 2004 WL 1799731 at 2 (Fla. 5th DCA 2004); (clear and unambiguous terms of a contract should be enforced as written); *V&M Erectors Inc. v. Middlesex Corp.*, 867 So.2d 1252 (Fla. 4th DCA 2004) (absent ambiguity in the contract, four corners of the instrument control).

> 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, § 45, Exh. A (emphasis added). Under Georgia law, this clause gives the Parties a substantive, contractual right against a tribunal's use of extraneous material to contradict the terms chosen in the contract. *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).

The *Supplemental Order Clarification* is quintessentially "extraneous material." Thus, however NuVox might wish to characterize that order's requirements (which itself is problematic, *see* below), the result here is the same: the merger clause bars the importation of any such requirements into the Florida Agreement.[7]

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[7] NuVox argues that the *Supplemental Order Clarification* became a term and condition of the Florida Agreement through the Agreement's "compliance with all applicable laws" provision when the Parties failed to expressly exempt its application. *See* NuVox's Motion to Dismiss at 3-4, n.5. The Agreement does require the parties to "comply with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement." Agreement, GTC § 35.1, Exh. A. Section 35.1, a generic contract clause found in a broad array of commercial agreements, is not relevant to this dispute, however. *See, e.g., Texaco v. FERC*, 148 F.3d 1091, 1096 (D.C.Cir. 1998) (D.C. Circuit, construing virtually identical "comply with all applicable laws" clause in pipeline contracts dispute, disregarded FERC's reliance on the clause in its administrative decision, stating that the clause is "merely a generic contract clause compelling both parties to adhere to the law" . . . [multiple citations omitted] and that "[i]ndeed, the structure of the . . . contracts confirms the banal nature of [the clause] and its irrelevance to rate setting.") Further, this ubiquitous clause, designed to allocate routine risks and costs of performing one's contractual

c. The Agreement was voluntarily negotiated.

Third, the audit provision was voluntarily negotiated by BellSouth and NuVox pursuant to Section 252(a)(1) of the Act. Hendrix Affidavit ¶ 3, Exh. C. It is a fundamental principle under the Act 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). *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 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 FCC - such as the *Supplemental Order Clarification. Iowa Utilities Board v. Commission*, 120 F.3d 753, n. 9 (81h 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

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obligations lawfully, should not be interpreted to override or alter the *specific Agreement provision that directly addresses EELs audits*. *See Central Georgia Electric Membership Corp. v. Ga. Power Co.*, 121 S.E.2d 644, 646 (Ga. 1961) (whenever "apparent inconsistency [exists] between a clause that is general and broadly inclusive in character and one that is more limited and specific in its coverage, the latter should generally be held to operate as a modification and *pro tanto* nullification of the former"); V. Ferreira, Encyclopedia of Georgia Law, § 64 (1996 Rev.) (same). *See also Schwartz v. Harris Waste Management Group*, 516 S.E.2d 371, 375 (Ga.App. 1999) (". . . under general rules of contract construction, a limited or specific provision will prevail over one that is more broadly inclusive"). Thus, with respect to EELs audits, it was not necessary for the Parties to engage in an encyclopedic recitation of laws, orders, *etc.* that did not form a part of their understanding; rather, the Parties could -- and did -- accomplish this through the selection of precise terms for the audits, *i.e.*, Section 10.5.4. *See, e.g., In Re: BellSouth*

state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations"). The FCC 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).

Because the Parties voluntarily negotiated the audit provision at issue, 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

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Telecommunications, Inc. v. NewSouth Communications, Corp., Order Granting Motion For Summary Disposition and Allowing Audit, Dkt. No. P-772, Sub 7 (North Carolina Utilities Commission, August 24, 2004).

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.*

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, once a state commission grants approval, "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.*

No dispute exists that the FCC 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 10.5.4 of the Agreement. Hendrix Affidavit ¶¶ 3-4, Exh. C. Because NuVox 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, § 10.5.4, Exh. A.

For example, Section 10.5.4 of the Agreement contains no requirement that BellSouth demonstrate, articulate or even have a "concern" before conducting an audit. Agreement, Att. 2, § 10.5.4, Exh. A; *see, in contrast, Supplemental Order Clarification* ¶ 31, n.86. Further, Section 10.5.4 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 NuVox now to receive the perceived 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 NuVox 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.

Further, NuVox's theory that the *Supplemental Order Clarification* somehow trumps or over-writes the Agreement is inconsistent with the Order itself. In declining to adopt certain auditing guidelines, the FCC noted that many "interconnection agreements already contain audit rights." *Supplemental Order Clarification* ¶ 32. In the words of the FCC: "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 NuVox's position, BellSouth would be restricted from relying on the express audit language in the Agreement.

In addition to being inconsistent with the text of the Act and with every authority on the issue, adopting NuVox's position would undermine the Act's entire negotiation and arbitration scheme. To the extent NuVox was interested in having the *Supplemental Order Clarification* govern EELs audits, NuVox could have negotiated such language into the Agreement. 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, NuVox should not be permitted to achieve the same end indirectly through this litigation.

B. The *Supplemental Order Clarification* Does Not Bar BellSouth's Audit of NuVox's EELs.

Even if the Commission determines that the *Supplemental Order Clarification* is somehow relevant to this dispute, which it is not, BellSouth is still entitled to audit NuVox's EELs immediately. NuVox's "demonstration of concern" and auditor preconditions are not only alien to the parties' Agreement, but also overstate -- at a minimum -- what the FCC actually required in the *Supplemental Order Clarification.* A less self-serving review of the relevant provisions of that order shows that the order does not justify NuVox's misconduct.

The *Supplemental Order Clarification* does not *require* an ILEC to demonstrate or even state a concern prior to the conduct of an audit.[8] At most, the FCC's language expresses -- in a footnote -- the FCC's aspiration or, arguably, expectation, that interconnecting parties would not abuse the audit process. The FCC, however, did not mandate that the party seeking an audit submit to the regulatory equivalent of a probable cause hearing, as NuVox has maintained.

[8] The FCC observed its accord with the position of certain CLECs 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." *Supplemental Order Clarification*, 15 F.C.C. Rcd. at 9603, n.86.

In Paragraphs 31 and 32 of the *Supplemental Order Clarification*, the FCC made several relevant statements using, alternatively, mandatory and permissive terms that appear both in text and footnotes. Examination of these statements separates dicta from determinations.

In Paragraph 31 (text), the FCC stated:

> We emphasize that incumbent LECs *may not require* a requesting carrier to submit to an audit *prior to provisioning* combinations of unbundled loop and transport network elements.

Supplemental Order Clarification, ¶ 31 (emphases added). One readily observes here that the FCC forbade (with "emphasis") ILECs from using audits as a precondition to provisioning EELs to CLECs. "May not require" audits "prior to provisioning" is unambiguous and mandatory, representing a clear declaration by the FCC that any auditing of the circuits is not to occur until after they are first provisioned by the ILECs.

In a *footnote* to this very provision, however, the FCC wrote:

> The incumbent LEC and competitive LEC signatories to the *February 28, 2000 Joint Letter* state 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. . . . We *agree* that this *should be* the only time that an incumbent LEC should request an audit.

Id. n.86 (emphasis added). Juxtaposed with the text of Paragraph 31 quoted above, footnote 86 leaves much to be desired as an FCC mandate, despite NuVox's insistence to the contrary.

The placement of these statements in a footnote as opposed to the text of the order suggests, from a declaration of policy standpoint, that the material is of lesser regulatory standing. More importantly, the strength of the statement upon which NuVox seizes -- the last sentence -- is weakened by the immediately preceding sentence that introduces it: a reference by the FCC to the *non-binding statements* of certain industry participants regarding *their* expectancy of how "routine" audits would be in a post-*Order* environment. Without maligning the import of

the parties' joint declaration (to which BellSouth was, in fact, a signatory), the statement is not a binding legal obligation immediately applicable to interconnection agreements. The operative language -- *e.g.*, "routine practice" and "concern" are subject to a variety of interpretations, obviously, and the FCC made no effort to choose one. As such, one can only conclude that the statement was one of expectancy, with respect to which the FCC generally agreed.

In the very next sentence, upon which NuVox principally relies, the FCC merely "agree[d] that this *should be* the only time that an incumbent LEC *should* request an audit." The FCC expressed no independent position; rather, it nodded approvingly at the cited declaration of intent by the industry parties mentioned. In a statement containing a double normative (*i.e.*, ILEC "concern" regarding the local exchange service criteria "should be" the only occasion on which an ILEC "should" seek an audit), the FCC expressed its aspirations. It did not issue any mandate, which certainly appears to be deliberate.

Paragraph 31 provides further demonstration that the FCC chose its language purposefully and carefully in order to distinguish between what it was requiring and what it may have wanted but did not wish to mandate. With respect to the issues of burden and cost associated with ILEC audits, the FCC stated:

> In order to reduce the burden on requesting carriers, *we find* that incumbent LECs *must provide* at least 30 days written notice to a carrier that has purchased a combination of unbundled loop and transport network elements *that it will conduct an audit*, and *may not* conduct more than one audit of the carrier in any calendar year *unless* an audit finds non-compliance.

