

LISA S. FOSHEE
Senior Attorney
BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0754

March 23, 2004

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

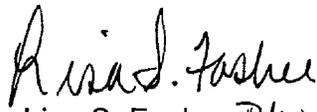
**Re: Docket No.: 040028-TP
Complaint and Request for Summary Disposition BellSouth
Telecommunications, Inc. Against NewSouth Communications, Corp.
to Enforce Contract Audit Provisions**

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief on Applicable Law, 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,


Lisa S. Foshee (RH)

Enclosures

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

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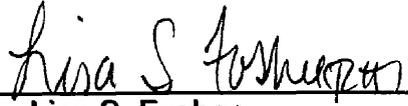
**CERTIFICATE OF SERVICE
Docket No. 040028-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 23rd day of March, 2004 to the following:

Beth Keating
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6212
bkeating@psc.state.fl.us

Jon C. Moyle, Jr.
Cathy M. Sellers
Moyle, Flanigan, Katz, Raymond
& Sheehan, P.A.
118 North Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 681-3828
Fax. No. (850) 681-8788
Attys. for NewSouth
jmoylejr@moylelaw.com

NewSouth Communications, Corp.
Two North Main Street
Greenville, South Carolina 29601
Tel. No.: (864) 672-5877



Lisa S. Foshee

Michael H. Pryor
Catherine Carroll
Mintz, Levin, Cohn, Ferris, Glovsky
& Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Tel. No. (202) 434-7375
Fax. No. (202) 434-7400
Attys. for NewSouth
mhpryor@mintz.com

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and request for summary disposition)
To enforce contract audit provisions in interconnection) Docket No. 040028-TP
Agreement with NewSouth Communications, Corp.)
By BellSouth Telecommunications, Inc.) Filed: March 23, 2004
_____)

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF ON APPLICABLE LAW

BellSouth Telecommunications, Inc. (“BellSouth”) hereby files this Brief in response to the Commission’s February 23, 2004 Order requesting the parties’ positions on “the issue of the correct law to be applied in determining the audit rights of BellSouth in regard to the referenced circuits.” *Order*, at 1. Specifically, the Commission asked the parties to address “the applicability, if any, of the *Triennial Review Order*, the *Supplemental Order Clarification*, the prevailing Interconnection Agreement, the Change-in-law provisions in that Agreement, and any other documents which the parties believe [are] controlling in this matter.” *Order*, at 1.

As BellSouth stated in its Complaint, the four corners of the Agreement, interpreted under Georgia law, govern BellSouth’s right to audit NewSouth’s EELs. Neither the *Supplemental Order Clarification* nor the *Triennial Review Order* is applicable to this dispute. Consequently, BellSouth respectfully requests that the Commission find in BellSouth’s favor that the Agreement provides BellSouth with an unqualified right to audit NewSouth’s EEL circuits.

SUMMARY

BellSouth is entitled to audit NewSouth’s loop and transport combinations (EELs), whether new or converted at NewSouth’s request from special access circuits to UNEs. Amendments to the Agreement dated September 24, 2001, November 14, 2001, and January 16, 2003, afford NewSouth the right to order new EELs. Amendments to Agreement, Exh. A. Section 4 of Attachment 2 of the Agreement affords NewSouth the right to seek conversion of

special access circuits to EEL UNE combinations provided that NewSouth self-certifies that the circuits are used to provide a “significant amount of local exchange traffic.” *See* Agreement, Att. 2, § 4.5 *Et seq*, Exh. A. Section 4.5.1.5 specifically affords BellSouth the right to audit NewSouth’s loop and transport combinations to verify the amount of local exchange traffic on the circuit. *See* Agreement, Att. 2, § 4.5.1.5, Exh. A. Section 4.5.1.5 provides as follows:

BellSouth may, at its sole expense, and upon thirty (30) days notice to NewSouth, audit NewSouth’s records not more than once in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on the audits, BellSouth concludes that NewSouth is not providing a significant amount of local exchange traffic over the combinations of loop and transport network elements, BellSouth may file a complaint with the appropriate Commission, pursuant to the dispute resolution process set forth in this Agreement. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from NewSouth.

