

ORIGINAL

**Matilda Sanders**

**From:** Fatool, Vicki [Vicki.Fatool@BellSouth.com]  
**Sent:** Thursday, July 01, 2004 2:50 PM  
**To:** Filings@psc.state.fl.us  
**Subject:** 040527-TP BST's Response to NuVox's Motion to Dismiss  
**Importance:** High

- A. Vicki Fatool  
 Legal Secretary to Nancy B. White  
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- B. Docket No.: 040527-TP  
 Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc.  
 and NuVox Communications, Inc.
- C. BellSouth Telecommunications, Inc.  
 on behalf of Nancy B. White
- D. 11 pages total (including letter, pleading, and certificate of service)
- E. BellSouth Telecommunications, Inc.'s Response to NuVox Communications, Inc.'s  
 Motion to Dismiss BellSouth's **Complaint**

.pdf and word version attached

<<Response to NuVox's Motion to Dismiss\_v11.DOC>> <<040527-T.pdf>>

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July 1, 2004

Mrs. Blanca S. Bayó  
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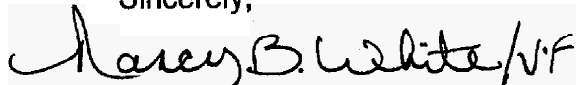
Re: **Docket No. 040527-TP**  
**BellSouth v. NuVox**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to Nuvox Communications, Inc.'s Motion to Dismiss BellSouth's Complaint, 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,

  
Nancy B. White

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

DOCUMENT NUMBER-DATE

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FLORIDA PUBLIC SERVICE COMMISSION CLERK

**CERTIFICATE OF SERVICE**  
**Docket No. 040527-TP**

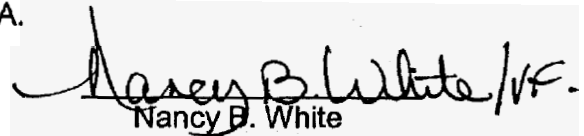
I HEREBY CERTIFY that a true and correct copy of the foregoing was served via (\*) Electronic Mail and First Class U. S. Mail this 1st day of July, 2004 to the following:

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Nancy B. White

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: July 1, 2004

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO  
NUVOX COMMUNICATIONS, INC.'S MOTION TO DISMISS BELLSOUTH'S  
COMPLAINT

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") deny the Motion to Dismiss BellSouth's Complaint filed by NuVox Communications, Inc. ("NuVox,") on June 24, 2004. NuVox has failed to establish that BellSouth's Complaint does not state a cause of action for which it may obtain relief. Indeed, BellSouth's Complaint states a compelling case for relief -- *i.e.*, that NuVox must submit to an audit of its Florida enhanced extended links ("EELs") immediately. NuVox's Motion continues its pattern of obstruction of BellSouth's contractual rights. NuVox's Motion should be denied.

DISCUSSION

In this matter, BellSouth seeks nothing more than to verify the type of traffic being placed over combinations of loop and transport network elements (*i.e.*, EELs) purchased by NuVox pursuant to the terms and conditions of the Parties' interconnection agreement, effective June 30, 2000 ("Agreement"). Starting in 2000, NuVox requested the conversion of almost 1,000 special access circuits to EELs upon self-certifying that NuVox was the "exclusive provider of local exchange service" to the end users to be

served by the circuits, and thus was providing "a significant amount of local exchange service" to those Florida customers. In accordance with the terms of the Agreement, BellSouth provisioned the conversions as requested, solely upon the self-certification provided.

For many months now, however, BellSouth has sought verification that NuVox's EELs have complied with its self-certification. The Agreement provides a mechanism -- audit -- for BellSouth to verify the status of the circuits. Under the Agreement, BellSouth must give NuVox 30 days' notice of its intent to audit the EELs, and must conduct the audit at its (BellSouth's) expense. Those are the only parameters governing the issue. Thus, although, for example, BellSouth has good reason to question NuVox's compliance with respect to the EELs (as described in BellSouth's Complaint), the existence of such cause or "concern" is *not a prerequisite* to its right or ability to audit NuVox's records for the circuits. Nor, for that matter, does the Agreement provide any opening for negotiation over who is to conduct the audit, or what the criteria should be for the selection of the auditor: both matters are contractually committed to BellSouth's discretion. NuVox has no say on either issue, and there are no extrinsic matters (*i.e.*, the vague, aspirational language of FCC pronouncements that themselves are ambiguous) that bear on the issue.

NuVox has decided that naked breach of contract is its best business course of conduct in relation to the audit of its EELs that BellSouth seeks. It uses obfuscation, red herring legal arguments and plain contumacy to avoid its obligations and to leverage itself into a position it has no right to under its contract. Its Motion is more of the same.

