

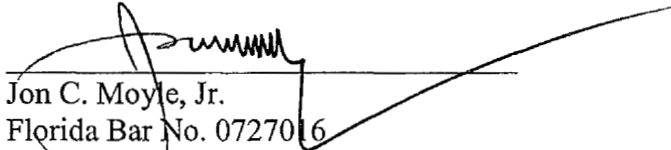
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 040028-TP
Filed March 9, 2004

NOTICE OF SUPPLEMENTAL AUTHORITY

NewSouth Communications Corp. hereby files this Notice of Supplemental Authority in the above-styled matter. Attached is a copy of the Recommended Order on Complaint issued in Georgia Public Service Commission Docket No. 12778-U, IN RE: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc. The Georgia case is similar to the one presently pending before this Commission.



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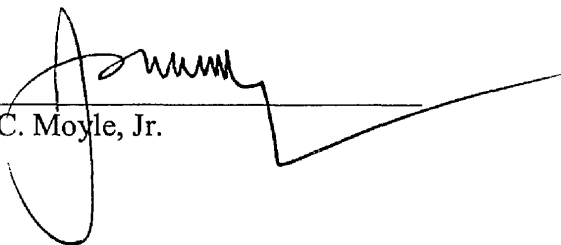
FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of March, 2004, a true and correct copy of the foregoing has been furnished by hand delivery* or by U.S. Mail to the following:

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Jon C. Moyle, Jr.

**BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION**

Docket No. 12778-U

**IN RE: Enforcement of Interconnection Agreement Between BellSouth
Telecommunications, Inc. and NuVox Communications, Inc.**

RECOMMENDED ORDER ON COMPLAINT

APPEARANCES

On Behalf of the Georgia Public Service Commission Staff:
Daniel Walsh, Esq.

On Behalf of the Consumers' Utility Counsel Division:
Clare McGuire, Esq.

On Behalf of BellSouth Telecommunications, Inc.:
Bennett Ross, Esq.
John Tyler, Esq.

On Behalf of NuVox Communications, Inc.:
John Heitmann, Esq.
Anne Lewis, Esq.

BY THE COMMISSION:

I. JURISDICTION AND PROCEEDINGS

A. Jurisdiction

The Georgia Public Service Commission ("Commission") has general jurisdiction over this matter pursuant to O.C.G.A. §§ 46-2-20(a) and (b), which vests the Commission with authority over all telecommunications carriers in Georgia. O.C.G.A. § 46-5-168 vests the Commission with jurisdiction in specific cases in order to implement and administer the provisions of the State Act. The Commission also has jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996. Since the Interconnection Agreement between the parties was approved by Order of the Commission on October 5, 2000, a Complaint that a party is in violation of the Agreement equates to a claim that a party is out of compliance with a Commission Order. The Commission is

authorized to enforce, and to ensure compliance with its orders pursuant to O.C.G.A. Sections 46-2-20(b), 46-2-91 and 46-5-169. The Commission has enforcement power and has an interest in ensuring that its Orders are upheld and enforced. *Campaign for a Prosperous Georgia v. Georgia Power Company*, 174 Ga. App. 263 (1985).

B. Proceedings

On May 13, 2002, BellSouth Telecommunications, Inc. ("BellSouth") filed with the Commission a complaint against NuVox Communications, Inc. ("NuVox") to enforce the parties' interconnection agreement. BellSouth stated that NuVox was refusing to allow BellSouth to conduct an audit of NuVox's records to verify the type of traffic being placed over combinations of loop and transport network elements. BellSouth asserted that the parties' interconnection agreement provided BellSouth with unconditional audit rights.