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

BellSouth’s right to audit NewSouth’s records is governed by the terms of the voluntarily negotiated Agreement. 47 U.S.C. § 252(a)(1); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that “an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)”); *Law Offices of Curtis V. Trinko LLP v. BellAtlantic Corp.*, 294 F.3d 307, 322 (2d Cir. 2002), *cert. granted*, 123 S.Ct. 1480 (2003) (refusing to allow a requesting carrier to “end run the carefully negotiated

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

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

To the extent NewSouth was interested in adding audit conditions from the *Supplemental Order Clarification*, NewSouth could have asked during negotiations that the specific audit language from the *Supplemental Order Clarification* be incorporated into the Parties’ Agreement. NewSouth did just that with respect to the separate audit provision in the Agreement for the so-called Option 4 conversions. Agreement, Att. 2, § 4.5.2.2, Exh. A (“[a]n audit conducted pursuant to this Section shall take into account a usage period of the past three (3) consecutive months, and shall be subject to the requirements for audits as set forth in the June 2, 2000 Order...”). However, with respect to audit rights for loop and transport combinations not falling under Option 4, the Parties did not incorporate the *Supplemental Order Clarification’s* audit requirements, whether by reference or by including specific language from the *Order*. This omission was intentional, as other sections of the Parties’ Agreement specifically mention the *Order*. See e.g., Agreement, Att. 2, § 4.5.2.2, Exh. A. Section 4.5.1.5 is unambiguous in

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

ARGUMENT

I. BellSouth's Right to Audit Is Governed by the Terms of the Parties' Voluntarily Negotiated Agreement As Interpreted Under Georgia Law.

The audit provisions of the Agreement interpreted under Georgia law govern BellSouth's right to audit NewSouth's EEL combinations to verify the amount of local exchange traffic on the circuit. It is a fundamental principle under the Telecommunications Act of 1996 that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251." 47 U.S.C. § 252(a)(1). This means that parties can bind themselves to the terms of that agreement, which may or may not incorporate all of the substantive obligations imposed under Sections 251(b) and (c) and any implementing Commission rules. See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 373 (1999) (recognizing that "an incumbent can negotiate an agreement without regard to the duties it would otherwise have under Section 251(b) or Section 251(c)"); *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1266 (9th Cir. 2000) ("[t]he reward for reaching an independent agreement is exemption from the substantive requirements of subsections 251(b)

and 251(c)"). The Commission itself has acknowledged that "parties that voluntarily negotiate agreements need not comply with the requirements [it] establishes] under Sections 251(b) and (c), including any pricing rules [it] adopt[s]." First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Red 15499, 15527-28 ¶ 54 (1996).

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

II. The Supplemental Order Clarification Is Not Relevant To The Commission's Decision In This Case.

Although BellSouth has complied with all of the requirements of the *Supplemental Order Clarification* as they pertain to EELs audits, the Parties chose not to incorporate those requirements into the Agreement as it relates to audits of EEL combinations, whether new or combinations converted from special access, as they are entitled to do under Section 252(a).

Because the parties did not incorporate the terms of the *Supplemental Order Clarification* into their voluntarily negotiated agreement, the Order is not relevant to the Commission's decision.

The terms of the Agreement regarding EEL audits are clear and unambiguous: BellSouth may conduct such an audit "at its sole expense, and upon thirty (30) days notice to NewSouth." *See* Agreement, Att. 2, § 4.5.1.5, Exh. A. When, as in this case, the terms of an agreement are clear and unambiguous, construction is "unnecessary," and the agreement must be enforced "according to its clear terms."¹ *Moore & Moore Plumbing, Inc. v. Tri-South Contractors, Inc.*, 567 S.E.2d 697, 699 (Ct. App. Ga. 2002); *see also Neely Dev. Corp. v. Service First Investments, Inc.*, 582 S.E.2d 200, 202 (Ct. App. Ga. 2003) ("Where ... the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties.") (internal quotations omitted); *First Data POS, Inc. v. Willis*, 546 S.E.2d 781, 784 (Ga. 2001) ("whenever the language of a contract is plain, unambiguous and capable of only one reasonable interpretation, no construction is required or even permissible, and the contractual language used by the parties must be afforded its literal meaning").