Id., ¶ 31 (emphases added). Here, again -- within the same operative textual paragraph upon which NuVox relies -- is an example of the FCC stating its intent with clarity, using mandatory language, and defining the obligations and limitations being imposed. Statements that the FCC "found," or that ILECs "must provide," or that ILECs "will not conduct" or "may not conduct".

etc., leave little room for doubt as to regulatory meaning or intent. There are no double normatives, no nodding references to non-binding agreements of a sample of the industry, *etc.* This statement stands in stark contrast with footnote 86, to the clear detriment of NuVox's position.

Finally, the next two sentences in Paragraph 31 are also instructive. The FCC stated:

> We agree with Bell Atlantic that at the same time that an incumbent LEC *provides notice of an audit* to the affected carrier, it should send a copy of the notice to the Commission. While the Commission will not take action to approve or disapprove every audit, the notices will allow us to monitor implementation of the interim requirements.

Id. (emphasis added). Here, the FCC placed itself in position to "monitor" the conduct of ILECs and CLECs with regard to EELs audits; it did not, however, establish FCC or any other prior approval as a precondition to those audits. If the FCC had intended any other result -- especially the result upon which NuVox insists -- it most certainly would have expressed it here. It did not.

In sum, one can only conclude from Paragraph 31 that the FCC *mandated* the following with respect to the mechanics of EELs audits:

1. that they may not precede, or be made preconditions to, the provisioning of EELs by the ILECs;

2. that at least thirty days' notice is required before any audit is to commence; and

3. that an ILEC may not perform more than one audit of any given CLEC per year, unless it finds non-compliance.

The remaining statements, as shown, clearly forecast how the FCC would view issues brought before it on these matters, but they do not rise to the level of unequivocal declarations of legal obligations as do the enumerated requirements.

The FCC's *Supplemental Order Clarification*, thus, establishes 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. The FCC 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 FCC even require the ILEC to share its concern with the CLEC. The FCC merely required the ILEC to provide notice to the FCC of audits, so that the FCC could monitor their use. The FCC did not in any way require or suggest that any pre-approval of the audit request was necessary - not by the FCC, let alone by the CLEC whose records were subject to audit.[9]

C. BellSouth Will Engage and Conduct a Proper Audit.

NuVox also questions BellSouth's power to choose an auditor and the standards by which the audit is to be conducted. Again, NuVox disregards the plain terms of the Agreement -- and common business sense -- in taking a patently unmeritorious position.

NuVox insists that BellSouth must hire an independent auditor to conduct the audit in compliance with AICPA standards, and that BellSouth has failed, or will fail, to do so. *See* NuVox's Motion to Dismiss at 4-5. This argument is pure fiction. Section 10.5.4 of the Florida Agreement gives NuVox no contractual say in BellSouth's choice of auditor. Indeed, BellSouth has the right to conduct the audit itself.

Moreover, NuVox's audit concerns are misplaced. As a matter of course, BellSouth would not choose an auditor lacking the independence, experience or professionalism required to conduct a proper, thorough audit. First, a sham audit would reveal itself instantly, would harm BellSouth's legal interests, and would be of no value to BellSouth. Thus, any theoretical

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[9] Even if BellSouth were required to articulate a "concern" before initiating an audit, BellSouth has done so. Complaint at ¶¶ 15, 20, 22-23; Hendrix Affidavit ¶ 8, Exh. C.

leverage that BellSouth might gain from a flawed audit would evaporate as soon as BellSouth attempted to enforce its rights based on such an audit's results.

As the Agreement makes clear, if any audit were to reveal non-compliance, BellSouth's remedy could only come through the filing of a "complaint with the appropriate Commission, pursuant to the dispute resolution process as set forth in this Agreement." Agreement, Attachment 2, § 10.5.4, Exh. A. In any such proceeding, the audit results would almost certainly be contested by NuVox, and would come under appropriately intense scrutiny before this Commission. Without question, an audit that lacked credibility would be exposed on the merits, and BellSouth would gain nothing. This fact alone negates the legitimacy of NuVox's concerns.

In any event, the check-and-balance the parties imposed in the Agreement was not an auditor selection prerequisite, or process through which NuVox could participate in that selection, veto it, *etc.* Rather, the parties chose to control the issue by disallowing self-help on the basis of the audit results alone, and instead requiring BellSouth to prove its case to "an appropriate Commission" before which such results could be carefully scrutinized. Thus, not only is NuVox's auditor selection argument entirely without contractual support, it rests on a demonstrably weak premise.

Finally, the auditor selected by BellSouth (American Consultants Alliance) is independent. Hendrix Affidavit ¶ 5, Exh. C. The firm is neither related to, 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.* NuVox's concerns in this vein are also unfounded.

CONCLUSION

For the reasons set forth, BellSouth respectfully requests that the Commission issue (1) a determination that NuVox's refusal to allow BellSouth to audit its EEL combinations violates the

Parties' Agreement; and (2) an order directing NuVox to do all things reasonably necessary to permit the independent auditor selected by BellSouth to commence the audit immediately.

Respectfully submitted this ___ day of September 2004.

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EXHIBIT LIST

EXHIBIT A	Interconnection Agreement (General Terms and Conditions and Attachment 2)
EXHIBIT B	Affidavit of Shelley Padgett
EXHIBIT C	Affidavit of Jerry Hendrix
EXHIBIT D	Letter from Jerry Hendrix to Hamilton Russell, III, March 15, 2002

EXHIBIT A

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and TriVergent Communications, Inc. ("TCI"), a South Carolina corporation, on behalf of itself and its certificated operating affiliates identified in Part C hereof, and shall be deemed effective as of June 30, 2000. This Agreement may refer to either BellSouth or TCI or both as a "Party" or "Parties ".

WITNESSETH

WHEREAS, BellSouth is an incumbent local exchange telecommunications company ("ILEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, TCI is an alternative local exchange telecommunications company ("CLEC") authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, the Parties wish to resell BellSouth's telecommunications services and/or interconnect their facilities, for TCI to purchase network elements and other services from BellSouth, and to exchange traffic specifically for the purposes of fulfilling their applicable obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 ("the Act").

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and TCI agree as follows:

1. **Purpose**

The resale, access and interconnection obligations contained herein enable TCI to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The Parties agree that TCI will not be considered to have offered telecommunications services to the public in any state within BellSouth's region until such time as it has ordered services for resale or interconnection facilities for the purposes of providing business and/or residential local exchange service to customers. Furthermore, the Parties agree that execution of this agreement will not preclude either party from advocating its position before the Commission or a court of competent jurisdiction.

2. **Term of the Agreement**

2.1 The term of this Agreement shall be three years, beginning June 30, 2000 and shall apply to the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. If as of the expiration of this Agreement, a Subsequent Agreement (as defined in Section 2.2 below) has not been executed by the Parties, this Agreement shall continue on a month-to-month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration shall be as set forth in Section 2.4 below.

2.2 The Parties agree that by no later than one hundred and eighty (180) days prior to the expiration of this Agreement, they shall commence negotiations with regard to the terms, conditions and prices of resale and/or local interconnection to be effective beginning on the expiration date of this Agreement ("Subsequent Agreement").

2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2, above, the Parties are unable to satisfactorily negotiate new resale and/or local interconnection terms, conditions and prices, either Party may petition the Commission to establish appropriate local interconnection and/or resale arrangements pursuant to 47 U.S.C. 252. The Parties agree that, in such event, they shall encourage the Commission to issue its order regarding the appropriate local interconnection and/or resale arrangements no later than the expiration date of this Agreement. The Parties further agree that in the event the Commission does not issue its order prior to the expiration date of this Agreement, or if the Parties continue beyond the expiration date of this Agreement to negotiate the local interconnection and/or resale arrangements without Commission intervention, the terms, conditions and prices ultimately ordered by the Commission, or negotiated by the Parties, will be effective retroactive to the day following the expiration date of this Agreement.

2.4 Notwithstanding the foregoing, in the event that as of the date of expiration of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and either no arbitration proceeding has been filed in accordance with Section 2.3 above, or the Parties have not mutually agreed (where permissible) to extend the arbitration window for petitioning the applicable Commission(s) for resolution of those terms upon which the Parties have not agreed, then either Party may terminate this Agreement upon sixty (60) days notice to the other Party. In the event that BellSouth or TCI terminates this Agreement as provided above, BellSouth shall continue to offer services to TCI pursuant to the terms, conditions and rates set forth in BellSouth's Statement of Generally Available Terms (SGAT) to the extent an SGAT has been approved by the applicable Commission(s). If any state Commission has not approved a BellSouth SGAT, then upon BellSouth's termination of this Agreement as provided herein, BellSouth will continue to provide services to TCI

pursuant to BellSouth's then current standard interconnection agreement. In the event that the SGAT or BellSouth's standard interconnection agreement becomes effective as between the Parties, the Parties may continue to negotiate a Subsequent Agreement, and the terms of such Subsequent Agreement shall be effective retroactive to the day following expiration of this Agreement.

3. **Ordering Procedures**

3.1 To the extent not already provided, State shall provide BellSouth its Carrier Identification Code (CIC), Operating Company Number (OCN), Group Access Code (GAC) and Access Customer Name and Address (ACNA) code as applicable prior to placing its first order.

3.2 The Parties agree to adhere to the BellSouth Local Interconnection and Facility Based Ordering Guide and Resale Ordering Guide, as appropriate for the services ordered, provided however that nothing required in these guides shall override TCI's rights or BellSouth's obligations under this Agreement.

3.3 TCI shall pay charges for Operational Support Systems (OSS) as specifically set forth in Attachments 1, 2, 3, 5 and 7 of this agreement, as applicable.