The matter was assigned to a Hearing Officer and oral argument was held. An evidentiary hearing was not held. On November 4, 2002, after receiving briefs from the parties, the Hearing Officer issued her decision. The Hearing Officer determined that BellSouth had demonstrated a concern. The Hearing Officer concluded that BellSouth's arguments that "records from Tennessee and Florida that indicate an inordinate amount of traffic from NuVox is not local, and that NuVox changed its jurisdictional factor significantly" sufficed to meet the requirement that a concern be demonstrated. The Hearing Officer also concluded that BellSouth did not yet violate any prohibition against audits becoming routine. Therefore, the Hearing Officer determined that it was not necessary to resolve the question of whether BellSouth was obligated to demonstrate a concern or comply with any prohibition against routine audits. Finally the Hearing Officer determined that the auditor was sufficiently independent. NuVox subsequently filed for Commission review of the Hearing Officer's decision.

The Commission Staff recommended that the Commission remand the matter to a hearing officer to conduct an evidentiary hearing on whether BellSouth was obligated to demonstrate a concern prior to being entitled to conduct the requested audit of NuVox, whether BellSouth demonstrated a concern and whether the proposed auditor is independent. At its April 1, 2003, Administrative Session, the Commission adopted Staff's recommendation. On April 17, 2003, the Commission reassigned the matter to a new Hearing Officer.

Both BellSouth and NuVox submitted proposed procedural and scheduling orders to the Hearing Officer. BellSouth proposed a hearing schedule calling for filing of direct, rebuttal and surrebuttal testimony, followed by a hearing, without discovery rights being granted to either party. NuVox proposed a hearing schedule commencing two weeks from the release of the Federal Communications Commission's ("FCC") Triennial Review. NuVox also requested that the parties be afforded discovery rights. On August 6, 2003, the Hearing Officer issued a Procedural and Scheduling Order, setting forth the dates for the filing of direct, rebuttal and surrebuttal testimony, as well as the date of the hearing. In the Procedural and Scheduling Order, the Hearing Officer also denied the request of NuVox for discovery rights as well as the request of NuVox that the dates for the proceeding be based upon the date upon which the FCC released its Triennial Review Order.

On August 22, 2003, BellSouth filed its direct testimony. NuVox filed its rebuttal testimony on September 12, 2003, and BellSouth filed its surrebuttal testimony on September 26, 2003. On October 17, 2003, a hearing was conducted in front of the Hearing Officer, at which time argument of counsel and testimony of witnesses was heard. Both BellSouth and NuVox submitted Briefs on December 22, 2003. The Commission has before it the testimony, evidence, arguments of counsel and all appropriate matters of record enabling it to reach its decision.

II. PROCEDURAL ISSUES

The Commission is called upon to rule on two evidentiary issues that arose during the hearing. The first issue concerns NuVox's motion to strike portions of the pre-filed testimony of BellSouth witness Shelley Padgett.¹ NuVox contends that because Ms. Padgett's testimony with respect to the intent of the parties to the interconnection agreement was not based on personal knowledge, those portions of Ms. Padgett's testimony regarding the intent of the parties are not admissible. NuVox contends further that those portions of Ms. Padgett's testimony relating to audits of Enhanced Extended Loops ("EELs") circuits are also inadmissible because Ms. Padgett is not an attorney and is not competent to render such an opinion.²

The Commission grants NuVox's motion to strike those portions of Ms. Padgett's testimony regarding the intent of the parties to the interconnection agreement, and denies NuVox's motion to strike those portions of Ms. Padgett's testimony relating to audits of EELs circuits. With respect to those portions of Ms. Padgett's testimony regarding the parties' intent, BellSouth contends that under Georgia law, when a witness testifies to facts there is a presumption of personal knowledge in the absence of anything to the contrary, citing *Johnson v. Woodward Lumber Co.*, 76 Ga. App. 152 (1947). However, on cross-examination, Ms. Padgett conceded that she did not negotiate the interconnection agreement between BellSouth and NuVox. Tr. at 122. When asked how she could testify under oath as to the parties' intentions in those negotiations, Ms. Padgett conceded that she could testify only to what the "language clearly says." Tr. at 124, 125. Under Georgia law, testimony which is not based on personal knowledge should be stricken: "Where a witness testifies to certain facts upon his direct examination, but upon cross-examination shows that he has answered from hearsay and without any personal knowledge of the facts about which he has testified, his testimony should, as hearsay, be excluded from consideration, for the reason that

