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Matilda Sanders

From: Fatool, Vicki [Vicki.Fatool@BellSouth.COM]
Sent: Friday, May 06, 2005 9:09 AM
To: Filings@psc.state.fl.us
Subject: 040028-TP BST's Supplement to Motion for Summary Disposition
Attachments: 040028-T.pdf

A. Vicki Fatool
Legal Secretary to Nancy B. White
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(305) 347-5560
vicki.fatool@bellsouth.com

B. Docket No. 040028-TP: Complaint and Request for Summary Disposition to Enforce
Contract Audit Provisions in Interconnection Agreement with NewSouth Communications
Corporation by BellSouth Telecommunications, Inc.

C. BellSouth Telecommunications, Inc.
on behalf of Nancy B. White and Theodore C. Marcus

D. 7 pages total (including letter, certificate of service and pleading)

E. BellSouth Telecommunications, Inc.'s Supplement to Motion for Summary Disposition
.pdf version attached

<<040028-T.pdf>>

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Legal Department

NANCY B. WHITE
General Counsel - Florida
BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

May 6, 2005

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 to Enforce Contract Audit Provisions in Interconnection
Agreement with NewSouth Communications Corporation by
BellSouth Telecommunications, Inc.**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Supplement to Motion for Summary Disposition, which we ask that you file in the captioned dockets.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,


Nancy B. White

Enclosures

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

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CERTIFICATE OF SERVICE
Docket Nos. 040028-TP and 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 6th day of May, 2005 to the following:

Jeremy Susac
Jason Rojas
Staff Counsels
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(850) 413-6236
jsusac@psc.state.fl.us
irojas@psc.state.fl.us

Mary Campbell/Jake Jennings
New South Center
Two North Main Street
Greenville, South Carolina 29601-2719
Tel. No.: (864) 672-5877
Fax. No.: (864) 672-5313
mcampbell@nuvox.com
jejennings@newsouth.com

John J. Heitmann, Esq.
Jennifer M. Kashatus
Kelley Drye & Warren, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
Tel. No. (202) 955-9888
Fax. No. (202) 955-9792
jheitmann@kelleydrye.com
jkashatus@kelleydrye.com

Jon C. Moyle, Jr.
Cathy M. Sellers/Diana Shumans
Vicki Kaufman
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
vkaufman@moylelaw.com
dshumans@moylelaw.com
csellers@moylelaw.com


Nancy B. White

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In Re:)
)
Enforcement of Interconnection Agreement) Docket No. 040028-TP
between BellSouth Telecommunications, Inc)
and NewSouth Communications, Inc.)
_____)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S SUPPLEMENT TO
MOTION FOR SUMMARY DISPOSITION**

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") permit BellSouth to supplement the arguments contained in its Motion for Summary Disposition, filed September 13, 2004. In particular, BellSouth seeks to bring to the Commission's attention an *ex parte* letter submitted by NuVox/NewSouth to the Wireline Competition bureau of the Federal Communications Commission ("FCC") on August 5, 2002. In that submission, NuVox/NewSouth challenged BellSouth's Five State 271 application on several grounds, including, as NuVox/NewSouth described it, BellSouth's "Noncompliant Audit Requests." The FCC's resolution of this issue, while not dispositive, is certainly instructive and undermines the claims asserted by NuVox in this proceeding.

NuVox/NewSouth is not prejudiced by the submission of this supplemental argument at this stage of the proceedings. The argument comes from material that was either developed by NuVox/NewSouth itself, or was developed entirely at

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NuVox's/NewSouth's behest. It cannot be argued, thus, that the argument is a late-hour "surprise." Moreover, as the Commission knows, no decision has been made on BellSouth's motion for summary disposition, nor has there been any oral argument or other hearing in this cause (assuming the Commission later determines that either is needed). NuVox/NewSouth has time to reply, if it so chooses.

The material is important and germane to the principal defense raised by NuVox/NewSouth in this matter, *i.e.*, that BellSouth's audit efforts are non-compliant with the *SOC*. Although BellSouth, as stated in its pleadings, disagrees entirely with NuVox/NewSouth's position that the *SOC* has any bearing on the instant dispute, it is noteworthy that the FCC disagreed with NuVox/NewSouth on the very subject. It is only appropriate, thus, for the Commission to consider the following in its assessment of NuVox's/NewSouth's defense to BellSouth's Complaints.

