

ORIGINAL

Matilda Sanders

From: CJ Cratty [cjcratty@moylelaw.com]
Sent: Thursday, April 14, 2005 3:47 PM
To: Filings@psc.state.fl.us
Cc: Heitmann, John; Kashatus, Jennifer M.; Jason Rojas; theodore.marcus@bellsouth.com; kip.edenfield@bellsouth.com; Vicki Gordon Kaufman
Subject: Docket No. 040527-TP
Attachments: Response to Bell motion for PO 04.14.05.pdf

<<Response to Bell motion for PO 04.14.05.pdf>>

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

A. The attorney responsible for filing is:

Vicki Gordon Kaufman
 Moyle, Flanigan, Katz, Raymond & Sheehan, P.A.
 The Perkins House
 118 North Gadsden Street
 Tallahassee FL 32301
 850.681.3828
 850.681.8788 Fax

B. The document is to be filed in Docket No. 040527-TP.

C. The document is filed on behalf of NuVox Communications, Inc.

D. The document is 6 (six) pages long.

E. **The document** is NuVox Communications, Inc.'s Response to BellSouth Telecommunications, Inc.'s Motion for Protective Order.

CJ Cratty

MP _____

OM _____ *The information contained in this electronic mail transmission is attorney/client privileged and confidential. It is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copy of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone collect at 850-681-3828. Thank you.*

TR _____

CR _____

iCL _____

JPC _____

MMS _____

ICA _____

SCR _____

SEC 1

JTH _____

4/14/2005

DOCUMENT NUMBER-DATE

03653 APR 14 05

FPSC-COMMISSION CLERK

ORIGINAL

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Enforcement of Interconnection Agreement
Between BellSouth Telecommunications, Inc. and
NuVox Communications, Inc.

Docket No.: 040527-TP
Filed: April 14, 2005

**NUVOX COMMUNICATIONS, INC.'S RESPONSE
TO BELL SOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR PROTECTIVE ORDER**

NuVox Communications, Inc. (NuVox), pursuant to rule 28-106.204, Florida Administrative Code, files this response in opposition to BellSouth Telecommunications, Inc.'s (BellSouth) Motion for Protective Order. BellSouth's motion should be denied and the deposition of Mr. Hendrix should proceed. As grounds therefore, NuVox states:

Introduction

1. This matter began when BellSouth filed a Complaint against NuVox alleging a breach of the Parties' Interconnection Agreement (ICA). BellSouth's Complaint raises numerous factual issues that require discovery.

2. On March 17, 2005, NuVox filed a Notice of Taking Deposition Duces Tecum for Jerry Hendrix. NuVox set the deposition for April 18, 2005. Attached to the Notice was a list of documents Mr. Hendrix was to bring to the deposition. Each document requested was directly related to statements made in BellSouth's Complaint and/or the affidavit of Mr. Hendrix filed in this proceeding on September 13, 2004.

3. On April 7, 2005, BellSouth filed a Motion for Protective Order in which it asks this Commission to prevent the deposition from going forward.

Background

4. As a preliminary matter, several of the comments in BellSouth's "Factual Background" require correction. First, the NuVox docket (in which the deposition notice was

filed) and the NewSouth matter¹ are separate dockets. They are not now and have never been consolidated.

5. Second, it is incorrect and inaccurate for BellSouth to claim that either NuVox or NewSouth urged the Commission to hold settlement discussions that encompassed both companies and both dockets, and that BellSouth acquiesced to NuVox's and NewSouth's request. To the contrary, BellSouth sought such linkage during settlement discussions and it was NuVox and NewSouth that acquiesced to BellSouth's request for purposes of those mediated discussions.

6. Third, the Commission entered the abeyance order to which BellSouth refers, Order No. PSC-04-0998-FOF-TP, in this docket, and the order pertains *only* to this docket.

7. Finally, BellSouth's representation that the February 15, 2005 conference call resulted in some sort of "stand still" agreement between the Parties is simply not the case. While BellSouth may prefer to see the two cases processed "on the papers," NuVox has not agreed to that nor has it agreed to a suspension of its discovery rights. In fact, during the February 15, 2005 conference call, discovery was specifically discussed, with respect to both cases, and BellSouth indicated that a response to NewSouth's discovery requests would be forthcoming.