¹ NuVox moved to strike Ms. Padgett's pre-filed direct testimony found at page 2, lines 14-17; page 4, lines 8-25; page 5, lines 1-13 and 18-26; page 6, lines 1-33; page 7, lines 1-3, 8-16 and 21-22; page 8, lines 1-11, and 17-22; page 9, lines 1-4 and 10-21; page 10, lines 1-3 and 7-21; page 11, lines 1-10; page 13, lines 1-22; page 15, lines 1-4, and 7-9; page 16, 10-13. (R. at 129-130). Likewise, NuVox moved to strike Ms. Padgett's pre-filed rebuttal testimony found at page 2, lines 9-21; page 3, lines 1-17 and 24-27; page 4, lines 1-23; page 5, lines 1-14 and 19-22; page 6, lines 10-18; page 7, lines 4-11; page 10, lines 14-23; page 11, lines 11-16, page 12, 1-10, and Exhibit SWP-3. (*Id.* at 130-131).

² At the hearing, BellSouth contended that the motion to strike should have been filed earlier. However, while motions to strike are often filed two days before the hearing, there is no Commission rule that requires such motions be filed prior to the hearing, which presumably allows for a prepared response at the hearing. To the extent that there was any harm to BellSouth, the Hearing Officer remedied that situation by allowing the parties to argue the issue in their briefs, thereby allowing BellSouth an opportunity to prepare a response.

hearsay evidence is without probative value." *Atlantic Coast Line Ry. Co. v. Collins*, 13 Ga. App. 759 (1913).³ Without dispute, Ms. Padgett never participated in the negotiation of the interconnection agreement. Therefore, her testimony as to what the parties intended in the negotiations is not admissible and should be stricken from the record.⁴

With respect to those portions of Ms. Padgett's testimony relating to audits of EELs circuits, the Commission notes that O.C.G.A. § 46-2-51 provides that the Commission is not "bound by the strict technical rules of pleading and evidence but may exercise such discretion as will facilitate its efforts to ascertain the facts bearing upon the right and justice of the matters before it." The Commission recognizes that Ms. Padgett testified that she is not an attorney or legal expert. However, the Commission concludes that in order to facilitate its efforts to ascertain the facts bearing upon the right and justice of the matter before it, those portions of Ms. Padgett's testimony relating to audits of EELs circuits should not be stricken, but should be considered with due weight accorded.

The second evidentiary issue to be considered concerns the admissibility of NuVox's Exhibit 12. During the hearing, as part of correcting witness Russell's testimony, NuVox sought to admit into evidence its Exhibit 12, consisting of a list of those customers BellSouth had identified in its direct testimony as receiving local exchange service from both BellSouth and NuVox along with notations summarizing NuVox's response concerning such customers. The Hearing Officer initially sustained BellSouth's objection to admitting Exhibit 12, and at the close of the hearing granted NuVox's request that the parties be entitled to submit briefs with respect to the admissibility of such Exhibit.

The Commission denies NuVox's request to admit Exhibit 12 into evidence. Such exhibit contains hearsay about telephone calls and conversations, has never been authenticated, and has never been established as a business record of NuVox. Therefore, NuVox's request to include Exhibit 12 into the record is denied.

³ The Commission notes that it may allow expert witnesses to testify with respect to matters not within their personal knowledge. However, as Ms. Padgett did not personally participate in the negotiations of the interconnection agreement between BellSouth and NuVox, she cannot be considered an expert with respect to the intent of the parties.

⁴ Specifically, the following portions of Ms. Padgett's pre-filed direct testimony are stricken from the record: page 2, lines 14-17; page 5, lines 11-13; page 8, lines 1-11 and 17-22; page 9, lines 1-4; page 16, lines 10-13. Additionally, the following portions of Ms. Padgett's pre-filed surrebuttal testimony are hereby stricken from the record: page 2, lines 9-21; page 3, lines 1-17; page 4, lines 14-23; page 5, lines 1-14 and 19-22; page 6, lines 10-18; page 10, lines 14-23; page 11, lines 11-16; page 12, lines 1-10.

