Before the
FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	
Enforcement of Interconnection Agreement	)	Docket No. 040527-TP
Between BellSouth Telecommunications, Inc. and	)	Filed: July 8, 2004
NuVox Communications, Inc.	)	

NOTICE OF FILING

NuVox Communications, Inc. ("NuVox"), through its undersigned counsel, respectfully gives Notice of Filing of the Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order of the Georgia Public Service Commission in *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U ("Order"). The Georgia Public Service Commission released the Order on July 6, 2004; the Order memorializes the actions made by that commission on May 18, 2004. NuVox referenced this decision in its Motion to Dismiss Complaint of BellSouth Telecommunications, Inc., filed with this Commission on June 24, 2004.

Respectfully submitted,

NuVox Communications, Inc.

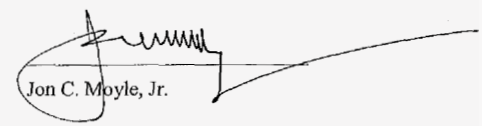
John J. Heitmann	Jon C. Moyle Jr.
Jennifer M. Kashatus	MOYLE, FLANIGAN, KATZ, RAYMOND & SHEEHAN, P.A.
KELLEY DRYE & WARREN LLP	The Perkins House
1200 19th Street, NW	118 North Gadsden Street
Suite 500	Tallahassee, Florida 32301
Washington, D.C. 20036	(850) 681-3828 (telephone)
(202) 955-9600 (telephone)	(850) 681-8788 (facsimile)
(202) 955-9792 (facsimile)	jmoylejr@moylelaw.com
jheitmann@kelleydrye.com jkashatus@kelleydrye.com	*Counsel to NuVox Communications, Inc.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was sent by U.S. Mail on this 8th day of July, 2004 to the following:

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

Nancy B. White, Esquire
General Counsel
BellSouth Communications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301



Jon C. Moyle, Jr.

Georgia Public Service Commission

244 WASHINGTON STREET, S.W.
ATLANTA, GEORGIA 30334-5701

(404) 656-4501
(800) 282-5813

FAX: (404) 656-2341
www.psc.state.ga.us

Docket No. 12778-U 12778

In Re: Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc. 73946

ORDER ADOPTING IN PART AND MODIFYING IN PART THE HEARING OFFICER'S RECOMMENDED ORDER

BY THE COMMISSION:

This matter arises from the May 13, 2002 Complaint by BellSouth Telecommunications, Inc. ("BellSouth") filed with the Georgia Public Service Commission ("Commission") against NuVox Communications, Inc. ("NuVox") to enforce the parties' interconnection agreement ("Agreement"). BellSouth asserts that it has the right under the parties' interconnection agreement to audit NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users. The facilities that BellSouth wishes to audit were initially purchased as special access facilities but were subsequently converted to enhanced extended loops ("EELs") based on NuVox's self-certification that the facilities were used to provide a significant amount of local exchange service.

In construing the interconnection agreement, it is necessary to consider the June 2, 2000 order of the Federal Communications Commission ("FCC") in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 00-183 ("*Supplemental Order Clarification*"). The parties disagree both with respect to the meaning of the FCC order, and the extent to which the order was incorporated into the Agreement.

I. STATEMENT OF PROCEEDINGS

On May 13, 2002, BellSouth filed its Complaint to enforce the parties' Commission-approved interconnection agreement. The specific relief requested by BellSouth was that the Commission resolve the Complaint on an expedited basis, declare that NuVox breached the interconnection agreement by refusing to allow BellSouth to audit the facilities NuVox self-certified as providing "a significant amount of local exchange service," require NuVox to allow such an audit as soon as BellSouth's auditors are available and order NuVox to cooperate with the auditors selected by BellSouth. (BellSouth Complaint, pp. 5-6). NuVox filed with the Commission its Answer to the Complaint on May 21, 2002. NuVox supplemented its Answer on June 4, 2002.