Discovery in this Case is Appropriate

8. The entire basis for BellSouth's attempt to avoid Mr. Hendrix's deposition is its misconception, which is not supported by any Commission order, regarding the "posture of the proceedings." It appears to be BellSouth's position that because it has a Motion for Summary Disposition pending, to which NuVox has filed a response in opposition, this case, and all activities associated with it, including discovery, are suspended. BellSouth argues that no discovery should occur until the Commission rules on its motion. However, there is no stay of discovery in effect in this case, nor has one been sought.

¹ Docket No. 040028-TP

9. Under Florida law, NuVox is permitted to depose BellSouth. BellSouth argues that the Commission has not ruled or suggested that discovery is appropriate in this case. No such ruling is necessary or required. Rule 28-106.206, Florida Administrative Code, provides that once an administrative proceeding begins, parties may obtain discovery “through the means and in the manner” provided in the Florida Rules of Civil Procedure. Rule 1.310 authorizes depositions, and, therefore, NuVox’s discovery request is appropriate.

10. Furthermore, the Commission has found that parties must be granted the opportunity to conduct discovery before it will grant a motion for final summary order. There is no authority to support BellSouth’s apparent argument that a motion for final summary order abates discovery. To the contrary, there is ample case law stating that the entry of final summary judgment, akin to BellSouth’s request for final summary order, is not appropriate absent the opportunity to conduct discovery. *See, i.e., Brandauer v. Publix Super Markets, Inc.*, 557 So. 2d 932 (Fla. 2nd DCA (1995) (grant of summary judgment reversed where plaintiff had not yet deposed any representative of the corporate defendant).

11. BellSouth’s pending motion has no impact on NuVox’s discovery rights. BellSouth itself has recognized that discovery is appropriate when a motion for summary disposition is pending. *See* Docket No. 020507-TL, BellSouth’s Opposition to FCCA Motion for Final Summary Order at 5. In denying FCCA’s motion for final summary order, the Commission quoted BellSouth’s argument and acknowledged that a final summary order was not appropriate because discovery had not yet occurred:

BellSouth states that FCCA’s Motion [for Final Summary Order] is premature because discovery has not begun. *See, Brandauer v. Publix Super Markets, Inc.*, 657 So.2d 932, 933 (Fla. 2nd DCA 1995) (holding that “[s]ummary judgment should not be granted until the facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists.” “As a general rule, a court should not enter summary judgment when the opposing party has not completed discovery.”); *see also*, Order No. PSC-00-2388-AS-WU, issued December 13, 2000, in

Docket No. 991437-WU (finding that it “is premature to decide whether a genuine issue of material fact exists when OPC has not had the opportunity to complete discovery and file testimony.”). Likewise, BellSouth argues that due process demands that it have the opportunity to respond to the testimony filed by FCCA.

Order No. PSC-02-1464-FOF-TL at 7

12. In this instance, it is obvious that there are facts in dispute and that discovery is appropriate. BellSouth attached as Exhibit C to its Motion for Summary Disposition an affidavit Mr. Hendrix executed. In that affidavit, Mr. Hendrix makes numerous factual assertions which NuVox has controverted and which NuVox is entitled to test through discovery. Mr. Hamilton E. Russell III, Vice President of Legal Affairs for NuVox, filed an affidavit which controverted many of Mr. Hendrix’s claims.

13. For example, Mr. Hendrix swears and asserts that the Parties did not intend to incorporate the terms of the FCC’s *Supplemental Clarification Order* into the ICA.² Mr. Russell swears and asserts that the Parties *did* intend to incorporate the *Supplemental Clarification Order* into the ICA.³

14. BellSouth claims it hired an “independent” auditor to conduct the audit of NuVox.⁴ NuVox disputes the independence of the firm BellSouth has engaged.⁵

15. On April 12, 2005, Mr. Hendrix filed a “Supplemental Affidavit” that raises a number of new factual issues that NuVox is entitled to inquire about in discovery. In an apparent

² Hendrix Affidavit, ¶ 4.

³ Russell Affidavit, ¶ 7, 11.

⁴ Hendrix Affidavit, ¶ 5.