4. **Parity**

When TCI purchases, pursuant to Attachment 1 of this Agreement, telecommunications services from BellSouth for the purposes of resale to end users, BellSouth shall provide said services so that the services are equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to its affiliates, subsidiaries and end users. To the extent technically feasible, the quality of a Network Element, as well as the quality of the access to such Network Element provided by BellSouth to TCI shall be at least equal in quality to that which BellSouth provides to itself. The provisioning intervals for network elements shall be at least equal to, but no longer than, those that BellSouth provides to itself. BellSouth shall make available network elements to TCI on the same terms and conditions as BellSouth provides to its affiliates, subsidiaries, end-users and any other carriers. The quality of the interconnection between the networks of BellSouth and the network of TCI shall be at a level that is equal to that which BellSouth provides itself, a subsidiary, an Affiliate, or any other party. The interconnection facilities shall be designed to meet the same technical criteria and service standards that are used within BellSouth's network and shall extend to a consideration of service quality as perceived by end users and service quality as perceived by TCI.

5. **White Pages Listings**

BellSouth shall provide TCI and its customers access to white pages directory listings under the following terms:

5.1 Listings. BellSouth or its agent will include TCI residential and business customer listings in the appropriate White Pages (residential and business) or alphabetical directories. Directory listings will make no distinction between TCI and BellSouth subscribers.

5.2 Rates. BellSouth and TCI will provide to each other subscriber primary listing information in the White Pages at no charge except for applicable service order charges as set forth in the applicable tariffs.

5.3 Procedures for Submitting TCI Subscriber Information. BellSouth will provide to TCI a magnetic tape or computer disk containing the proper format for submitting subscriber listings. TCI will be required to provide BellSouth with directory listings and daily updates to those listings, including new, changed, and deleted listings, in an industry-accepted format. These procedures are detailed in BellSouth's Local Interconnection and Facility Based Ordering Guide.

5.3.1 Notwithstanding any provision(s) to the contrary, TCI agrees to provide to BellSouth, and BellSouth agrees to accept, TCI's Subscriber Listing Information (SLI) relating to TCI's customers in the geographic area(s) covered by this Interconnection Agreement. TCI authorizes BellSouth to release all such TCI SLI provided to BellSouth by TCI to qualifying third parties via either license agreement or BellSouth's Directory Publishers Database Service (DPDS), General Subscriber Services Tariff, Section A38.2, as the same may be amended from time to time. Such TCI SLI shall be intermingled with BellSouth's own customer listings of any other CLEC that has authorized a similar release of SLI. Where necessary, BellSouth will use good faith efforts to obtain state commission approval of any necessary modifications to Section A38.2 of its tariff to provide for release of third party directory listings, including modifications regarding listings to be released pursuant to such tariff and BellSouth's liability thereunder. BellSouth's obligation pursuant to this Section shall not arise in any particular state until the commission of such state has approved modifications to such tariff.

5.3.2 No compensation shall be paid to TCI for BellSouth's receipt of TCI SLI, or for the subsequent release to third parties of such SLI. In addition, to the extent BellSouth incurs costs to modify its systems to enable the release of TCI's SLI, or costs on an ongoing basis to administer the release of TCI SLI, TCI shall pay to BellSouth its proportionate share of the reasonable and nondiscriminatory costs associated therewith.

5.3.3 BellSouth shall not be liable for the content or accuracy of any SLI provided by TCI under this Agreement. TCI shall indemnify, hold harmless and defend

BellSouth from and against any damages, losses, liabilities, demands claims, suits, judgments, costs and expenses (including but not limited to reasonable attorneys' fees and expenses) arising from BellSouth's tariff obligations or otherwise and resulting from or arising out of any third party's claim of inaccurate TCI listings or use of the SLI provided pursuant to this Agreement. BellSouth shall forward to TCI any complaints received by BellSouth relating to the accuracy or quality of TCI listings.

5.3.4 Listings and subsequent updates will be released consistent with BellSouth system changes and/or update scheduling requirements.

5.4 Unlisted/Non-Published Subscribers. TCI will be required to provide to BellSouth the names, addresses and telephone numbers of all TCI customers that wish to be omitted from directories.

5.5 Inclusion of TCI Customers in Directory Assistance Database. BellSouth will include and maintain TCI subscriber listings in BellSouth's directory assistance databases at no charge. BellSouth and TCI will adhere to appropriate procedures regarding lead time, timeliness, format and content of listing information as set forth in the BellSouth Local Interconnection and Facility Based Ordering Guide.

5.6 Listing Information Confidentiality. BellSouth will accord TCI's directory listing information the same level of confidentiality that BellSouth accords its own directory listing information, and BellSouth shall limit access to TCI's customer proprietary confidential directory information to those BellSouth employees who are involved in the preparation of listings.

5.7 Optional Listings. Additional listings and optional listings will be offered by BellSouth at tariffed rates as set forth in the General Subscriber Services Tariff.

5.8 Delivery. BellSouth or its agent shall deliver White Pages directories to TCI subscribers at no charge and within the same time frame as BellSouth delivers such directories to its own subscribers.

6. **Bona Fide Request/New Business Request Process for Further Unbundling**

Subject to 47 C.F.R. 51.317 and 47 C.F.R. 51.319 BellSouth shall, upon request of TCI, provide to TCI access to network elements not identified in this agreement at any technically feasible point for the provision of TCI's telecommunications service.. Any request by TCI for access to a network element, interconnection option, or for the provisioning of any service or product that is not already available shall be treated as a Bona Fide Request/New Business Request, and shall be submitted to BellSouth pursuant to the Bona Fide Request/New Business Request process set forth in Attachment 12 of this Agreement.

7. **Local Dialing Parity**

BellSouth shall provide local dialing parity as described in the Act and required by FCC rules, regulations and policies. TCI End Users shall not have to dial any greater number of digits than BellSouth End Users to complete the same call. In addition, TCI End Users shall experience at least the same service quality as BellSouth End Users in terms of post-dial delay, call completion rate and transmission quality.

8. **Court Ordered Requests for Call Detail Records and Other Subscriber Information**

8.1 To the extent technically feasible, BellSouth maintains call detail records for TCI end users for limited time periods and can respond to subpoenas and court ordered requests for this information. BellSouth shall maintain such information for TCI end users for the same length of time it maintains such information for its own end users.

8.2 TCI agrees that BellSouth will respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to TCI end users. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.3 TCI agrees that in cases where TCI receives subpoenas or court ordered requests for call detail records for targeted telephone numbers belonging to TCI end users, TCI will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.4 Where BellSouth is providing to TCI telecommunications services for resale or providing to TCI the local switching function, then TCI agrees that in those cases

where TCI receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to TCI end users, if TCI does not have the requested information, TCI will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth. Where the request has been forwarded to BellSouth, billing for call detail information will be generated by BellSouth and directed to the law enforcement agency initiating the request.

8.5 TCI will provide TCI end user and/or other customer information that is available to TCI in response to subpoenas and court orders for their own customer records. BellSouth will redirect subpoenas and court ordered requests for TCI end user and/or other customer information to TCI for the purpose of providing this information to the law enforcement agency.

9. **Liability and Indemnification**

9.1 BellSouth Liability. BellSouth shall take financial responsibility for its own actions in causing, or its lack of action in preventing, unbillable or uncollectible TCI revenues.

9.2 TCI Liability. In the event that TCI consists of two (2) or more separate entities as set forth in the preamble to this Agreement, all such entities shall be jointly and severally liable for the obligations of TCI under this Agreement.

9.3 Liability for Acts or Omissions of Third Parties. Neither BellSouth nor TCI shall be liable for any act or omission of another telecommunications company providing a portion of the services provided under this Agreement.

9.4 Limitation of Liability.

9.4.1 With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by TCI, any TCI Customer or by any other Person or entity, for damages associated with any of the services provided by BellSouth pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and subject to the provisions of the remainder of this Section, BellSouth's liability shall be limited to an amount equal to the proportionate charge for the service provided pursuant to this Agreement for the period during which the service was affected. Notwithstanding the foregoing, claims for damages by TCI, any TCI Customer or any other Person or entity, resulting from the gross negligence or willful misconduct of BellSouth, shall not be subject to such limitation of liability.

9.4.2 With respect to any claim or suit, whether based in contract, tort or any other theory of legal liability, by BellSouth, any BellSouth Customer or by any other Person or entity, for damages associated with any of the services provided by TCI

pursuant to or in connection with this Agreement, including but not limited to the installation, provision, preemption, termination, maintenance, repair or restoration of service, and subject to the provisions of the remainder of this Section, TCI's liability shall be limited to an amount equal to the proportionate charge for the service provided pursuant to this Agreement for the period during which the service was affected. Notwithstanding the foregoing, claims for damages by BellSouth, any BellSouth Customer or any other Person or entity resulting from the gross negligence or willful misconduct of TCI, shall not be subject to such limitation of liability.

9.4.3 Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its Customer and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to Customer or third Party for (i) any Loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such Loss and (ii) Consequential Damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a Loss as a result thereof, such Party shall indemnify and reimburse the other Party for that portion of the Loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such Loss.

9.4.4 Neither BellSouth nor TCI shall be liable for damages to the other's terminal location, POI or other company's customers' premises resulting from the furnishing of a service, including, but not limited to, the installation and removal of equipment or associated wiring, except to the extent caused by a company's negligence or willful misconduct or by a company's failure to properly ground a local loop after disconnection.