A. Initial Assignment to Hearing Officer

In an effort to accommodate BellSouth's request for expedited treatment, the Commission assigned the matter to a Hearing Officer for oral argument. Oral argument took place before the Hearing Officer on August 13, 2002. BellSouth and NuVox filed their briefs on October 4 and October 7, 2002 respectively. Regarding whether an audit should be allowed to proceed, the relevant questions were whether BellSouth was required to demonstrate a concern that NuVox had not satisfied the criteria of its self-certification, and whether, if required, BellSouth had demonstrated such a concern. In the event that BellSouth was permitted to proceed with the audit, NuVox objected to the auditor BellSouth intended to use charging that the auditor was not independent.

On November 5, 2002, the Hearing Officer issued an Order Denying Request to Dismiss, Deny or Stay Consideration, Denying Request to Enter an Order that the Interconnection Agreement has been Breached and Granting Request to Audit. The Hearing Officer determined that it was not necessary to reach the issue of whether BellSouth was required to demonstrate a concern because BellSouth did show that it had a concern. (November 5, 2002 Order, p. 5). The Hearing Officer based this conclusion upon BellSouth's allegations that records from Florida and Tennessee indicated that in those states an inordinate amount of the traffic from NuVox was not local. *Id.* at 8. BellSouth had asserted that, because most customers generate more local than toll calls, if NuVox were the exclusive provider, it would be expected that a significant percentage of the carrier's traffic would be local. (BellSouth October 4, Brief, p. 10). Yet, according to BellSouth, its records reflected that local traffic constituted only 25% of its traffic in one state. *Id.* at 11. An additional issue raised by NuVox was whether the auditor BellSouth intended to use, American Consultants Alliance ("ACA"), was independent. The Hearing Officer rejected NuVox's charges that ACA was not independent. (Hearing Officer's November 5, 2002 Order, pp. 8-10).

On November 26, 2002, NuVox applied to the Commission for review of the Hearing Officer's decision. NuVox challenged both the Hearing Officer's conclusions that BellSouth demonstrated a concern and that the auditor was independent. (NuVox Application, p. 2). Finding that questions remained essential to the resolution of the issues, the Commission remanded the matter to a Hearing Officer for 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." (Remand Order, p. 2).

B. Second Assignment to a Hearing Officer

As a preliminary matter, the Hearing Officer denied NuVox's request for discovery and request that the dates for this proceeding be based upon the date on which the FCC releases the Triennial Review Order. (Procedural and Scheduling Order, p. 2). On October 17, 2003, an evidentiary hearing was held before the Hearing Officer. Nuvox and BellSouth filed briefs on December 23, 2003 and December 29, 2003 respectively. On February 11, 2004, the Hearing Officer issued his Recommended Order on Complaint ("Recommended Order").

The Hearing Officer first determined that BellSouth was obligated to demonstrate a concern. The Hearing Officer based this conclusion upon evidence that in negotiating the interconnection agreement the parties were cognizant of the *Supplemental Order Clarification* and that the language of the interconnection agreement does not make it exempt from the requirements of this order to show a concern. (Recommended Order, pp. 8-9).

The Hearing Officer next determined that BellSouth demonstrated a concern that NuVox is not the exclusive provider of local exchange service. Id. at 9-10. This conclusion was based on BellSouth's identification of forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users who the Hearing Officer found also receive local exchange service from BellSouth. Id. at 9.

The Hearing Officer then found that BellSouth's proposed auditor is an independent third party auditor as required by the *Supplemental Order Clarification* and the Agreement. The Hearing Officer concluded that the evidence did not demonstrate that ACA was subject to the control or influence of, associated with or dependent upon BellSouth. Id. at 11. The Hearing Officer determined that neither the interconnection agreement nor the *Supplemental Order Clarification* requires that the auditor comply with American Institute of Certified Public Accountants ("AICPA") standards; therefore to the extent NuVox insists upon the proposed auditor's adherence to those standards, NuVox should bear the additional costs. Id.

C. Petitions for Review of the Recommended Order

On March 12, 2004, NuVox filed its Objections to and Application for Commission Review of Recommended Order on Complaint. On this same date, BellSouth filed its Petition for Review of Recommended Order.