Regarding the merits, NuVox argues that the issues relating to BellSouth's audit rights of NuVox's *Florida* EELs under the Parties' Agreement *in Florida* has been

decided by the Georgia Public Service Commission (GPSC). Further, NuVox contends, since the GPSC has "ruled" on the matter for NuVox's *Georgia* EELs under the agreement *in Georgia*, there is nothing for this Commission to do but apply that decision here *in Florida* with respect to the Agreement governing the *Florida* EELs. This argument has been considered and rejected by this Commission before. The Commission should again reject that position.

**A. Standard of Review**

Though it is not mentioned in NuVox's pleading, the legal standard applicable to NuVox's Motion is as follows:

Under Florida law, the purpose of a Motion to Dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. . . . In order to sustain a Motion to Dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. . . . When 'determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side.'

*In re BellSouth Telecommunications, Inc.*, 2003 WL 21705234 (Fla. P.S.C. 2003) at 3 (citing *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993), and *In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, 95 FPSC 5:339 (1995)). NuVox's Motion utterly fails to meet this standard.

**B. BellSouth's Complaint States a Cause of Action for Relief.**

NuVox seeks dismissal of BellSouth's Complaint on the grounds of *res judicata* and collateral estoppel. It argues that "the parties already have litigated the identical claims and issues before the [GPSC], [the GPSC] already has evaluated these same



claims and issues under the identical relevant provisions of the Agreement," and the GPSC has "ruled on these same issues." Motion at 1-2. NuVox's argument is wholly without merit.

1. **The Commission is not bound by the GPSC's determinations.**

Assuming, for the moment, that the GPSC has ruled on the issues that are also present in this litigation (which it has not -- see below), neither the decision nor the issues resolved therein have any binding effect in these proceedings or on this Commission. The Commission's ruling in *ITC--DeltaCom Communications, Inc. v. BellSouth*, 2000 WL 1364191 (Fla. P.S.C. 2000) makes this abundantly clear, and is dispositive on the matter.

In *ITC--DeltaCom Communications*, ITC--DeltaCom sought arbitration of a complaint against BellSouth regarding intercarrier compensation for delivery of internet service provider ("ISP") traffic. In that matter, ITC--DeltaCom argued that BellSouth was required to pay it reciprocal compensation for calls placed by customers of BellSouth to ISPs served by DeltaCom under its interconnection agreement with BellSouth (which was part of multi-state, multi-agreement relationship, as in this matter). It argued, as NuVox does here, that its contractual and legal position accorded with Federal Communications Commission rulings and the rulings of various state commissions. *Id.* at 2-3.

In a motion for a summary final order, ITC--DeltaCom claimed that "five state commissions ha[d] addressed th[e] same issue in proceedings in which BellSouth was a party," and that those "commissions interpreted interconnection agreements between BellSouth and various CLECs as providing for payment of reciprocal compensation on ISP traffic." *Id.* at 3-4. Moreover, ITC--DeltaCom argued, the "Alabama PSC . . .

interpreted the very same interconnection agreement at issue in this proceeding," *i.e.*, regarding reciprocal compensation, and that the parties had argued the same positions before the APSC that were being taken before the Commission. *Id.* at 4.

On these premises, ITC--DeltaCom argued (as NuVox also does now), that the matter before the Commission had "already been fully litigated and, therefore, BellSouth [was] collaterally estopped from re-litigating whether it must pay reciprocal compensation." *Id.* The Commission rejected ITC--DeltaCom's argument in summary fashion. *Id.* at 9. In so doing, the Commission observed, "we believe that while the Alabama PSC decision is instructive, *it is not controlling* . . . [m]oreover, the decision of the Alabama PSC has been appealed to the U.S. Court of Appeals," *i.e.*, it was not "final" for preclusion purposes. *Id.* (emphasis added). The Commission then proceeded to determine the issues on the merits, and in accordance with *its* construction and interpretation of the parties' interconnection agreement. *Id.*

The Commission's decision in ITC--DeltaCom echoes other Commission precedent. *See, e.g., In re: Request for Arbitration Concerning Complaint of AT&T*, 2003 WL 1970159 (Fla. P.S.C. 2003) (although North Carolina Utilities Commission decided that provisions of interconnection agreement also at issue before Commission were "ambiguous" under applicable Georgia law, the Commission had to decide on its own whether that language was ambiguous in the proceedings before it in order to rule on motion to strike extrinsic evidence -- Commission observed that NCUC's "decision is not binding on this Commission . . ."); *BellSouth Telecommunications, Inc. v. Supra Telecommunications and Information Systems, Inc.*, 2002 WL 596196 (Fla. P.S.C. 2002) (rejecting contention that 11th Circuit's finding regarding GPSC's authority to resolve



interconnection agreement disputes under Georgia state law pursuant to choice of law clause was binding on the Commission with respect to its arbitration of dispute regarding interconnection agreement in Florida, and noting that "choice of law provision merely dictates what law we should apply in resolving such disputes"). *See also In re: DIECA Communications, Inc.*, 2004 WL 285967 (Fla. P.S.C. 2004) (New York PSC Order and Virginia Arbitration order accepting complainant's position were "not binding on this Commission" with respect to the same or similar issues raised in proceedings before the Commission).