III. FINDINGS OF FACT

1.

BellSouth is an incumbent local exchange company (“ILEC”) that provides telecommunications services in various states, including Georgia.

2.

NuVox is a competing local exchange carrier (“CLEC”) that provides telecommunications services in various states, including Georgia.

3.

BellSouth and NuVox entered into an Interconnection Agreement on June 30, 2000 that subsequently was approved by the Commission. That Agreement was voluntarily negotiated by the parties pursuant to Section 252(a)(1) of the Telecommunications Act of 1996 (“1996 Act”).

4.

In their Agreement, the parties agreed to language concerning NuVox’s use of EELs to serve customers to whom it was providing a “significant amount of local exchange service” and granting BellSouth’s right to audit NuVox’s records concerning such use. Specifically, in Attachment 2, Section 10.5.4 of the Agreement between BellSouth and NuVox, the parties agreed as follows:

BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox’s] records not more than one [sic] 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 sufficient amount of local 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].

5.

The Federal Communications Commission (“FCC”) issued an order on June 2, 2000 in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC

Docket No. 96-98, FCC 00-183 (“*Supplemental Order Clarification*”). In the *Supplemental Order Clarification*, the FCC found that (1) audits will not be routine practice and may only be conducted under limited circumstances and (2) only when the incumbent local exchange company has stated a concern that a requesting carrier is not meeting the qualifying criteria and (3) that such an audit must be performed by an independent third party that is hired and paid for by the incumbent local exchange company.

6.

After the FCC issued its *Supplemental Order Clarification*, the parties negotiated changes to the EEL conversion and audit language, which are reflected in the parties’ current Agreement.

7.

Following issuance of the *Supplemental Order Clarification*, the parties modified their Agreement to provide that BellSouth could conduct an audit “upon thirty (30) days notice” to NuVox, provided that BellSouth could not audit NuVox’s records “more than one [sic] in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the [*Supplemental Order Clarification*], in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.” The parties also agreed that any audit would be conducted at BellSouth’s sole expense.

8.

By letter dated March 15, 2002, BellSouth provided the requisite 30 days’ notice of its intent to conduct an audit of NuVox’s records. NuVox refused to allow the audit to proceed because, according to NuVox, BellSouth had failed to “demonstrate a concern” that would justify an audit and had failed to select an auditor that is “independent.”

9.

On May 13, 2002, BellSouth filed a Complaint with the Commission seeking to enforce Section 10.5.4 of the parties’ Agreement and to conduct an audit of NuVox’s records. NuVox filed a timely Answer to BellSouth’s Complaint, and the matter was referred to Hearing Officer Nancy Gibson for resolution. Hearing Officer Gibson heard oral argument from the parties on August 13, 2002 and received post-argument filings from BellSouth and NuVox.

10.

On November 4, 2002, Hearing Officer Gibson filed her decision in which she determined that BellSouth was entitled to conduct an audit of NuVox’s records and that the auditor selected by

BellSouth was sufficiently “independent.” Hearing Officer Gibson determined that it was not necessary to resolve the question whether BellSouth was required to “demonstrate a concern” prior to conducting an audit, finding that BellSouth had satisfied this requirement in any event.

11.

NuVox subsequently filed for Commission review of Hearing Officer Gibson’s decision, and the Commission remanded the matter to a Hearing Officer for an evidentiary hearing on three issues: first, whether BellSouth was obligated to demonstrate a concern prior to being entitled to conduct the requested audit of NuVox; second, whether BellSouth demonstrated a concern; and third, whether BellSouth’s proposed auditor is independent.

12.

An evidentiary hearing was held on October 17, 2003, and the parties have submitted post-hearing briefs.