NuVox raised numerous grounds of disagreement with the Hearing Officer's Recommended Order. First, NuVox argued that the Hearing Officer erred in finding that BellSouth demonstrated a concern. As a preliminary matter, NuVox argued that BellSouth's notice was deficient because BellSouth didn't have a concern at the time it notified NuVox of its intent to audit. (Objections, p. 2). NuVox also contended that BellSouth did not include any evidence to support the Hearing Officer's conclusion that NuVox does not provide a significant amount of local exchange service to a number of customers NuVox serves via EELs. *Id.* at 5. NuVox charged that the Hearing Officer erred in finding that BellSouth supplied evidence demonstrating BellSouth provides local exchange services to thirty or so NuVox customers served by forty-four converted EELs in Georgia. *Id.* at 6.

The second component of the Recommended Order that NuVox takes issue with is the conclusion that BellSouth is entitled to audit all of Nuvox's EELs in Georgia. NuVox stated that the scope of the audit, if approved, should be limited to those circuits for which BellSouth has demonstrated a concern. (Objections, p. 16). NuVox argued that BellSouth's alleged concern is customer and circuit specific. *Id.* at 17. NuVox also relied upon the *Supplemental Order Clarification* to support a narrower scope for any audit. The *Supplemental Order Clarification* permits only limited audits that will not be routine. (Objections, p. 17, citing to *Supplemental Order Clarification*, ¶¶ 29, 31-32).

NuVox also argued that the Hearing Officer erred in concluding that the proposed auditor is independent. The standard used by the Hearing Officer for independence was that the auditor could not be subject to the control or influence of, associated with or dependent upon BellSouth. (Recommended Order, p. 11). While NuVox did not find fault with this standard, it argued that the Hearing Officer misapplied the standard in this instance. NuVox contended that admissions by BellSouth's witness of discussions with the proposed auditor concerning matters such as the *Supplemental Order Clarification* and other audits reveal that ACA is subject to the influence of BellSouth. **(Objections, p. 19).** NuVox also claimed that ACA received training from BellSouth, and consulted with BellSouth during audits. *Id.* at 20.

Finally, NuVox requested that the Commission stay the order should it be determined that BellSouth may proceed with the audit. NuVox asserts that it will be irreparably harmed by such a Commission order. (Objections, p. 22).

BellSouth raised two points in its Petition for Review of Recommended Order. First, BellSouth requested that the Commission clarify that BellSouth is authorized to provide the auditor with records in BellSouth's possession that contain proprietary information of another carrier. BellSouth argued that review of this information is likely to uncover additional violations by NuVox. (Petition, p. 3). BellSouth argued that such records include information that may not be subject to disclosure absent an order from a regulatory agency. *Id.*

The second argument raised by BellSouth in its Petition is that the Hearing Officer erred in finding that BellSouth is required to demonstrate a concern before conducting an audit. BellSouth asserted that the *Supplemental Order Clarification* only requires that incumbent local exchange carriers ("ILECs") have a concern, not that such a concern be stated or demonstrated. In addition, the parties' interconnection agreement does not include this requirement that BellSouth demonstrate a concern, and differs from the federal law on other aspects of the audit. (Petition, pp. 11-12).

II. JURISDICTION

The 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 Georgia's Telecommunications and Competition Development Act of 1995 ("State Act"). The Commission also has jurisdiction pursuant to Section 252 of the Federal Telecommunications Act of 1996 ("Federal Act"). Since the Interconnection Agreement between the parties was approved by Order of the Commission, 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. §§ 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, 264, 329 S.E.2d 570 (1985).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. BellSouth is required to demonstrate a concern.

The first issue to address is whether BellSouth was required to demonstrate a concern that NuVox is not satisfying the terms of its self-certification. If the Commission were to determine that BellSouth need not demonstrate a concern, then it becomes a moot question as to whether BellSouth did, in fact, present evidence adequate to show that it has a concern. If the Commission determines that BellSouth must make such a showing, then the Commission must turn its attention to the evidence in the record.

