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Subject: Docket No. 040028-TP
Attachments: response to BST supplement 05.13.05.pdf

<<response to BST supplement 05.13.05.pdf>>

Pursuant to the Commission's procedures for e-filing, NewSouth Communications Corp. provides the following information:

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B. The document is to be filed in Docket No. 040028-TP.

C. The document is filed on behalf of NewSouth Communications Corp.

D. The document is 7 pages long.

E. The document is NewSouth Communications Corp.'s Response to BellSouth Telecommunications, Inc.'s "Supplement" to Motion for Summary Disposition.

CMP _____

COM CJ Cratty

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Complaint and Request for Summary Disposition)	Docket No. 040028-TP
BellSouth Telecommunications, Inc. Against)	
NewSouth Communications Corp., To Enforce)	
Contract Audit Provisions)	Filed: May 13, 2005

**NEWSOUTH COMMUNICATIONS CORP. S RESPONSE TO
BELLSOUTH TELECOMMUNICATIONS, INC.'S
"SUPPLEMENT" TO MOTION FOR SUMMARY DISPOSITION**

NewSouth Communications Corp. (NewSouth), through its undersigned counsel, files its Response to BellSouth Telecommunications, Inc.'s (BellSouth) "Supplement" to Motion for Summary Disposition. BellSouth's "supplement" is an unauthorized filing not permitted by either the Commission rules or the Uniform Rules and should be disregarded. Further, the matters BellSouth attempts to argue add nothing to the issues before the Commission in this case.

1. On January 12, 2004, BellSouth filed a Complaint and Request for Summary Disposition in this case. In that 29-page pleading, with an additional attached 6 exhibits, BellSouth presented argument as to its claim that this matter should be disposed of without an evidentiary hearing.

2. On February 2, 2004, NewSouth filed its Answer and Response in Opposition.

3. Now, some 16 months after its original motion was filed, BellSouth has filed what it calls a "supplement" to its original motion. In this unauthorized pleading, BellSouth seeks to argue limited and irrelevant excerpts from an FCC 271 order, which does not even relate to Florida. Because BellSouth's "supplement" is not authorized by either the Uniform Rules or this

Commission's rules and because it has no substantive value, it should be rejected by the Commission.

4. As a matter of procedure, the applicable procedural rules do not authorize BellSouth's "supplement." Chapter 28-106, Florida Administrative Code, delineates the pleadings authorized in a proceeding to determine a party's substantial interests. These pleadings include a petition to initiate a proceeding,¹ an answer to the petition,² a petition to intervene,³ and motions.⁴ The rules provide that motions are the appropriate vehicle for "[a]ll requests for relief."⁵

5. Nowhere is a "supplement" to a motion that has already been filed permitted, especially where, as in this case, the "supplement" seeks to argue information that was clearly available to BellSouth well before the original motion was filed. BellSouth acknowledges that its "supplement" is unauthorized by requesting that the Commission "permit"⁶ it to make the filing. But having recognized the unauthorized character of its filing, BellSouth then goes on to blithely make its arguments anyway.

6. This Commission has often held that it will not consider an unauthorized pleading. In ruling on an AT&T pleading which BellSouth contended the Commission should not consider, the Commission held:

¹ Rule 28-106.201(1).

² Rule 28-106.203.

³ Rule 28-106.205

⁴ Rule 28-106.204.

⁵ *Id.*

⁶ BellSouth "supplement" at 1

[W]e find that AT&T's Response to BellSouth's Response is an inappropriate pleading. *As noted by BellSouth, in previous cases where a party has filed a pleading not contemplated by our rules or the uniform rules, we have not considered the pleading.*⁷

The Commission should similarly disregard BellSouth's unauthorized pleading.

8. Substantively, the "supplement" is irrelevant and does little more than illustrate the inconsistencies in BellSouth's positions in this case. While arguing out of one side of its mouth that the *SOC*⁸ has "[no] bearing on the instant dispute,"⁹ BellSouth then argues out of the other side that the FCC has decided that BellSouth has complied with the order. A review of BellSouth's argument reveals it to be without merit.

9. BellSouth argues that NewSouth submitted an *ex parte* presentation in the Five State 271 proceeding¹⁰ before the FCC in which NewSouth noted that BellSouth did not comply with the FCC's *SOC* criteria. It is notable that BellSouth chose to cut just a few words out of the quote, as the missing words indicate that audits and the temporary use restrictions adopted in the *SOC* apply only to converted circuits.¹¹ BellSouth then relies on dicta in that FCC order which states that, on the basis of the (limited) record before it, it does not appear that BellSouth's audit request expressly violates an FCC rule. BellSouth then declined to disclose that it was omitting footnotes attached to the language it selectively quoted.

⁷ Order No. PSC-03-0525-FOF-TP, footnote omitted, emphasis added. *See also*, Order No. PSC-01-1930-PCO-EI at 7.

⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification (SOC)*, 15 FCC Rcd 9587 (2000) (*SOC*).

⁹ BellSouth "supplement" at 2.

¹⁰ *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17, 5905, 17714 (2002) (FCC Five State Order).

¹¹ Demonstrative of its penchant for engaging in predatory litigation, BellSouth seeks to audit "new" EELs and in so doing inexplicably seeks to audit certifications neither made nor requested and compliance with use restrictions that do not apply. *See, e.g., TRO*, ¶ 622 (affirming that the *SOC* "only addressed EEL conversions.")

10. Several interesting observations can be made about BellSouth's selective quote of the 271 order. First, BellSouth *itself* notes that the FCC did not decide the issues before the Commission here.¹² This alone demonstrates the irrelevance of BellSouth's "supplement." Nor could the FCC have decided the issues now before the Commission in this docket, since the issue before the FCC in the 271 matter was whether BellSouth had complied with the 271 checklist so as to gain permission to provide long distance service. The 271 case was not a proceeding to determine whether BellSouth had complied with its obligations under its Interconnection Agreement, which include the *SOC*'s concern and independent auditor requirements. And, as the FCC explained, the 271 proceeding was not one in which it would engage in resolution of rule interpretation issues it determined were more appropriately resolved in an enforcement proceeding.¹³

11. Second, the limited quote BellSouth attempts to rely upon provides little comfort to BellSouth. The quote refers to "this record" – that is the record before the FCC. Notably, NewSouth's *ex parte* filing did not include BellSouth's audit request or any of the other related materials supplied by the parties in conjunction with their submissions in this case. Moreover, that record is not before this Commission (it does not even relate to the state of Florida) and thus cannot form the basis for any decision in this case. Further, as this Commission is aware, section 271 application proceedings before the FCC are done via review of the paper filings. The FCC does not in a time-limited 271 proceeding conduct a live evidentiary hearing, with testimony and cross-examination, as this Commission is required to do pursuant to Chapter 120, Florida Statutes.

¹² BellSouth "supplement" at 3. BellSouth suggests that the FCC did not decide the issue conclusively in BellSouth's favor – the truth is that the FCC did not decide the issue of whether BellSouth's request violated the *SOC* at all.

¹³ FCC Five State 271 Order, ¶ 211, n. 816 (2002).

12. Third, the FCC noted that the issues raised regarding the audit should be resolved in an enforcement proceeding *not* in the context of a 271 application.¹⁴ That is *exactly* the purpose of this proceeding.

13. Finally, BellSouth apparently accords great weight to the fact that the FCC has never changed a statement which does *not* decide the issues in this case. This lack of action has no probative value, as the FCC has neither been asked nor has it had the occasion to change that statement or to rule on the disputes at issue in this case before the Commission. Moreover, BellSouth ignores the fact that the FCC has indeed had more to say about its EEL audit requirements. In its *Triennial Review Order*, the FCC made clear that the *SOC's* concern requirement was real¹⁵ and that independent auditors must comply with AICPA standards¹⁶ (two things BellSouth has argued against in this case). As the Georgia Commission found, the FCC's latest pronouncements on EEL audits make clear that the FCC has in no way countenanced BellSouth's attempts to nullify the concern and independent auditor requirements.¹⁷

¹⁴ *Id.*

¹⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17367, ¶ 621 (2003 (Triennial Review Order) (“the Commission concluded that ‘audits will not be routine practice, but will be 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’” (citing the *SOC* at note 86)(emphasis added)), ¶ 622 (“[a]lthough the bases and criteria for the service tests we impose in this Order differ from those of the *Supplemental Order Clarification*, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification **based upon cause**, are equally applicable.” (emphasis added)).

¹⁶ *Id.* at ¶ 625 (stating that a state commission is the appropriate forum for determining whether a given party satisfies the test for independence) and ¶ 626 (noting that an audit must be conducted in compliance with AICPA standards and that AICPA standards for determining independence govern (n. 1905)).

¹⁷ *Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc., Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order*, Docket No. 12778-U at 5 (quoting a portion of paragraph 622 of the *TRO* and concluding that the quoted language “eliminates any ambiguity over whether [footnote 86] in the *Supplemental Order Clarification* was intended to make the demonstration of a concern a mandatory pre-condition of these audits”) and 14 (finding that the Commission has discretion to look to the *Triennial Review Order* for guidance and that “[t]he *Triennial Review Order* gives clear guidance that compliance with AICPA standards is necessary in order for a third party to be independent”).

WHEREFORE, NewSouth requests that BellSouth's "supplement" be disregarded or to the extent the Commission determines that it should be considered, that it only be considered in conjunction with this response.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to “Supplement” to Motion for Summary Disposition was served via electronic mail and US mail this 13th day of May, 2005 on the following parties of record:

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