9.4.5 Except in case of gross negligence or willful or intentional misconduct, under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages, including, but not limited to, economic loss or lost business or profits, damages arising from the use or performance of equipment or software, or the loss of use of software or equipment, or accessories attached thereto, delay, error, or loss of data. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the Services, or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.

9.5 Indemnification for Certain Claims. The Party providing services hereunder, its affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or

damage arising from the receiving company's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving company's own communications, or (2) any claim, loss or damage claimed by the customer of the Party receiving services arising from such company's use or reliance on the providing company's services, actions, duties, or obligations arising out of this Agreement.

9.6 Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE.

10. Intellectual Property Rights and Indemnification

10.1 No License. **No patent, copyright, trademark or other proprietary right is** licensed, granted or otherwise transferred by this Agreement. TCI is strictly prohibited from any use, including but not limited to in sales, in marketing or advertising of telecommunications services, of any BellSouth name, service mark or trademark.

10.2 Ownership of Intellectual Property. Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.

10.3 Indemnification. The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service and will indemnify the receiving Party for any damages awarded based solely on such claims in accordance with Section 8 of this Agreement.

10.4 Claim of Infringement. In the event that use of any facilities or equipment (including software), becomes, or in reasonable judgment of the Party who owns the affected network is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party shall promptly and at its sole expense, but subject to the limitations of liability set forth below:

10.4.1 modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or

10.4.2 obtain a license sufficient to allow such use to continue.

10.4.3 In the event 9.4.1 or 9.4.2 are commercially unreasonable, then said Party may, terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment (including software), but solely to the extent required to avoid the infringement claim.

10.5 Exception to Obligations. Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor provided the facilities or equipment (including software) would not be infringing if used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement; or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein.

10.6 Exclusive Remedy. The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement.

11. Treatment of Proprietary and Confidential Information

11.1 Confidential Information. It may be necessary for BellSouth and TCI to provide each other with certain confidential information, including trade secret information, including but not limited to, technical and business plans, technical information, proposals, specifications, drawings, procedures, customer account data, call detail records and like information (hereinafter collectively referred to as "Information"). All Information shall be in writing or other tangible form and clearly marked with a confidential, private or proprietary legend and that the Information will be returned to the owner within a reasonable time. The Information shall not be copied or reproduced in any form. BellSouth and TCI shall receive such Information and not disclose such Information. BellSouth and TCI shall protect the Information received from distribution, disclosure or

dissemination to anyone except employees of BellSouth and TCI with a need to know such Information and which employees agree to be bound by the terms of this Section. BellSouth and TCI will use the same standard of care to protect Information received as they would use to protect their own confidential and proprietary Information.

11.2 Exception to Obligation. Notwithstanding the foregoing, there will be no obligation on BellSouth or TCI to protect any portion of the Information that is: (1) made publicly available by the owner of the Information or lawfully disclosed by a Party other than BellSouth or TCI; (2) lawfully obtained from any source other than the owner of the Information; or (3) previously known to the receiving Party without an obligation to keep it confidential.

12. **Assignments**

Neither Party hereto may assign or otherwise transfer its rights or obligations under this Agreement, except with the prior written consent of the other Party hereto, which consent shall not be unreasonably withheld; provided, however, that, so long as the performance of any assignee is guaranteed by the assignor: (i) either Party may assign its rights and delegate its benefits, duties and obligations under this Agreement, without the consent of the other Party, to any Affiliate of such Party and (ii) either Party may assign its rights and delegate its benefits, duties and obligations under this Agreement, without the consent of the other, to any person or entity that obtains control of all or substantially all of such assigning Party's assets, by stock purchase, asset purchase, merger, foreclosure, or otherwise. Each Party shall notify the other in writing of any such assignment. Nothing in this Section is intended to impair the right of either Party to utilize subcontractors.

13. **Escalation Procedures**

Each Party hereto shall provide the other party hereto with the names and telephone numbers or pagers of their respective managers up to the Vice Presidential level for the escalation of unresolved matters relating to their performance of their duties under this Agreement. Each Party shall supplement and update such information as necessary to facilitate prompt resolution of such matters. Each Party further agrees to establish an automatic internal escalation procedure relating to unresolved disputes arising under this Agreement.

14. **Expedite Procedures**

Each Party shall promptly establish a nondiscriminatory procedure for expediting installation and repair of facilities provided pursuant to this Agreement.

15. **Resolution of Disputes**

Except as otherwise stated in this Agreement, the Parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, either Party may petition the Commission, the FCC or a court of law for resolution of the dispute. Each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their obligations under the Agreement while any dispute resolution is pending

16. **Taxes**

16.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

16.2 Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party.

16.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

16.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

16.3 Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party.

16.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.

16.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

16.3.3 If the purchasing Party determines that in its opinion any such taxes or fees are not payable, the providing Party shall not bill such taxes or fees to the purchasing

Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be payable, or any such tax or fee that was not billed by the providing Party, the purchasing Party may contest the same in good faith, at its own expense. In any such contest, the purchasing Party shall promptly furnish the providing Party with copies of all filings in any proceeding, protest, or legal challenge, all rulings issued in connection therewith, and all correspondence between the purchasing Party and the taxing authority.

16.3.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

16.3.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

16.3.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

16.3.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

16.4 Taxes and Fees Imposed on Providing Party But Passed On To Purchasing Party.

16.4.1 Taxes and fees imposed on the providing Party, which are permitted or required to be passed on by the providing Party to its customer, shall be borne by the purchasing Party.

16.4.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown as separate items on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing

Party at the time that the respective service is billed. The Parties agree to use best efforts to bill taxes promptly.

16.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. Both Parties shall retain the right to contest the imposition of such taxes and fees. However, the Party contesting the imposition of such taxes and fees shall bear the resulting expense.

16.4.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.

16.4.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.

16.4.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other reasonable charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.

16.4.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.

16.5 Mutual Cooperation. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

17. Network Maintenance and Management

17.1 The Parties shall work cooperatively to implement this Agreement. The Parties shall exchange appropriate information (e.g., maintenance contact numbers, network information, information required to comply with law enforcement and other security agencies of the Government, etc.) as reasonably required to implement and perform this Agreement.

17.2 Each Party hereto shall design, maintain and operate their respective networks as necessary to ensure that the other Party hereto receives service quality which is consistent with generally accepted industry standards at least at parity with the network service quality given to itself, its Affiliates, its End Users or any other Telecommunications Carrier.

17.3 Neither Party shall use any service or facility provided under this Agreement in a manner that impairs the quality of service to other Telecommunications Carriers' or to either Party's End Users. Each Party will provide the other Party notice of any such impairment at the earliest practicable time.

17.4 BellSouth agrees to provide TCI prior notice consistent with applicable FCC rules and the Act of changes in the information necessary for the transmission and routing of services using BellSouth's facilities or networks, as well as other changes that affect the interoperability of those respective facilities and networks. This Agreement is not intended to limit BellSouth's ability to upgrade its network through the incorporation of new equipment, new software or otherwise so long as such upgrades are not inconsistent with BellSouth's obligations to TCI under the terms of this Agreement.

18. Changes In Subscriber Carrier Selection

18.1 Both Parties hereto shall apply all of the principles set forth in 47 C.F.R. § 64.1100 to the process for End User selection of a primary Local Exchange Carrier. BellSouth shall not require a disconnect order from an TCI Customer or another LEC in order to process an TCI order for Resale Service for an TCI End User. Until the FCC or the Commission adopts final rules and procedures regarding a Customer's selection of a primary Local Exchange Carrier, unless already done so, TCI shall deliver to BellSouth a Blanket Representation of Authorization that applies to all orders submitted by TCI under this Agreement that require a primary Local Exchange Carrier change. Both Parties hereto shall retain on file all applicable documentation of authorization, including letters of authorization, relating to their End User's selection as its primary Local Exchange Carrier, which documentation shall be available for inspection by the other Party hereto upon reasonable request during normal business hours.

18.2 If an End User denies authorizing a change in his or her primary Local Exchange Carrier selection to a different local exchange carrier ("Unauthorized Switching"),

the Party receiving the End User complaint shall switch or caused to be switched that End User back to his preferred carrier in accordance with Applicable Law.

19. **Force Majeure**

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by Customer, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased); provided however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

20. **Year 2000 Compliance**

Each Party warrants that it has implemented a program the goal of which is to ensure that all software, hardware and related materials (collectively called "Systems") delivered, connected with BellSouth or supplied in the furtherance of the terms and conditions specified in this Agreement: (i) will record, store, process and display calendar dates falling on or after January 1, 2000, in the same manner, and with the same functionality as such software records, stores, processes and calendar dates falling on or before December 31, 1999; and (ii) shall include without limitation date data century recognition, calculations that accommodate same century and multicentury formulas and date values, and date data interface values that reflect the century.

21. **Modification of Agreement**

21.1 BellSouth shall make available, pursuant to 47 USC § 252(i) and the FCC rules and regulations regarding such availability, to TCI at the same rates and terms and conditions of any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 USC § 252. The adopted interconnection, service, or network element and agreement shall apply to the same states as such other agreement and for the identical term of such other agreement.