There are two questions that must be answered in determining whether BellSouth must show a concern. The first question is whether the *Supplemental Order Clarification* requires that an ILEC demonstrate a concern prior to conducting this type of audit. If this question is answered in the affirmative, the next question is whether the parties' interconnection agreement opts out of this requirement.

The Commission Staff ("Staff") recommended that the Commission determine that BellSouth was required to demonstrate a concern. The *Supplemental Order Clarification* requires that the ILEC demonstrate a concern prior to conducting an audit. The *Supplemental Order Clarification* states that audits should only take place when the ILECs have a concern. (*Supplemental Order Clarification*, ¶ 31, n.86). This reading of the Supplemental Clarification Order is reinforced by the *Triennial Review Order*, which states as follows:

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order Clarification, we conclude that they share the basic principles of entitling requesting carriers unimpeded UNE access based upon self-certification, subject to later verification based upon cause, are equally applicable.

(*Triennial Review Order*, ¶ 622).

This language eliminates any ambiguity over whether the above-cited footnote in the *Supplemental Order Clarification* was intended to make the demonstration of a concern a mandatory pre-condition of these audits. Not only does the *Triennial Review Order* provide that ILECs must base audits on cause, but it states that this principle is shared by the *Supplemental Order Clarification*. At the time the parties negotiated their interconnection agreement, federal law required that BellSouth demonstrate a concern prior to conducting an audit.

BellSouth's argument that at most ILECs only have to "have" a concern, rather than an obligation to state or demonstrate the required concern has no merit. Such a construction would render meaningless the FCC's requirement. A construction that would allow BellSouth to meet the concern requirement, without so much as stating what that concern is, sets the bar unacceptably low.

Having concluded that the *Supplemental Order Clarification* requires that BellSouth demonstrate a concern, it is necessary to examine the parties' interconnection agreement. No one disputed that BellSouth and NuVox were free to contract to terms and conditions that were different than what is set forth in the *Supplemental Order Clarification*. The parties disagree over whether that was what they did.

Under Georgia law, parties are presumed to enter into agreements with regard to existing law. *Van Dyck v. Van Dyck*, 263 Ga. 161, 163 (1993). If parties intend to stipulate that their contract not be governed by existing law, then the other legal principles to govern the contract must be expressly stated therein. *Jenkins v. Morgan*, 100 Ga. App. 561, 562 (1959). The parties' interconnection agreement does not expressly state that the parties stipulated that the contract would be governed by principles other than existing law. To the contrary, the parties agreed to contract with regard to applicable law:

> 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.

(Agreement, General Terms and Conditions, § 35.1).

As stated above, the federal law provides that BellSouth must demonstrate a concern prior to proceeding with an audit. With respect to audits, the Agreement included the following provision:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records 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].

(Agreement, Att. 2, § 10.5.4).

BellSouth emphasized that parties may voluntarily agree to terms and conditions that would not otherwise comply with the law. (BellSouth Petition, p. 6). BellSouth argued that the parties negotiated specific terms and conditions for audits, and that pursuant to federal law, these are the terms and conditions that should govern their audit rights. *Id.* Specifically, BellSouth attacked NuVox's reliance on the Georgia Supreme Court's decision in *Van Dyck*, which involved the "automatic proration" of alimony or child support. The Court in *Van Dyck* concluded, *inter alia*, that because some sections of the parties' contract provided for "automatic proration" based on contingent events, the parties' failure to include the same language in the section under dispute meant that no such "automatic proration" was intended in relation to that section. *Van Dyck*, 263 Ga. at 164. BellSouth points out that NuVox and BellSouth expressly reference the *Supplemental Order Clarification* at times in the Agreement, but not with respect to the audit rights. (BellSouth Petition, p. 11). BellSouth reasons that *Van Dyck* therefore supports its position. *Id.*

BellSouth's analysis overlooks a key distinction between this case and *Van Dyck*. In *Van Dyck*, the applicable law prohibited "automatic proration," except as specifically provided for in the decree. *Van Dyck*, 263 Ga. at 163. The provision in dispute in that case did not specifically provide for "automatic proration," and the Court did not construe the provision to allow for such a proration. *Id.* Therefore, the Court found that the agreement did not reflect the intent to differ from applicable law. In contrast, BellSouth asks this Commission to conclude that the relevant law does not apply to this section of the Agreement. It is one thing to say an agreement that specifies a variance from existing law in one section reflects intent to follow existing law in a different section where no such specification is made; it is quite another to conclude that an agreement that specifies compliance with existing law in one section reflects intent to vary from existing law where no such specification is made.