In accordance with the cited authorities, the Commission should, once again, reject the contention that the decision of another state's administrative agency on issues before it, however similar those issues might be characterized, is binding on this Commission.

The issues to be decided in this case are whether BellSouth has a right to audit the EEL circuits at issue and, if so, under what circumstances and conditions. Both issues are to be resolved under the Parties' Agreement. That Agreement was approved by this Commission and, as such, is considered a valid, enforceable contract in Florida, regardless of the fact that Georgia law may apply to how its terms are to be interpreted by a Florida adjudicative body, or any other body. *See Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475 (5th Cir. 2000) ("... we are satisfied that the [Telecommunications Act of 1996's] grant of authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved") (citation omitted). *See also BellSouth Telecommunications, Inc. v. MCIMetro Access*

*Transmission Services Inc.*, 317 F.3d 1270, 1276 (11th Cir. 2003) ("state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252") (citation omitted). Thus, this Commission must now decide the issues raised by BellSouth's Complaint with respect to the Agreement in Florida: the GPSC has no power to bind the Commission's hands in that regard.

**2. There has been no "final order" by the GPSC.**

Putting aside the fact that any GPSC decision regarding the Parties' Georgia interconnection agreement is not binding on this Commission, NuVox's Motion additionally fails because NuVox has not established any *final* order with respect to which collateral estoppel or *res judicata* might theoretically apply.<sup>1</sup>

NuVox wants this Commission to rule, as a matter of law, that BellSouth is precluded from making its claims and is precluded from even raising issues in support of its claims, all on the basis of a decision that even NuVox acknowledges has been rendered only very recently. Whatever that decision actually says regarding the issues that might also be before this Commission (on which BellSouth is not in position to comment), it is clear that BellSouth's opportunity to seek reconsideration has not expired, nor has any opportunity for judicial review of the decision passed.

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<sup>1</sup> At page 2 of its Motion, NuVox makes the damning admission that, at the time of its Motion, there was, in fact, no written GPSC decision. NuVox states:

At this time, the Georgia Commission has voted and its written decision has yet to be released. It is NuVox's understanding that the Georgia Commission's written decision, when finalized, will adopt parts of the hearing Officer's recommendation supported by NuVox, parts of two Georgia Commission Staff recommendations, and amendments adopted by the Georgia Commissioners overruling parts of the Hearing Officer and initial Staff Recommendations. NuVox will provide the Commission with a copy of Georgia [sic] Commission's order when it becomes available.

NuVox Motion at 2, n. 2 (emphases added). Although BellSouth has not yet received its copy of the Commission's decision, and thus cannot comment on its language in relation to this Motion, BellSouth is

Thus, NuVox has referred the Commission to a GPSC "decision" that can only be regarded as incipient. Yet, for estoppel and claim preclusion purposes, NuVox insists that the matters before this Commission are fully and finally disposed of by that "decision." As the movant, it is NuVox's burden to establish the decision -- in full and final form -- with respect to which its collateral estoppel and *res judicata* positions are to be evaluated. It has not done so, which is fatal to its Motion, without more.

### CONCLUSION

NuVox's Motion should be summarily rejected. The suggestion that the Commission lacks the authority, on its own, to consider the issues before it because it is somehow bound by the decision of an administrative agency from another state is patently absurd. This is particularly obvious when one considers the argument in the context of a §252 Arbitration proceeding, where identical issues are litigated on a multi-state basis. Under NuVox's theory, the first arbitration decision from a state commission would be binding upon all other state commissions, as the parties and subject matter would be the same in each jurisdiction.<sup>2</sup> This is preposterous, and not what the Act requires or permits.

As this Commission clearly established in the *ITC--DeltaCom* matter, it is simply bad policy for the Commission to rely upon foreign administrative bodies to determine a course of action for Florida. The Florida Commission is in the best position to determine the appropriate course of action for Florida, and, in fact, is vested with the responsibility to do so. Therefore, BellSouth respectfully submits that the Commission should conduct its own hearing, determine for itself what facts are relevant, and issue an order that

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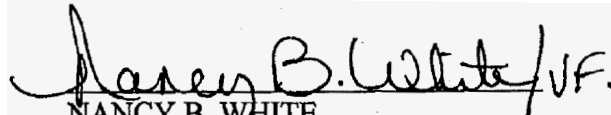
now aware that a written decision exists. BellSouth awaits delivery of that decision from the GPSC.

<sup>2</sup> Presumably, NuVox is not arguing that the GPSC acts as a supreme court with respect to all interconnection agreements in BellSouth's region that have Georgia choice of law designations. The fallacy

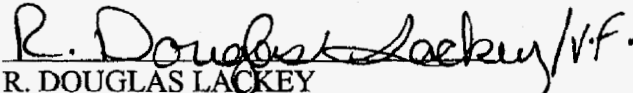
complies with Florida law.

Respectfully submitted this 1st day of July 2004.

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of that position, of course, is self-evident.