21.2 If TCI changes its name or makes changes to its identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of TCI to notify

BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

21.3 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

21.4 Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

21.5 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of TCI or BellSouth to perform any material terms of this Agreement, TCI or BellSouth may, on fifteen (15) business days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within forty-five (45) business days after such notice, the Dispute may be referred to the Dispute Resolution procedure set forth in Section 12. In the event that the Parties reach agreement as to the new terms consistent with the above, the Parties agree to make the effective date of such amendment retroactive to the effective date of such Order consistent with this section, unless otherwise stated in the relevant Order.

22. **Waivers**

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

23. **Governing Law**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.

24. **Arm's Length Negotiations**

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

25. **Notices**

25.1 Every notice, consent, approval, or other communications required or contemplated by this Agreement shall be in writing and shall be delivered in person or given by postage prepaid mail, addressed to:

BellSouth Telecommunications, Inc.

CLEC Account Team
9th Floor
600 North 19th Street
Birmingham, Alabama 35203

and

General Attorney - COU
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

TriVergent Communications, Inc.

TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601

Hamilton E. Russell, III
Executive Vice President of Regulatory Affairs
TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601
e-mail address: brussell@trivergent.com
Phone: 864-331-7323
Facsimile: 864-331-7144

and

Riley Murphy, Esq.
General Counsel
TriVergent Communications, Inc.
Suite 303
200 North Main Street
Greenville, SC 29601
e-mail address: rmurphy@trivergent.com
Phone: 864-331-7318
Facsimile: 864-331-7146

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

25.2 Where specifically required, notices shall be by certified or registered mail. Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

25.3 BellSouth shall provide TCI notice via Internet posting of price changes and of changes to the terms and conditions of services available for resale.

26. **Relationship of Parties**

This Agreement shall not establish, be interpreted as establishing, or be used by either Party to establish, or to represent their relationship as any form of agency, partnership or joint venture. Neither Party shall have any authority to bind the other or to act as an agent for the other unless written authority, separate form this Agreement, is provided. Nothing in this Agreement shall be construed as providing for the sharing of profits or losses arising out of the efforts of either or both of the Parties. Nothing herein shall be construed as making either Party responsible or liable for the obligations and undertakings of the other Party.

27. **Third Party Beneficiaries**

This Agreement does not provide, and shall not be construed to provide, third parties with any benefit, remedy, claim, liability, reimbursement, cause of action, or other privilege.

28. **Cooperation on Preventing End User Fraud**

The Parties agree to cooperate fully with one another to investigate, minimize, prevent, and take corrective action in cases of fraud.

29. **Good Faith Performance**

In the performance of their obligations under this Agreement the Parties will act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including without limitation, the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action will not be unreasonably delayed, withheld or conditioned.

30. **Independent Contractors**

Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance of its obligations under this Agreement, and retains full control over the employment, direction, compensation and discharge of its employees assisting in the performance of such obligations. Each Party shall be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes and all other regulations governing such matters. Subject to the limitations on liability and except as otherwise provided in this Agreement, each Party shall be responsible for (i) its own acts and performance of all obligations imposed by Applicable Law in connection with its activities, legal status and property, real or personal and, (ii) the acts of its own Affiliates, employees, agents and contractors during the performance of the Party's obligations hereunder.

31. **Subcontracting**

If any obligation is performed through a subcontractor, each Party shall remain fully responsible for the performance of this Agreement in accordance with its terms, including any obligations either Party performs through subcontractors, and each Party shall be solely responsible for payments due the Party's subcontractors. No contract, subcontract or other Agreement entered into by either Party with any third party in connection with the provision of any facilities or services provided herein, shall provide for any indemnity, guarantee or assumption of liability by, or other obligation of, the other Party to this Agreement with respect to such arrangement, except as consented to in writing by the other Party. No subcontractor shall be deemed a third party beneficiary for any purposes under this Agreement. Any subcontractor who gains access to CPNI or Confidential Information covered by this Agreement shall be required by the subcontracting Party to protect such CPNI or Confidential Information to the same extent that the subcontracting Party is required to protect the same under the terms of this Agreement.

32. **Severability**

If any term, condition or provision of this Agreement is held to be invalid or unenforceable for any reason, such invalidity or unenforceability shall not invalidate the entire Agreement, unless such construction would be unreasonable. The Agreement shall be construed as if it did not contain the invalid or unenforceable provision or provisions, and the rights and obligations of each Party shall be construed and enforced accordingly. Provided, however, that in the event such invalid or unenforceable provision or provisions are essential elements of this Agreement and substantially impair the rights or obligations of either Party, the Parties shall promptly negotiate a replacement provision or provisions. If impasse is reached, the Parties will resolve said impasse under the dispute resolution procedures set forth in Section 13.

33. **Survival of Obligations**

Any liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement, and any obligation of a Party under the provisions regarding indemnification, Confidential Information, limitations on liability, and any other provisions of this Agreement which, by their terms are contemplated to survive (or to be performed after) termination of this Agreement, shall survive cancellation or termination thereof.

34. **Customer Inquiries**

34.1 **Each Party shall refer** all questions regarding the other Party's services or products directly to the other Party at a telephone number specified by that Party.

34.2 Each Party shall ensure that each of their representatives who receive inquiries regarding the other Party's services: (i) provide the numbers described in Section 46.1 to callers who inquire about the other Party's services or products, and (ii) do

not in any way disparage or discriminate against the other Party or its products or services.

35. **Compliance with Applicable Law**

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

35.2 Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

36. **Labor Relations**

Each Party shall be responsible for labor relations with its own employees. Each Party agrees to notify the other Party as soon as practicable whenever such Party has knowledge that a labor dispute concerning its employees is delaying or threatens to delay such Party's timely performance of its obligations under this Agreement and shall endeavor to minimize impairment of service to the other Party (by using its management personnel to perform work or by other means) in the event of a labor dispute to the extent permitted by Applicable Law.

37. **Compliance with the Communications Law Enforcement Act of 1994 ("CALEA")**

Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with CALEA. Each Party shall indemnify and hold the other Party harmless from any and all penalties imposed upon the other Party for such other Party's noncompliance, and shall at the non-compliant Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the other Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

38. **Arm's Length Negotiations**

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

39. **Rule of Construction**

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

40. **Headings of No Force or Effect**

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

41. **Multiple Counterparts**

This Agreement may be executed multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

42. **Implementation of Agreement**

If TCI is a facilities based provider or a facilities based and resale provider, this section shall apply. Within 60 days of the execution of this Agreement or within 30 days of TCI placing its first order, whichever is later, the Parties will adopt a schedule for the implementation of the Agreement. The schedule shall state with specificity time frames for submission of including but not limited to, network design, interconnection points, collocation arrangement requests, pre-sales testing and full operational time frames for the business and residential markets. An implementation template to be used for the implementation schedule is contained in Attachment 10 of this Agreement.

43. **Additional Fair Competition Requirements**

43.1 In the event that either Party transfers facilities or other assets to an Affiliate which are necessary to comply with its obligations under this Agreement, the obligations hereunder shall survive and transfer to such Affiliate.

43.2 BellSouth shall allow local exchange customers of TCI to select BellSouth for the provision of intraLATA toll services on a nondiscriminatory basis; provided, however, that prior to establishment of BellSouth as the intraLATA toll carrier for TCI local exchange customers, the Parties shall negotiate a billing and collections agreement on commercially reasonable terms whereby TCI shall bill the customer on BellSouth's behalf and shall collect from the customer and remit to BellSouth intraLATA toll revenues. TCI agrees to bill its customers on BellSouth's behalf for both presubscribed and "dial around" intraLATA toll traffic. The Parties shall exchange customer record data on a timely basis as necessary to bill such customers for intraLATA toll usage.

43.3 BellSouth shall not use information derived from providing services or facilities to TCI to create a lead or other information base for a "winback" sales program.

44. **Filing of Agreement**

Upon execution of this Agreement it shall be filed with the appropriate state regulatory agency pursuant to the requirements of Section 252 of the Act. If the regulatory agency imposes any filing or public interest notice fees regarding the filing or approval of the Agreement, TCI shall be responsible for publishing the required notice and the publication and/or notice costs shall be borne by TCI.

45. **Entire Agreement**

This Agreement and its Attachments, incorporated herein by this 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.

This Agreement may include attachments with provisions for the following services:

Network Elements and Other Services
Local Interconnection
Resale
Collocation

The following services are included as options for purchase by TCI. TCI shall elect said services by written request to its Account Manager if applicable.

Optional Daily Usage File (ODUF)
Enhanced Optional Daily Usage File (EODUF)
Access Daily Usage File (ADUF)
Line Information Database (LIDB) Storage
Centralized Message Distribution Service (CMDS)
Calling Name (CNAM)

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year above first written.

BellSouth Telecommunications, Inc.

Signature

Jerry D. Heaslip

Name

Sr. Director

Title

06/30/2000

Date

TriVergent Communications, Inc.

Signature

Riley M. Murphy

Name

Sr. Vice President and General Counsel

Title

June 30, 2000

Date

Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent.

Centralized Message Distribution System is the Telcordia (formerly BellCore) administered national system, based in Kansas City, Missouri, used to exchange Exchange Message Interface (EMI) formatted data among host companies.

Commission is defined as the appropriate regulatory agency in each of the states in BellSouth's nine state region: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Daily Usage File is the compilation of messages or copies of messages in standard Exchange Message Interface (EMI) format exchanged from BellSouth to a CLEC.

Exchange Message Interface is the nationally administered standard format for the exchange of data among the Exchange Carriers within the telecommunications industry.