SUPPLEMENTAL ARGUMENT

I. The FCC Did Not Credit NuVox/NewSouth's Argument, When Presented With It, That BellSouth's Audit Requests Do Not Comply With Its Orders, Including The SOC.

NewSouth¹ submitted an *ex parte* to the FCC in the Five State Section 271² proceedings on August 5, 2002, which states, among other things:

¹ Subsequent to this submission, obviously, NuVox and NewSouth merged to form "NuVox." Nevertheless, the *ex parte* was submitted by NuVox's and NewSouth's present "regional" counsel, John Heitmann, and it is clear that the companies were acting in concert, at least with respect to the present issues, at that time. Moreover, NewSouth's *ex parte* argument is the same argument, verbatim, that NuVox has made against BellSouth's audit efforts from the very beginning. The effective date of the companies' merger, thus, should be of no moment in consideration of this argument against both NuVox and NewSouth in these cases.

² *In the Matter of Joint Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act to Provide In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, WC Docket No. 02-150, *Memorandum Opinion and Order*, September 18, 2002 ("*Five State Order*").

BellSouth's satisfaction of checklist item (ii) also is marred by its *failure to comply with the [FCC's SOC] limits on its ability to audit EEL conversions*. As NewSouth and several other CLECs have demonstrated in various filings in support of NuVox's Petition for Declaratory Rulings related to ILEC audits of CLECs' compliance with the local use restrictions . . . , BellSouth insists on harassing NewSouth and other competitors *with audit requests that do not comply with the limitations on such audits established in those orders*. Until BellSouth relents from its insistence on having an ILEC consulting group conduct random audits (three months after it made its audit request, *BellSouth still has not identified a reasonable concern regarding NewSouth's compliance with the use restrictions established by the Commission*), it cannot be determined that it is providing access to UNEs in conformance with its checklist obligation.

Ltrr from J. Heitmann to M. Dortch, *In the Matter of Joint Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act to Provide In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, WC Docket No. 02-150, 8/15/02 at p. 6 (emphases added).

In the *Five State Order*, the FCC responded to the foregoing argument as follows:

We reject NewSouth's claims that BellSouth does not comply with the Commission's requirements regarding EELs audits. NewSouth alleges that BellSouth has not identified a *reasonable concern* regarding NewSouth's compliance with EELs local usage restrictions. Based on this record, *it does not appear that BellSouth's EELs audit request expressly violates a Commission rule*.

Five State Order, 17 F.C.C. Rcd. 17,595 at 17,713 ¶ 211 (emphases added).

Although the FCC did not “decide” the issue conclusively in BellSouth’s favor in the *Five State Order*, the FCC noted declaratory judgment proceedings initiated by NuVox (also represented by Mr. Heitmann), in which the issue before the FCC was “the appropriateness of EELs audits.” *Id.* In a note to this paragraph, the FCC observed that NewSouth/NuVox's "claims raise issues of *interpretation under our rules* that are more

appropriately *resolved in an enforcement proceeding* rather than the limited timeframe of a section 271 application." *Id.* n. 816.³

Importantly, the FCC has never withdrawn, clarified or modified its statement that BellSouth's specific audit approach did not expressly violate the FCC's rules or orders. Furthermore, to the extent that NuVox insists (presumably based on further interpretations of the FCC's even later *Triennial Review Order*) that the *SOC* favors its position *in this case*, the FCC, when given two opportunities to make that express statement, did not do so, thus leaving the *Five State Order* as the only official statement reflecting its view on the *specific issue now before this Commission*.

³ See *Pleading Cycle Established for Comments on NuVox, Inc. Petition for Declaratory Ruling*, CC Docket No. 96-98, Public Notice, DA 02-1302 (rel. June 4, 2002).

CONCLUSION

To be certain, the Parties *did not* agree to wholesale incorporation of the SOC -- whatever its requirements are -- into the Florida Interconnection Agreements. This should end the matter, as BellSouth has stated. However, even if one were to entertain the possibility of such incorporation, it is significant that the FCC, the agency that issued the SOC, did not view BellSouth's audit approach to be a violation of its order, *when that very issue was presented to it*. The FCC has never altered or reconsidered that position or the statement, despite having the opportunity to do so in later determinations on the subject. These are damning non-developments for NuVox/NewSouth.

Respectfully submitted this 6th day of May, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5555



R. DOUGLAS LACKEY
E. EARL EDENFIELD, JR.
THEODORE C. MARCUS
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0763