BellSouth also argues that the *Jenkins* decision favors its position because the Agreement sets forth the "legal principles to govern" the terms of the audit. (BellSouth Petition, p. 12). BellSouth states that the parties agreed that the Agreement "contains language making the giving of 30 days' notice the only precondition that must be satisfied before BellSouth can conduct an audit." *Id.* The Agreement, however, does not state that the notice is the only precondition. The Agreement does not address the requirement to demonstrate a concern, and that is the specific issue in dispute. Without language evidencing intent to vary from the requirement to show a concern, it is unreasonable to conclude that NuVox intended to waive its protection under federal law.

Unless a contract is ambiguous, the finder of fact need not look any further than the language in the agreement to determine the intent of the parties. *Undercofler v. Whiteway Neon Ad, Inc.*, 114 Ga. 644 (1966). An agreement cannot be deemed ambiguous until "application of the pertinent rules of interpretation leaves it uncertain as to which of two or more possible meanings represents the true intention of the parties." *Crooks v. Crim*, 159 Ga. App. 745, 748 (1981). Construing the contractual provision in question in accordance with well-established rules of construction results in the conclusion that BellSouth is obligated to demonstrate a concern. Even if the Commission were to find the contract ambiguous, the evidence of intent

presented at the hearing supports NuVox's arguments that the parties intended for BellSouth to be obligated to show a concern prior to conducting an audit.

NuVox sponsored the testimony of Hamilton Russell, one of the NuVox employees personally responsible for negotiating the interconnection agreement. Mr. Russell testified that, during the negotiation process, the parties discussed the "concern" requirement, and that the parties agreed that BellSouth must state a valid concern prior to initiating an audit. (Tr. 278). Mr. Russell testified further that the parties agreed to strike the language proposed by BellSouth that would have allowed BellSouth to conduct the audit at its "sole discretion." (Tr. 278). The interconnection agreement does not provide that BellSouth may conduct an audit at its sole discretion, but remains silent on the "concern" requirement. Had language allowing BellSouth to conduct the audit at its sole discretion been incorporated into the final Agreement, then it may have withstood the presumption that the parties intended to contract with reference to existing law. That such language was proposed, and that NuVox balked at its inclusion, supports a finding that the parties agreed to follow the existing law as set forth in the *Supplemental Order Clarification*.

The Commission adopts the Staff's recommendation that the Agreement requires BellSouth to demonstrate a concern prior to conducting an audit. Such a concern was required under relevant law at the time the parties negotiated the Agreement, and it does not contain any language indicating that the parties did not intend to contract with reference to existing law. Even if the Agreement were found to be ambiguous, which it is not, the evidence in the record demonstrates that the parties intended for BellSouth to have to demonstrate a concern prior to conducting an audit.

B. BellSouth demonstrated a concern.

The Hearing Officer correctly explained that a 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 a concern exists." (Recommended Order, p. 9). Neither party disputed this standard.

In its effort to demonstrate a concern, BellSouth presented evidence of forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users who also receive local exchange service from BellSouth. (Tr. 96-98, BellSouth Exhibit 2 (proprietary)). BellSouth compared the name and location of each NuVox end user customer served by EEL circuits with BellSouth end user records and discovered forty-four EELs in Georgia that NuVox is using to provide local exchange service to end users that are also receiving local exchange service from BellSouth.[1] (Tr. 98). BellSouth argued that NuVox cannot be the exclusive provider of local exchange service to an end user that also receives this service from BellSouth. (Tr. 98).

[1] In her prefiled direct testimony, Ms. Padgett stated that BellSouth had identified at least forty-five circuits. This number was subsequently amended to forty-four. (*See* BellSouth's Post-Hearing Brief, p. 21).