Information Service means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

Intercompany Settlements (ICS) is the revenue associated with charges billed by a company other than the company in whose service area such charges were incurred. ICS on a national level includes third number and credit card calls and is administered by Telcordia (formerly BellCore)'s Calling Card and Third Number Settlement System (CATS). Included is traffic that originates in one Regional Bell Operating Company's (RBOC) territory and bills in another RBOC's territory.

Intermediary Function is defined as the delivery of traffic from TCI, a CLEC other than TCI or another telecommunications carrier through the network of BellSouth or TCI to an end user of TCI, a CLEC other than TCI or another telecommunications carrier.

Local Interconnection is defined as 1) the delivery of local traffic to be terminated on each Party's local network so that end users of either Party have the ability to reach end users of the other Party without the use of any access code or substantial delay in the processing of the call; 2) the LEC network features, functions, and capabilities set forth in this Agreement; and 3) Service Provider Number Portability sometimes referred to as temporary telephone number portability to be implemented pursuant to the terms of this Agreement.

Local Traffic is as defined in Attachment 3.

Message Distribution is routing determination and subsequent delivery of message data from one company to another. Also included is the interface function with CMDS, where appropriate.

Multiple Exchange Carrier Access Billing ("MECAB") means the document prepared by the Billing Committee of the Ordering and Billing Forum ("OBF:), which functions under the auspices of the Carrier Liaison Committee of the Alliance for Telecommunications Industry Solutions ("ATIS") and by Telcordia (formerly BellCore) as Special Report SR-BDS-000983, Containing the recommended guidelines for the billing of Exchange Service access provided by two or more LECs and/or CLECs or by one LEC in two or more states within a single LATA.

Network Element is defined to mean a facility or equipment used in the provision of a telecommunications service. Such term may include, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. BellSouth offers access to the following Network Elements: unbundled loops; network interface device; sub-loop elements; local switching; transport; tandem switching; signaling; access to call-related databases; dark fiber as set forth in Attachment 2 of this Agreement. BellSouth will provide packet switching capability only to the extent required pursuant to FCC rules. BellSouth will make Operator Call Processing and Directory Assistance Services available at the rates set forth in Exhibit C of Attachment 2 of this Agreement.

Non-Intercompany Settlement System (NICS) is the Telcordia (formerly BellCore) system that calculates non-intercompany settlements amounts due from one company to another within the same RBOC region. It includes credit card, third number and collect messages.

Percent of Interstate Usage (PIU) is defined as a factor to be applied to terminating access services minutes of use to obtain those minutes that should be rated as interstate access services minutes of use. The numerator includes all interstate "non-intermediary" minutes of use, including interstate minutes of use that are forwarded due to service provider number portability less any interstate minutes of use for Terminating Party Pays services, such as 800 Services. The denominator includes all "non-intermediary", local , interstate, intrastate, toll and access minutes of use adjusted for service provider number portability less all minutes attributable to terminating Party pays services.

Percent Local Usage (PLU) is defined as a factor to be applied to intrastate terminating minutes of use. The numerator shall include all "non-intermediary" local minutes of use adjusted for those minutes of use that only apply local due to Service Provider Number Portability. The denominator is the total intrastate minutes of use including local, intrastate toll, and access, adjusted for Service Provider Number Portability less intrastate terminating Party pays minutes of use.

Revenue Accounting Office (RAO) Status Company is a local exchange company/alternate local exchange company that has been assigned a unique RAO code. Message data exchanged

among RAO status companies is grouped (i.e. packed) according to From/To/Bill RAO combinations.

Service Control Points ("SCPs") are defined as databases that store information and have the ability to manipulate data required to offer particular services.

Signal Transfer Points ("STPs") are signaling message switches that interconnect Signaling Links to route signaling messages between switches and databases. STPs enable the exchange of Signaling System 7 ("SS7") messages between switching elements, database elements and STPs. STPs provide access to various BellSouth and third party network elements such as local switching and databases.

Signaling links are dedicated transmission paths carrying signaling messages between carrier switches and signaling networks. Signal Link Transport is a set of two or four dedicated 56 kbps transmission paths between TCI designated Signaling Points of Interconnection that provide a diverse transmission path and cross connect to a BellSouth Signal Transfer Point.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telecommunications Act of 1996 ("Act") means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47, U.S.C. Section 1 et. seq.).

SCHEDULE OF TRIVERGENT COMMUNICATIONS, INC. OPERATING AFFALIATES

Trivergent Communications, Inc. (AL, FL, GA, KY, LA, MS, NC, SC, TN)

Attachment 2

Network Elements and Other Services

TABLE OF CONTENTS

ACCESS TO NETWORK ELEMENTS AND OTHER SERVICES

1. **Introduction**

1.1 Network Element is defined to mean a facility or equipment used in the provision of a telecommunications service. Such term may include, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service. BellSouth offers access to the Network Elements, unbundled loops; network interface device; sub-loop elements; local switching; transport; tandem switching; operator systems; signaling; access to call-related databases; dark fiber as set forth in this Attachment.

1.2 BellSouth shall, upon request of TCI, and to the extent technically feasible, provide to TCI access to its network elements for the provision of TCI's telecommunications service. If no rate is identified in the contract, the rate for the specific service or function will be as set forth in applicable BellSouth tariff or as negotiated by the Parties upon request by either Party.

1.3 TCI may purchase network elements and other services from BellSouth for the purpose of combining such network elements in any manner TCI chooses to provide telecommunication services to its intended users, including recreating existing BellSouth services. With the exception of the sub-loop elements which are located outside of the central office, BellSouth shall deliver the network elements purchased by TCI for combining to the designated TCI collocation space. The network elements shall be provided as set forth in this Attachment.

1.4 BellSouth will provide the following combined network elements for purchase by TCI. The rate of the following combined network elements is the sum of the individual element prices as set forth in this Attachment. Order Coordination as defined in Section 2 of Attachment 2 of this Agreement is available for each of these combinations:

- SL1 or SL2 loop and cross connect
- Port and cross connect
- Port and cross connect and common (shared) transport
- Port and vertical features
- SL2 Loop with loop concentration
- Port and common (shared) transport
- SL1 or SL2 Loop and LNP

10.3.13 4-wire 56 kbps Interoffice Channel + 4-wire 56 kbps Local Loop

10.3.14 4-wire 64 kbps Interoffice Channel + 4-wire 64 kbps Local Loop

10.4 Other Network Element Combinations

In the state of Georgia, BellSouth shall make available to TCI, at the rates set forth in Section 10.6 below: (1) Existing Combinations of network elements other than EELs; and (2) combinations of network elements other than EELs that are not Existing Combinations but that BellSouth ordinarily combines in its network. In all other states, BellSouth shall make available to TCI, at the rates set forth in Section 10.6 below, combinations of network elements other than EELs only to the extent such combinations are Existing Combinations.

10.5 Special Access Service Conversions

10.5.1 TCI may not convert special access services to combinations of loop and transport network elements, whether or not TCI self-provides its entrance facilities (or obtains entrance facilities from a third party), unless TCI uses the combination to provide a "significant amount of local exchange service" (as described in Section 10.5.2 below), in addition to exchange access service, to a particular customer.

10.5.2 For the purpose of special access conversions, a "significant amount of local exchange service" is as defined in the FCC's Supplemental Order Clarification, released June 2, 2000, in CC Docket No. 96-98 ("June 2, 2000 Order"). The Parties agree to incorporate by reference paragraph 22 of the June 2, 2000 Order. When TCI requests conversion of special access circuits, TCI will self-certify to BellSouth in the manner specified in paragraph 29 of the June 2, 2000 Order that the circuits to be converted qualify for conversion. In addition there may be extraordinary circumstances where TCI is providing a significant amount of local exchange service, but does not qualify under any of the three options set forth in paragraph 22 of June 2, 2000 Order. In such case, TCI may petition the FCC for a waiver of the local usage options set forth in the June 2, 2000 Order. If a waiver is granted, then upon TCI's request the Parties shall amend this Agreement to the extent necessary to incorporate the terms of such waiver for such extraordinary circumstance.

10.5.3 Upon request for conversions of up to 15 circuits from special access to EELs, BellSouth shall perform such conversions within seven (7) days from BellSouth's receipt of a valid, error free service order from TCI. Requests for conversions of

fifteen (15) or more circuits from special access to EELs will be provisioned on a project basis. Conversions should not require the special access circuit to be disconnected and reconnected because only the billing information or other administrative information associated with the circuit will change when TCI requests a conversion. The Access Service Request process will be used for conversion requests.

10.5.4 BellSouth may, at its sole expense, and upon thirty (30) days notice to TCI, audit TCIs records not more than one 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 TCI 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 as 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 TCI.

10.6 Rates

10.6.1 Georgia

10.6.1.1 The non-recurring and recurring rates for the EEL combinations set forth in 10.3, whether or not such EELs are Existing Combinations, are as set forth in Exhibit A of this Attachment.

10.6.1.2 On an interim basis, for combinations of loop and transport network elements not set forth in Section 10.3, where the elements are not Existing Combinations but are ordinarily combined in BellSouth's network, the non-recurring and recurring charges for such UNE combinations shall be the sum of the stand-alone non-recurring and recurring charges of the network elements which make up the combination. These interim rates shall be subject to true-up based on the Commission's review of BellSouth's cost studies.

10.6.1.3 To the extent that TCI seeks to obtain other combinations of network elements that BellSouth ordinarily combines in its network which have not been specifically priced by the Commission when purchased in combined form, TCI, at its option, can request that such rates be determined pursuant to the Bona Fide Request/New Business Request (NBR) process set forth in this Agreement.