⁵ Russell Affidavit, ¶ 22-24. On April 12, 2004, BellSouth filed a Supplemental Affidavit of Mr. Hendrix indicating that BellSouth has replaced the auditor it initially selected with KPMG. During the course of the on-going Georgia audit, KPMG, the new auditor BellSouth selected, violated a non-disclosure agreement with NuVox by revealing unverified (and erroneous) preliminary findings to BellSouth. This breach likely will result in litigation between NuVox and KPMG, as NuVox has already notified KPMG of its intent to seek appropriate legal remedies. NuVox is entitled to explore the relationship and arrangements between BellSouth and KPMG, or between BellSouth and any other entity selected for the audit. KPMG’s breach of its non-disclosure agreement with NuVox casts grave doubt on its ability to serve as an independent auditor in this context.

attempt to prejudice this Commission, BellSouth's Supplemental Affidavit of Mr. Hendrix includes information based on preliminary, unverified and erroneous audit results from a different state. The information upon which BellSouth relies to make the assertions in Mr. Hendrix's Supplemental Affidavit is the subject of a non-disclosure agreement between NuVox and KPMG. BellSouth has improperly obtained that confidential preliminary information, and misused it. NuVox is entitled to probe each of the assertions made by Mr. Hendrix in his affidavits.

16. Nonetheless, the many "facts" which Mr. Hendrix attests to in his Supplemental Affidavit (such as "substantial noncompliance," "inadequate control and record keeping," the amount BellSouth claims is at risk, and statements regarding NuVox's financial position) amply illustrate that this case is not appropriate for summary disposition and that NuVox is entitled to test the assertions upon which BellSouth seeks to rely.

17. Numerous other additional examples of disputed facts are obvious from a review of the two affidavits. In a case such as this, where there are controverting affidavits addressing material issues, discovery is not only appropriate, but is a right of the parties.

18. Section 120.57(1)(h), Florida Statutes, which governs final summary orders, contemplates discovery before the entry of a summary final order. Section 120.57(1)(h) provides, in part: "A final summary order shall be rendered [if a determination is made] from the pleadings, *depositions, answers to interrogatories, and admission on file, together with affidavits*, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order."⁶ BellSouth would have the Commission ignore the express language of section 120.57(a)(h) and rely solely on a pleading with an attached affidavit. Discovery is appropriate in this case.

⁶ Emphasis supplied.

19. Finally, on April 1, 2005, NuVox filed a request for Official Recognition of the Order for Preliminary Injunction issued by the United States District court for the Eastern District of North Carolina Western Division, in *NuVox Communications, Inc. and NewSouth Communications Corp. v. North Carolina Utilities Commission, et al.*, Case No. 5:05-CV-207-BR(3), on April 1, 2005. In that order, the federal court noted that two state utility commissions, in interpreting the same agreement, came to two different results. *Id.* at 5. This fact highlights that the dispute is not one on which the Commission should lunge toward summary disposition.

20. Contrary to BellSouth's hyperbole that NuVox's discovery is "preposterous" or is an attempt to "steamroll the Commission's deliberations", NuVox is simply attempting to engage in normal discovery processes to test the many factual assertions which allegedly support BellSouth's theory of the case. Discovery is not "premature" but entirely appropriate. It is BellSouth which is, by fiat, attempting to circumvent normal Commission procedures.

WHEREFORE, BellSouth's Motion should be denied and BellSouth should be required to immediately produce Mr. Hendrix for deposition with the documents requested in his Subpoena Duces Tecum.

NuVox Communications, Inc.

John J. Heitmann
Jennifer M. Kashatus
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)
jheitmann@kelleydrye.com
jkashatus@kelleydrye.com

s/ Vicki Gordon Kaufman

Jon C. Moyle Jr.
Vicki Gordon Kaufman
MOYLE, FLANIGAN, KATZ, RAYMOND & SHEEHAN,
P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301
(850) 681-3828 (telephone)
(850) 681-8788 (facsimile)
jmoylejr@moylelaw.com
vkaufman@moylelaw.com

Counsel to NuVox Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NuVox Communications, Inc.'s Response to BellSouth Telecommunications, Inc.'s Motion for Protective Order was served by electronic mail and U.S. Mail this 14th day of April, 2005 to the following:

Jason Rojas
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Theodore Marcus
Kip Edenfield
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301

/S/ Vicki Gordon Kaufman
Vicki Gordon Kaufman