NuVox argued that BellSouth's evidence does not show that BellSouth provides local exchange service to customers of NuVox served via converted EELs. (NuVox Post-Hearing Brief, p. 36). Through cross-examination of BellSouth's witness, NuVox explored several reasons that the customers alleged to be receiving local exchange service from BellSouth were not, in fact, receiving such service. NuVox asserted 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 Ms. Padgett testified that there were explanations for each of NuVox's assertions. First, Ms. Padgett testified that NuVox may have gotten a "not active" or "this number has been disconnected" recording for certain BellSouth customers because it appeared NuVox was dialing the wrong number or was dialing the billing number, which is not a valid telephone number. (Tr. 233-234). Ms. Padgett explained that differences in customer names may be the result of the same customer going by two different names. (Tr. 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. 175-176). An alternative explanation for a difference in address may be that the customer receives service at one address but has bills sent to a different address. (Tr. 236). Ms. Padgett also testified that digital subscriber line ("DSL") service works on the high frequency portion of a loop, while telephone service works on the low frequency portion. (Tr. 236). If the telephone number of an end user who receives DSL service is dialed, the call would still be completed. (Tr. 236). The Hearing Officer concluded that Ms. Padgett's explanations were reasonable. (Recommended Order, p. 10).

In its Objections to and Application for Review of the Recommended Order, NuVox states that BellSouth did not "prove" that it was providing local exchange service to the end use customers in question. (*See* Objections, p. 9 "does not constitute proof that BellSouth provides local service," p.10 "BellSouth Exhibit 2 cannot reasonably be found to constitute proof that BellSouth provides local service . . ."). NuVox also states that "it has never been established" that BellSouth provides service to these customers. *Id.* at 7. In making these arguments, NuVox sets the "concern" standard unreasonably high. The stated purpose of BellSouth's audit is to examine whether NuVox is complying with its certification as the exclusive provider of local exchange service. If the "concern" requirement was construed to require BellSouth to prove that NuVox was not the exclusive provider of service in order to conduct such an audit, then no audit would be necessary in the event the concern was satisfied. To state that BellSouth cannot conduct an audit unless it proves its case prior to conducting an audit is effectively stripping BellSouth of any audit rights it has under the Agreement.

BellSouth presented the Commission with evidence that supported that it had a concern that NuVox was not the exclusive provider of local exchange service. NuVox questioned the evidence, and BellSouth provided credible explanations in response to those questions. NuVox charges that these explanations were mere speculation, and that BellSouth's witness did not have

actual knowledge that these explanations were accurate. (Objections, pp. 12-13). Again, the issue is not whether BellSouth can demonstrate with certainty that NuVox is in violation of the safe harbor provision, but rather, that it has a legitimate concern. By providing credible explanations for the questions raised by NuVox, BellSouth satisfies this requirement. It is reasonable to conclude that BellSouth has stated the necessary concern.

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 converted EELs. The Commission emphasizes that the determination that the concern requirement was satisfied is fact-specific.

The Staff recommended that the Commission reject Nuvox's argument that BellSouth should have to re-file the notice of its intent to conduct an audit. The Agreement provides BellSouth may proceed with an audit upon thirty days notice. (Agreement, Att. 2, § 10.5.4). BellSouth initially relied upon data from Tennessee and Florida related to the division between local and toll calls. On remand, BellSouth raised a separate concern related to forty-four converted circuits in Georgia. NuVox argued that, because the notice issued related to the initial concern, BellSouth failed to meet this requirement in the Agreement. (Objections, pp. 2-3).