10.6.2 All Other States

10.6.2.1 Subject to Section 10.2.3 and 10.4 preceding, for all other states, the non-recurring and recurring rates for the Existing Combinations of EELs set forth in

EXHIBIT B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.	)	Docket No. 040527-TP

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 Assistant Director-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 NuVox is a Delaware corporation with its principal place of business at 301 North Main Street, Suite 5000, Greenville, South Carolina 29601.

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

6. On June 30, 2000, the Parties entered into an interconnection agreement that afforded NuVox the ability to order Enhanced Extended Links ("EELs") from BellSouth (the

"Agreement"). The Agreement also afforded NuVox the right to convert special access circuits to EELs so long as NuVox 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 NuVox provided a significant amount of local exchange traffic over the EEL. Agreement, Att. 2, § 10.5.2, Exh. A.

7. In 2000, pursuant to the conversion process set forth in the Agreement, NuVox began to submit requests to BellSouth via e-mail to convert special access circuits to UNEs. NuVox self-certified that the EELs were to be used to provide a "significant amount of local exchange service" based on the "exclusive provider of local exchange service" safe harbor option provided for under the Agreement. Since 2000, NuVox has requested conversion of approximately 981 circuits from special access services to UNEs in Florida.

8. Pursuant to the terms of the Agreement, BellSouth processed the orders for conversions from special access circuits to EELs based on NuVox's self-certifications. At no time did BellSouth demand or request an audit of any NuVox circuits prior to the conversion of those circuits from special access to EELs.

9. This concludes my statement.

Shelley W. Padgett

Shelley Padgett

Affirmed to before me this 15th day of September, 2004.

Lynn Barclay

Notary Public

549830

Lynn J. Barclay
Notary Public, DeKalb County, Georgia
My Commission Expires August 13, 2006.

EXHIBIT C

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.	)	Docket No. 040527-TP

AFFIDAVIT OF JERRY D. HENDRIX

ON BEHALF OF BELLSOUTH 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. NuVox provides telecommunications services in each of BellSouth's nine states.

3. I executed the Interconnection Agreement with NuVox 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 10.5.4 of the Agreement, the Parties agreed that BellSouth would have an unqualified right to audit NuVox's Florida EELs for compliance with the requirement that NuVox provide a significant amount of local exchange traffic over the EELs upon 30 days notice and at BellSouth's expense. Agreement, Att. 2, § 10.5.4, Exh. A. The parties specifically did not incorporate the terms of the Federal Communications Commission's ("FCC") *Supplemental Order Clarification* into the audit provision. BellSouth is entitled to conduct an audit of NuVox's EELs under these terms.

5. BellSouth intends to engage American Consultants Alliance to audit NuVox'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 NuVox's EELs on March 15, 2002. On that date, I sent NuVox a letter notifying NuVox of BellSouth's intent to conduct an audit thirty days hence "to verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order." My letter informed NuVox 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 NuVox's circuits to be non-compliant). *See Letter from Jerry Hendrix to Hamilton Russell*, 3/15/02, Exh. B.

7. Between March 2002 and May 2002, BellSouth and NuVox exchanged correspondence and had discussions regarding BellSouth's audit request. Despite the fact that BellSouth satisfied all prerequisites for BellSouth to conduct the audit under the Agreement, NuVox persistently refused to permit the audit.

8. In support of its refusal to permit the audit, NuVox has cited the FCC's *Supplemental Order Clarification*, in seeming disregard of the actual Agreement. *See, e.g.,, Letter from John Heitmann to Parkey Jordan,* 4/9/02, Exh. C. 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 that *Order*. BellSouth hired an independent auditor and provided NuVox with thirty days' notice of its intent to audit. And, even if BellSouth were required to articulate or "demonstrate" a "concern" before initiating an audit, BellSouth has done so, as evidenced (1) by BellSouth's April 1, 2002 e-mail setting forth BellSouth's concerns, and, further, (2) BellSouth's analysis of its own customer records which showed that a number of NuVox's EEL-served customers were also BellSouth local exchange service customers. *See e-mail from Parkey Jordan to John Heitmann,* 4/1/02, Exh. D; BellSouth's Complaint at ¶¶ 18-21.

9. The parties made extensive efforts to resolve this dispute prior to the filing of the Complaint.

10. This concludes my statement.

Jerry D. Hendrix

Affirmed to before me this 16th day of September, 2004.

Notary Public

549835

Lynn J. Barclay
Notary Public, DeKalb County, Georgia
My Commission Expires August 13, 2006.

-----Original Message-----
From: Jordan, Parkey
Sent: Monday, April 01, 2002 5:10 PM
To: 'jheitmann@kelleydrye.com'
Subject: Nuvox EEL Audit

9FZ001!.DOC
(38 KB)

John, sorry to be so late in the day getting this to you. I have been in meetings all afternoon. This is the response to your "threshold issues" regarding the Nuvox EEL audit.

John, this is in response to the issues you raised in your email of March 27, 2002, regarding BellSouth's audit request to Nuvox for EEL circuits. I believe we covered most of these issues, at least briefly, on our conference call yesterday. As for providing Nuvox with the auditor's agreement, we can provide you with the auditor's proposal to BellSouth, which we have accepted. Shelley will send you a copy via overnight mail. As for your specific enumerated issues:

1. Reason for the Audit

   I do not agree that that the FCC has obligated BellSouth to disclose to Nuvox the reason for conducting the audit. That being said, I do agree that that audits of EEL circuits are not "routine" and should only be undertaken in the event BellSouth has a concern that a particular carrier has not met the local service requirements set forth in the Supplemental Clarification Order. I would have assumed that Nuvox would want to maintain the confidentiality of the reasons for the audit, but if that is not the case, I have no problem simply providing the information. In the case of Nuvox, the facts that cause BellSouth concern and that prompted this audit are as follows:

   BellSouth's records show that a high percentage of NuVox's traffic in Tennessee and Florida is intrastate access, yet NuVox has certified that it provides a significant amount of local traffic over circuits in these two states. In addition, Nuvox is now claiming a significant change in its PIU jurisdictional factors.

2. Scope of Audit

   BellSouth indicated when requesting the audit that the audit would encompass all the special access circuits that Nuvox has requested be converted. Nuvox should have that information, but on March 28, 2002, Shelley Walls forwarded to you via email the spreadsheet listing those circuits. The audit will encompass converted circuits only. New EELS are not included in this audit.

3. Independent Auditor/NDA

   As we discussed on the conference call on March 28, the auditor BellSouth has selected is an independent auditor, not an agent of BellSouth. You spent some time on the call questioning Larry Fowler about his background, the background of his company and his affiliation (or lack thereof) with BellSouth. I believe we have established that the auditor is an independent third party. The auditor will be requesting information relevant to prove that the circuits listed in the spreadsheet are or are not in compliance with the appropriate local usage option under which the circuits were converted. BellSouth will not be reviewing the information Nuvox provides to the auditor. However, BellSouth will see the audit results. I believe it is appropriate for BellSouth to agree not to disclose any information contained in the audit results, or the results themselves, and we forwarded you a nondisclosure agreement for that purpose.

4. Independent Auditor / "Ex Parte" Rules

The independent auditor will have to certify, in connection with the audit, that he did in fact act independently. BellSouth has no intention of "bribing" the auditor, and I feel certain that Nuvox similarly has no such intention. I do not want to burden the auditor or the parties with unnecessary and burdensome rules. However, BellSouth will agree with Nuvox that during the audit the parties will not conduct any substantive conversations with the auditor concerning information provided by Nuvox or the auditor's use of that information without both parties being represented.

5. Money Issues / 20% Threshold

The Supplemental Clarification Order provides that "incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options." The Order does not speak in terms of partial reimbursement. In fact, per the language of the Order, there is no threshold level of non-compliance that must be met for the CLEC to become responsible for the cost of the audit. Any non-compliance triggers the reimbursement obligation. However, to allow for unintentional errors, BellSouth has established a reasonable threshold under which no reimbursement will be necessary. In other contexts, BellSouth has used a threshold of 20% to shift the burden of payment for an audit. PIU audits described in BellSouth's tariffs specify the 20% threshold (see tariff section attached). Further, the parties' interconnection agreement states that the party requesting a PIU or PLU audit will be responsible for the cost of the audit unless the audited party is found to have misstated the PIU or PLU in excess of 20% (see Attachment 3, Section 6.5, of the parties' interconnection agreement). We believe such a proposal is reasonable and consistent with industry practice. Further, we believe that no such threshold actually exists per the Supplemental Clarification Order, and that any non-compliance would shift the burden for payment to Nuvox. Whether Nuvox agrees with this position should not affect whether Nuvox proceeds with the audit. BellSouth is the party responsible for paying the auditor, and reimbursement from Nuvox, if applicable, has no affect on whether the audit occurs in the first place. Unless non-compliance is found, this will be a moot issue.

6. Money Issues / NRC

To the extent Nuvox's circuits, or any number of them, fail to meet the requirements for those circuits to be provisioned and maintained as UNEs, BellSouth will convert those circuits to the corresponding special access circuits. The charge for such conversion should be the appropriate non-recurring charges set forth in BellSouth's tariffs. Bear in mind that if Nuvox has in fact lived up to its certification, no such charges will apply. However, by law, BellSouth provisions special access circuits only pursuant to filed and approved tariffs, not pursuant to interconnection agreements. Again, the rate for reestablishing special access circuits is not a threshold issue that must be litigated before the audit occurs. If Nuvox has certified correctly, no charges would apply, and the issue will never arise.