Moreover, the integration clause in the Agreement, *see* Agreement, GTC, § 29, Exh. A, also precludes reading the audit provisions to incorporate extraneous terms. Under Georgia law, a merger or integration clause in a contract provides the parties with a substantive right not to have extraneous material used to "construe" the contract in contradiction of its express terms. *GE Life and Annuity Assurance Co. v. Donaldson*, 189 F. Supp. 2d 1348, 1357 (M.D. Ga. 2002) (under Georgia law, "a contract containing a 'merger' clause indicates a complete agreement between the parties that may not be contradicted by extraneous material"); *see also McBride v.*

¹ Pursuant to the Agreement's governing law provision, Georgia law controls the construction and enforcement of the Agreement. *See* Agreement, Att. 2, § 18, Exh. A.

Life Ins. Co. of Virginia, 190 F. Supp.2d 1366, 1376 (M.D. Ga. 2002) (“As a matter of general contract construction, a contract containing a ‘merger’ clause indicates a complete agreement between the parties that may not be contradicted by extraneous material.”); *GE Life and Annuity Assurance Co. v. Combs*, 191 F. Supp.2d 1364, 1373 (M.D. Ga. 2002) (same).

To the extent NewSouth was interested in having the *Supplemental Order Clarification* govern loop and transport combinations audits, NewSouth could have sought to negotiate such language into the Agreement, exactly as it did with respect to the provision governing audits of Option 4 circuits. See Agreement, Att. 2, § 4.5.2.2, Exh. A (incorporating “the requirements for audits as set forth in the June 2, 2000 Order” with respect to audits of EELs converted pursuant to Option 4). Failing that, it could have sought arbitration on this issue. See generally 47 U.S.C. § 252(b). Having elected not to avail itself of these alternatives, NewSouth should not be permitted to achieve the same end indirectly through this litigation. BellSouth’s right to audit NewSouth’s EEL combinations is governed by the clear and unambiguous terms of the Agreement interpreted under Georgia law.

III. The Triennial Review Order and the change of law provision in the Agreement Are Not Relevant To The Commission’s Decision In This Case.

The Commission also asked whether the *Triennial Review Order* and/or the change of law provision in the Agreement are relevant to this case. The simple answer to this question is no. The *Triennial Review Order* did address EEL audits at paragraphs 625-629. As explained with respect to the *Supplemental Order Clarification*, however, the Agreement alone sets forth the terms of the parties’ agreement with respect to EEL audits. Because the parties voluntarily negotiated the audit provision, FCC Orders such as the *Triennial Review Order* and the *Supplemental Order Clarification* can not and should not be read to vary the terms of the Agreement.

Moreover, the *Triennial Review Order* was adopted in August 2003, well after the execution of the Agreement. Thus, it has no relevance to the interpretation of the Agreement unless and until it is incorporated into the Agreement by the parties in writing via the change of law provision. The change of law provision specifically sets forth the procedure by which the parties can amend their agreement to reflect new, valid laws if they choose to do so. As of this time, no party has invoked the change of law process to amend the EEL audit provision in the Agreement pursuant to the *Triennial Review Order*. Consequently, the Agreement has not been changed to incorporate the *Triennial Review Order* EEL audit holdings and therefore the *Triennial Review Order* has no bearing on this case.

Finally, common sense dictates that the *Triennial Review Order* is not applicable to this case. The dispute before the Commission arises out of an existing interconnection agreement, and must be resolved by interpreting the Agreement either on its face or via the parties' intent. The Commission cannot use an order issued years after the execution of the Agreement to discern the intent of the parties or to inform the Commission as to the meaning of Section 4.5.1.5, Att. 2. The Commission's decision must be made on the basis of facts that existed at the time the contract was executed, and not on the basis of orders issued subsequent to the Agreement being made.

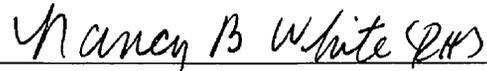
CONCLUSION

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

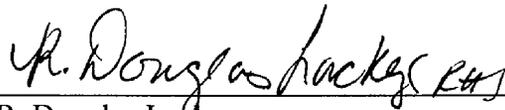
NewSouth to do all things reasonably necessary to permit the independent auditor selected by BellSouth to commence the audit immediately.

This 23rd day of March, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.



Nancy B. White
c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5558



R. Douglas Laeky
Lisa Foshee
675 West Peachtree Street
Suite 4300
Atlanta, Georgia 30375
(404) 335-0754

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