IV. CONCLUSIONS OF LAW AND DISCUSSION

A. BellSouth is Obligated to Demonstrate a Concern Prior to Being Entitled to Conduct Its Requested Audit

The Agreement at Paragraph 10.5.4 of Attachment 2 states:

BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] record not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combination 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].⁵

Section 35.1 of the General Terms and Conditions of the Agreement incorporates Applicable Law, as follows:

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.⁶

The Commission finds that under the language of the Agreement, BellSouth is required to comply with all applicable law, including the *Supplemental Order Clarification*. The parties do not dispute that the Agreement is governed by Georgia law. Under Georgia law, contracting parties are presumed to have incorporated the laws that existed when they entered into the contract, unless they explicitly excluded those obligations from the contract. There is nothing in the Agreement that carves-out the exemption BellSouth claims from the *Supplemental Order Clarification's* requirements regarding "concern" and an independent auditor. Therefore, by operation of Georgia law, the *Supplemental Order Clarification* is incorporated into the Agreement. We also find that the requirements in the *Supplemental Order Clarification* are incorporated into the Agreement by operation of the Applicable Law provision.

In addition, we find that the parties did not exclude the requirements set forth in the *Supplemental Order Clarification* from the Agreement. Under Georgia law, the parties are presumed to have contracted with regard to existing law, unless the contract explicitly states to the contrary. Neither Section 10.5.4 nor Section 35.1, both of which are quoted above, exempts the *Supplemental Order Clarification* and the requirements set forth therein from the Agreement. Therefore, we find that BellSouth is required to comply with the *Supplemental Order Clarification*.

Additionally, the record evidence regarding the parties' intent supports a finding that BellSouth must demonstrate a "concern" and hire an independent auditor prior to conducting an audit. At the Hearing, Hamilton Russell, one of the NuVox employees personally responsible for negotiating the Agreement, testified that the parties were fully cognizant of the FCC's *Supplemental Order Clarification* and its requirements pertaining to EEL audits (no BellSouth witness personally participated in the negotiation of the Agreement). Mr. Russell testified that having already

⁵ Agreement, Att. 2, § 10.5.4.

⁶ Agreement, General Terms and Conditions, § 35.1.

negotiated the General Terms and Conditions, including the Applicable Law and Georgia law provisions, there was no need to ensure that each requirement contained in the *Supplemental Order Clarification* was expressly included in Section 10.5.4 of Attachment 2, as all requirements were included unless explicitly exempted. Mr. Russell further testified that there was no intent to create exemptions from the requirements of the *Supplemental Order Clarification*.

Based upon the plain language of the Agreement, as well as the testimony of Mr. Russell regarding the intent of the parties, the Commission concludes that BellSouth is obligated to demonstrate a concern prior to being entitled to conduct its requested audit, and that any such audit must be conducted by an independent third party.

B. BellSouth Has Demonstrated a Concern

In the *Supplemental Order Clarification*, the FCC stated that an audit would only be undertaken when the ILEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service. The FCC set forth no specific conditions or standard of evidence with respect to the level of concern. Additionally, in response to a question from the Hearing Officer, NuVox witness Russell stated that he did not know how to determine whether a concern was adequate or reasonable. Tr. at 290. However, it is evident that such concern cannot be so speculative as to render the FCC's requirement meaningless, nor can the standard for determining whether a concern exists be so high as to require an audit to determine if such concern exists. The Commission must consider all appropriate factors on a case-by-case basis to determine if an ILEC has provided a reasonable basis for a concern to support the initiation of an audit.

During the hearing, BellSouth presented evidence that NuVox does not provide a "significant amount of local exchange service" to a number of customers NuVox serves via EELs. Such evidence satisfies any requirement that BellSouth "demonstrate a concern" before an audit of NuVox's records can proceed.