I trust that the foregoing has provided you with sufficient information and that Nuvox will be willing to proceed with the audit in a timely manner. While we want to work with Nuvox and provide all relevant information so that the process can run smoothly, we do not want unnecessary delays in the audit itself.

-----Original Message-----
From: Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
Sent: Tuesday, April 09, 2002 4:20 PM
To: 'parkey.jordan@bellsouth.com'; 'shelley.walls@bellsouth.com'
Cc: 'brussell@bellsouth.com'
Subject: NVX/BST EEL Audit Memo

<<(DC01-179890-v1) NVX BST EEL Audit Memo.DOC>>

Parkey and Shelley,
Attached, please find NuVox's response to your April 1 e-mail/memo and follow-up to our two most recent calls.
Thanks, John

KELLEY DRYE & WARREN LLP

M E M O R A N D U M

TO:	**Parkey Jordan** **Shelley Walls**	**FILE NO:**	**012687.0001**
CC:	**Bo Russell**		
FROM:	**John Heitmann**		
DATE:	**April 9, 2002**		
RE:	**BST SPA to EEL Conversion Audit**		

This memorandum is in response to Parkey's e-mail memorandum of Monday, April 1, 2002 and serves as a follow-up to calls between the parties on this matter conducted on Wednesday, April 3 and on April 8, 2002. In sum, I believe that, through our discussions, we have made significant progress addressing threshold issues related to BellSouth's proposed audit of NuVox's converted EEL circuits. However, at this point, the parties remain far apart on two issues and I believe we agree that it does not appear likely that the parties will agree on how to resolve those two issues on their own. Those two threshold issues are: (1) identification of a reason (*i.e.*, "concern") that BellSouth has for requesting the audit, and (2) selection of an independent auditor. Below, I will recap NuVox's position on those issues, as well as with respect to the other threshold issues discussed previously. It is NuVox's understanding that BellSouth plans to weigh its options internally regarding the two "impasse" issues. NuVox remains open to additional discussions on those issues and with respect to any other issues concerning the proposed audit. NuVox will continue to cooperate with BellSouth as the parties endeavor to sort through and resolve this and numerous other disputes that currently cloud what otherwise should be a healthy and substantial business relationship between the parties, as we appreciate that both sides would benefit substantially if fewer resources were devoted to dispute resolution.

1. Reason for the Audit (Concern re Certified Compliance)

As identified on today's call, this is the first of two likely "impasse" issues. As stated in previous correspondence, NuVox insists that BellSouth identify a reason (*i.e.*, a "concern") that triggers its limited right to conduct an audit. Because the FCC's local use restrictions (applicable only to EEL conversions) are "interim", the FCC determined that audit rights would be limited (indeed, it only granted audit rights after the use restrictions were extended beyond their initial term). Thus, circuit conversion audits may be neither routine nor random.

In Parkey's April 1 letter, BellSouth offered the following reasons for the audit request: (1) BellSouth's records show a high percentage of intrastate access traffic in Tennessee and Florida, and (2) NuVox now claims a significant change in certain PIU jurisdictional factors.

As I explained on today's call, those alleged facts have no bearing upon whether NuVox is in compliance with the requirements of "safe harbor" "Option One" – which is the option under which all NuVox conversions have been certified (to date). Under that option, there is no restriction on the type of traffic that can be carried over a converted circuit. Thus, it is not reasonable for BellSouth to cite statewide (and not even circuit specific) traffic figures and adjusted PIUs for two states (and not for each state in which it seeks to cover with its audit request), when those figures have absolutely nothing to do with the exclusive provider and collocation requirements specified in Option One.

Because NuVox believes that the FCC's *Supplemental Order Clarification* contemplates that audits will be rare and only undertaken for the purpose of pursuing a legitimate and rationally related concern regarding compliance, NuVox is unwilling to have the audit commence prior to having been informed of such a concern.

2. Scope of the Audit

NuVox accepts BellSouth's representation that none of the circuits listed are "new EELs". Furthermore, both parties agree that the audit may not address conversions that have been requested, but not completed. Given that NuVox's current pending requests should be completed prior to the commencement date of the audit, it is unlikely that the parties have any disagreement here. NuVox proposes that BellSouth confirm that it has completed conversion of all circuits identified, once actual dates have been set for commencing the audit.

3. Independent Auditor/NDA

The parties are in agreement that there will be two NDAs. One NDA should be between the parties and the auditor regarding the audit report and results. The other should be between NuVox and the auditor regarding actual documentation provided at the audit. NuVox will propose an NDA for the auditor to sign once it is satisfied that an independent auditor has been selected. We have not reviewed BellSouth's proposal for the other NDA, but we are willing to consider that as the starting point. We will propose changes to that document, if any are needed, at the same time we propose the other NDA.

4. Independent Auditor/"Ex Parte" Rules

The parties agree that neither party shall discuss the substance of the FCC's safe harbor requirements and the *Supplemental Order Clarification* (or its interpretation of them) without the other party present, but that purely logistical and scheduling-type inquiries may handled individually. Indeed, the independent status of the auditor would be best assured if no conversations regarding the substance of the FCC's safe harbor requirements and the *Supplemental Order Clarification* took place.

NuVox appreciates that BellSouth has hired its selected auditor for other audits, as well, and that BellSouth will need to discuss those audits with the auditor separately. However, NuVox would be prejudiced, if BellSouth was able to discuss with the auditor

what must be looked at and demonstrated with respect to compliance with Option One. Thus, should the same auditor eventually serve on the audit of NuVox circuits, NuVox proposes that the following ex parte rule should govern with respect to the additional contact that BellSouth wishes to have regarding other audits:

BellSouth may discuss other engagements with the auditor independently, provided that those discussions do not address the substance of the FCC's safe harbor requirements and the Supplemental Order Clarification *or what it would take to demonstrate compliance with the safe harbor options set forth therein.*

5. Money Issues/20% Threshold

Although NuVox believes other threshold levels could be considered reasonable, NuVox will accept the 20% threshold. If more than 20% of the circuits in a given state are found to be non-compliant and BellSouth files with and prevails before the relevant state commission, according to the EEL audit procedures previously agreed to by the parties in Section 10.5.4 of Attachment 3, NuVox will reimburse BellSouth for the reasonable costs of the audit attributable to that state (NuVox proposes that such attribution be done on a pro rata basis).

6. Money Issues/NRC

The parties remain in disagreement over this issue. Although NuVox would prefer to have the issue of the NRC applicable to any re-conversions resolved prior to commencement of the audit, the parties have agreed that this issue can be resolved in the context of a state commission proceeding initiated by BellSouth pursuant to Section 10.5.4 of Attachment 3 of the parties' Agreement. That section requires BellSouth to file a complaint with the relevant state commission if non-compliance is found and if BellSouth would like to seek re-conversions based on that finding.

7. Independent Auditor

As we explained on our call, NuVox cannot agree that ACA qualifies as an independent auditor. Given the ILEC backgrounds of the proposed auditors and the fact that their client base appears to be virtually all ILEC, NuVox believes that the proposed auditor's views will be unduly influenced by that background as well as past and present representation, despite the best of intentions to be neutral. The additional materials supplied on Wednesday regarding BellSouth's engagement of ACA lend no additional assurances of independence. In ACA's proposal to BellSouth, it touts that its "successful" audits have saved its clients (ILECs) "millions of dollars". Thus, it appears that the proposed auditor measures success in terms of finding non-compliance and securing a monetary benefit for his client. NuVox believes that it will be difficult for the proposed auditor to overcome the normal and natural desire to succeed (based on his own view of what a successful audit would be). Accordingly, NuVox renews its objection to BellSouth's selected auditor and renews its request for BellSouth to select an auditor without such an impressive portfolio of ILEC consultant representation. As NuVox has

explained on an earlier call, ACA appears to be a successful and well qualified consultant but that success makes them less than qualified to serve as an independent auditor.

JJH

EXHIBIT D

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

Jerry D. Hendrix
Executive Director

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

March 15, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc.
Suite 500
301 North Main Street
Greenville, SC 29601

Dear Mr. Russell:

NuVox 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 NuVox'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 NuVox.

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

Audit to Determine the Compliance Of Circuits Converted by NuVox 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 April 15

Prior to the audit, ACA or BellSouth will provide NuVox the circuit records as recorded by BellSouth for the circuits requested by NuVox that have been converted from BellSouth's special access services to unbundled network elements. These records will include the option under which NuVox 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:

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

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

Second Option: NuVox 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: NuVox 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.

- 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 NuVox chose for self certification, other supporting information may be required.

Larry Fowler, ACA (via electronic mail)
John Heitmann, Kelley Drye & Warren LLP (via electronic mail)
Tony Nelson, NuVox (via electronic mail)
Jim Schenk, BellSouth (via electronic mail)

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

In order to minimize disruption of NuVox'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, NuVox 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. Circuits found to be non-compliant with the certification provided by NuVox will be converted back to special access services and will be subject to the applicable non-recurring charges for those services. 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 April 15 at NuVox's office in Greenville, SC, or another NuVox 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 NuVox plan for ACA to be on-site for two weeks. Our audit team will consist of three auditors and an ACA partner in charge.

NuVox 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)