NuVox received ample notice of the concern raised by BellSouth during the remanded proceeding to the Hearing Officer. It cross-examined BellSouth extensively on the alleged concern. It sponsored witnesses to rebut the allegations of BellSouth. It briefed the issues before the Commission. The apparent intent of the notice requirement in the Agreement is to protect NuVox from BellSouth commencing an audit without NuVox having any opportunity to challenge the concern, raise any objection or otherwise prepare in an effort to minimize the disruption to its business that an audit would cause. That this order is being released two years after BellSouth filed its Complaint in this docket indicates that NuVox has not lacked for preparation. NuVox has not cited to anything that the Agreement requires as to the form of the notice. As BellSouth points out, "no particular form of written notice is required." (BellSouth Response to NuVox Objections, p. 2). Because NuVox has been on notice for more than thirty days that BellSouth intended to audit based on the concern raised with the forty-four converted circuits, allowing BellSouth to proceed with an audit without serving additional notice upon NuVox meets both the spirit and the letter of the Agreement. Furthermore, NuVox's argument is based on the incorrect premise that BellSouth's initial concern was determined to be inadequate. That is not the case. The Commission remanded the matter for an evidentiary hearing once it determined that there were significant questions of fact remaining without any evidentiary hearing.

The Commission adopts the Staff's recommendation that BellSouth satisfied the concern requirement in the Agreement. In relation to BellSouth's showing of a concern, the Staff recommended that to the extent the Recommended Order concludes that BellSouth was providing service to EELs for which NuVox has contended it is the exclusive provider, that finding should be modified to state that the Commission finds BellSouth has provided evidence indicating that it may be providing such service. The Commission does not need to reach the question of whether BellSouth is providing this service until BellSouth presents the results of ACA's audit. The Commission adopts the Staff's recommendation on this issue.

C. The scope of the audit should be limited to the forty-four EELs for which BellSouth demonstrated a concern.

The Recommended Order states that the audit should apply to all EELs. (Recommended Order, p. 10). The Staff recommended that the Commission limit the scope of the audit to converted EELs because such an order was consistent with the relief sought in BellSouth's complaint. In other words, the relief granted by the Hearing Officer on this issue surpassed the relief that BellSouth had requested.

NuVox argued that the scope of the audit should be limited to the circuits for which BellSouth has stated a concern. NuVox based this argument on both applicable facts and law. BellSouth's allegations related to the forty-four circuits do not apply to any other converted EEL circuits used by NuVox in Georgia. (NuVox Post-Hearing Brief, p. 44). In addition, the *Supplemental Order Clarification* permits only limited audits. (Nuvox Brief, p. 44, citing to *Supplemental Order Clarification* ¶¶ 29, 31-32). NuVox argued that permitting BellSouth to audit those circuits for which no concern has been raised would not constitute a limited audit. (NuVox Post-Hearing Brief, p. 44).

The Commission agrees with Nuvox that a limited audit should include only those circuits for which BellSouth has demonstrated a concern. However, the Commission does not entirely adopt NuVox's position on the scope of the audit. The Commission finds that it is reasonable to limit the audit initially to the forty-four circuits. Once the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits.

D. The auditor's access to CPNI in BellSouth's possession should be limited to those instances in which BellSouth obtains the approval of the carriers to whom the information pertains.

BellSouth requested that the Commission clarify that it is authorized to provide the auditor with records in BellSouth's possession that contain proprietary information of another carrier. BellSouth's concern was based on a comparison of NuVox records with its own records. It is possible that a customer for which NuVox has certified that it is the exclusive provider of local exchange service is also receiving this service from another carrier. The policy reason behind BellSouth's request, therefore, is that examination of these records is necessary to uncover any additional violations. (BellSouth Petition, p.3). The legal basis BellSouth offers in support of its request is that 47 U.S.C. § 222(c)(1) authorizes BellSouth to release customer proprietary network information ("CPNI") with the approval of other parties or if required by law. *Id.* at 3.

The determination of the scope of the audit disposes of BellSouth's policy argument because the Commission limited the audit to the forty-four converted circuits for which BellSouth stated a concern. The Staff recommended that the Commission reject BellSouth's legal argument. The federal statute prohibits the release of CPNI, with certain exceptions. The

exceptions in 47 U.S.C. § 222(c)(1) provide that CPNI may be released with the approval of the customer or if required by law. BellSouth is not required by law to release this information to its auditor; but rather it is requesting authorization from the Commission to do so. It does not appear consistent with the intent of the law to authorize release of the information in this instance. The Staff recommended that BellSouth only be permitted to release the CPNI with the customer's approval.