According to NuVox, its EELs provide a "significant amount of local exchange service" as mandated by the Agreement under the FCC's "safe harbor" Option 1, which requires that NuVox be the "exclusive provider of local exchange service" to the end user being served by the EEL. However, BellSouth examined its own records to determine whether NuVox is the exclusive local exchange provider for its end users served by EELs in Georgia and manually compared the name and location of each NuVox end user served by EEL circuits with BellSouth's retail end-user records. As a result of this review, BellSouth identified 44 EELs in Georgia that NuVox is using to provide local exchange service to end users who also receive local exchange service from BellSouth. Tr. at 96-98; BellSouth Exhibit 2 (proprietary). The Commission agrees with BellSouth that NuVox cannot be the "exclusive" provider of local exchange service to an end user who also receives local exchange service from BellSouth.

NuVox presented no evidence that any of the end users that BellSouth's records reflect as receiving local exchange service from both NuVox and BellSouth were in fact being served exclusively by NuVox. Tr. at 232. Although NuVox claims that the percentage of EEL circuits at issue was only 12 percent rather than 18 percent as calculated by BellSouth, the difference in these percentages appears to be the result of NuVox's and BellSouth's calculations being made at

different points in time. Tr. at 271, 238. Furthermore, the specific percentage of EEL circuits for which NuVox is not the exclusive provider of local exchange service is not the issue. The fact that NuVox is using some number of EEL circuits in Georgia to serve customers for whom NuVox is not the exclusive provider of local exchange evidences a “concern” and justifies an audit of all of NuVox’s EELs in the State.

During the hearing, NuVox suggested several reasons that the customers identified as BellSouth end-user customers were not really BellSouth customers or were different from the end users served by NuVox by alleging that: (1) the numbers for the customers identified as BellSouth end users generated a “not active” or “this number has been disconnected” recording when called; (2) the name of the BellSouth’s customer was different than the name of the customer served by NuVox; (3) the address of BellSouth’s end user was different than the address for NuVox’s customer; and (4) certain numbers when dialed “ring to a computer or modem,” which, according to NuVox, means the customer is receiving DSL and not local exchange service. Tr. at 164, 167-168, 173, 180-183.

BellSouth witness Padgett provided a reasonable explanation with respect to each allegation. Ms. Padgett testified that the reason that NuVox may have gotten a “not active” or “this number has been disconnected” recording for certain BellSouth customers was because it appears NuVox was dialing the wrong number or was dialing the billing number, which is not a valid telephone number. Tr. at 233-234. Similarly, any differences in the names of the customers being served by both BellSouth and NuVox do not mean that the customers are different, but rather may simply mean that the same customer goes by two different names. Tr. at 169-170. The same is true for differences in customer addresses, which can be explained by the customer’s use of a “different naming convention” when establishing service. Tr. at 175-176. Likewise, differences in customer addresses also can be explained by the fact that the customer receives service at one address but has bills sent to a different address. Tr. at 236.

The Commission concludes that BellSouth has submitted sufficient evidence to demonstrate a concern that NuVox is not the exclusive provider of local exchange service to a number of customers served via EELs, which warrants an audit of all of NuVox’s EELs in Georgia.

C. The Proposed Auditor Selected by BellSouth is Independent

In the *Supplemental Order Clarification*, the FCC made clear that any audit requested by an ILEC having a concern that a requesting carrier is not meeting the qualifying criteria must be performed by an independent third party hired and paid for by the ILEC. The FCC also stated that to the extent parties dispute the definition of an “independent” auditor and whether a given party satisfies the test for independence, the more appropriate forum for such determination is a state commission.

NuVox questions the independence of the auditor selected by BellSouth, American Consultants Alliance (“ACA”). Specifically, NuVox witness Russell testified that, in his opinion, ACA is not independent because it “is a consulting shop completely dependent on incumbent LECs, such as and including BellSouth, for virtually all of its revenues.” Tr. at 274. Mr. Russell further testified that “[i]f ACA is dependent on incumbent LECs such as BellSouth for virtually all of its revenues, it cannot at the same time be independent.” Tr. at 274. In addition, NuVox pointed

out that in its marketing materials, ACA describes as “highly successful” the audits that have recovered millions of dollars for its ILEC clients. Tr. at 199.

BellSouth argued that even though it believed it was not required to do so, it hired ACA as an independent third-party auditing firm. BellSouth witness Padgett testified that neither ACA or its principals have been employed by BellSouth in the past, and that ACA is not “subject to the control or influence” of BellSouth nor is ACA “associated with” BellSouth or “dependent upon” BellSouth. Furthermore, Ms. Padgett testified that Mr. Russell’s suggestion that ACA does not provide services to CLECs is false, pointing to ACA’s client list indicating that ACA provides services to various CLECs. Tr. at 196-199.

The Commission finds that ACA is an independent third-party auditor, as required by the *Supplemental Order Clarification*. That ACA may receive revenues for services provided to ILECs does not mean that ACA is “subject to the control or influence” of BellSouth, nor does it mean that ACA is “associated with” BellSouth or “dependent” upon BellSouth, which the Commission concludes is the appropriate standard for adjudging “independence.” As the Commission is called upon to consider whether ACA is independent of BellSouth, the Commission must consider the relationship between ACA and BellSouth and not ACA’s relationship with other ILECs. ACA’s relationship with other ILECs is not relevant to whether ACA is “dependent” upon BellSouth or subject to “influence or control” by BellSouth. There is no evidence in the record which establishes that BellSouth is ACA’s “principal revenue source” or that BellSouth “influences” or “controls” ACA. As NuVox witness Russell testified, BellSouth “has not hired” ACA previously and “does not control” ACA. Tr. at 289.

Finally, NuVox argued that ACA cannot be an “independent” auditor because BellSouth did not demonstrate that ACA will comply with the auditing standards of the American Institute of Certified Public Accountants (“AICPA”). Tr. at 275-276. The Commission notes that neither the Agreement nor the *Supplemental Order Clarification* requires the auditor to adhere to AICPA standards. Nevertheless, as Ms. Padgett testified, ACA can supply the requisite “showing and attestation of compliance with the AICPA standards.” To date, BellSouth has not requested that ACA do so because of the expense involved and because of its belief that it was not obligated to make such a showing. Tr. at 209-211. However, to the extent NuVox insists upon ACA’s adherence to AICPA standards, which would require ACA engaging a second auditing firm, the Commission concludes that NuVox should bear the additional costs associated with such ACA’s doing so.

V. ORDERING PARAGRAPHS

The Hearing Officer certifies the record in this docket to the Commission and issues this recommendation pursuant to O.C.G.A. 46-2-58(d) and 50-13-17(a). Based upon the evidence, the Hearing Officer finds and concludes that (1) BellSouth is obligated to demonstrate a concern prior to being entitled to conduct its requested audit; (2) BellSouth has demonstrated such a concern; and (3) the proposed auditor selected by BellSouth, ACA, is independent.

WHEREFORE IT IS ORDERED, that NuVox's request to dismiss or deny BellSouth's complaint is hereby denied.

ORDERED FURTHER, that BellSouth be allowed to conduct an audit of all of NuVox's EELs in Georgia to verify NuVox's self-certification that it is providing "a significant amount of local exchange service".

ORDERED FURTHER, that NuVox's motion to strike those portions of Shelley Padgett's pre-filed testimony regarding the intent of the parties to the interconnection agreement, as specifically set forth in this Order, is granted.

ORDERED FURTHER, that NuVox's motion to strike those portions of Shelley Padgett's pre-filed testimony relating to audits of EELs circuits is denied.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission; and

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose on entering such further Order or Orders as to this Commission may seem just and proper.

This ___ day of February, 2004.

Jeffrey C. Stair
Hearing Officer

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I have caused to be served the required copies of the foregoing *Recommended Order on Complaint* to all parties to the case as listed below by first class mail with proper postage affixed, unless otherwise indicated, as follows:

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*By Hand Delivery

This ____ day of February, 2004

Jeffrey C. Stair
Hearing Officer