The Commission adopts the Staff's recommendation with respect to the release of CPNI to BellSouth's auditor.

E. The auditor proposed by BellSouth must be compliant with with the standards and criteria established by the American Institute of Certified Public Accountants.

The *Supplemental Order Clarification* requires that audits must be conducted by independent third parties paid for by the incumbent local exchange provider. (*Supplemental Order Clarification*, ¶ 1). The Agreement includes the following language on BellSouth's audit rights:

> 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 loca) 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.

(Agreement, Att. 2, § 10.5.4).

This language does not specifically address the issue of the independence of the auditor. BellSouth maintained that it is not required to use a third party independent auditor. It supported this position with the same argument that it used to support its position on the "concern" requirement. That is, BellSouth argued that "the only audit requirement to which the parties agreed is that BellSouth give 30-days' notice." (BellSouth Post-Hearing Brief, p. 3). NuVox disagreed, and argued that the parties did not exempt BellSouth from its obligation to conduct an audit using an independent third party auditor. (Tr. 253). This question of contract construction poses the same question as was addressed with the concern requirement. The Agreement does not expressly state either that BellSouth must show a concern or that BellSouth does not need to show a concern.

The Staff recommended that the Commission find that the *Supplemental Order Clarification* and the Agreement require that the audit be conducted by an independent third party auditor. For the reasons discussed in the analysis of the "concern" issue, the Commission adopts Staff's recommendation that the Agreement is unambiguous that the audit is required to be conducted by an independent third party.

The next question is whether the auditor selected by BellSouth is independent. NuVox vigorously objected to the Hearing Officer's conclusion that ACA satisfied this request. NuVox

argued that ACA is a small consulting shop that was dependent on ILECs for its business, and therefore could not be characterized as independent. (NuVox Post-Hearing Brief, p. 46). NuVox also claims that ACA marketing material characterizing as "highly successful" its audits that have recovered large sums for ILEC clients reflects a bias. *Id.* NuVox also complained that BellSouth's witness, Ms. Padgett admitted that she had private conversations with ACA regarding the requirements set forth in the *Supplemental Order Clarification*, before and during ongoing audits, with and without the audited party being present. (NuVox Objections, p. 19). NuVox reasons that this illustrates that ACA is subject to the influence of BellSouth. *Id.* NuVox requested that BellSouth conduct the audit using a nationally recognized accounting firm. (NuVox Post-Hearing Brief, p. 47). NuVox also contested the auditor's independence on the ground that ACA is not certified under the standards established by the AICPA. (Tr. 275).

BellSouth argues that none of these points demonstrate that ACA is not independent from BellSouth. (BellSouth Post-Hearing Brief, pp. 27-28). BellSouth counters NuVox's claims with evidence that ACA has competitive local exchange carrier clients and that BellSouth has not previously hired ACA. *Id.* BellSouth also argues that neither the Agreement nor the *Supplemental Order Clarification* required the auditor to comply with AICPA standards. *Id.* at 28.

The *Triennial Review Order*, which the FCC issued after the date of the Agreement, states that audits must be conducted pursuant to the standards established by the AICPA. (*Triennial Review Order*, ¶ 626). The question then is whether this compliance is required for audits conducted pursuant to agreements entered into prior to the issuance of the *Triennial Review Order*. NuVox's position that it should be required is based on a reading that, like with the "concern" requirement, the FCC was simply clarifying in the *Triennial Review Order* what was intended by the term "independent" in the *Supplemental Order Clarification*. (Tr. 276). BellSouth argues that the *Triennial Review Order* does not impact the parties' rights under the Agreement, and in fact, illustrates that the *Supplemental Order Clarification* did not contain this requirement. (BellSouth Post-Hearing Brief, FN 7).

The Staff recommended that the Commission find that BellSouth's auditor met the standards of independence set forth in the *Supplemental Order Clarification*, but that the Commission should consider in its evaluation of the credibility of any audit results whether the audit was conducted pursuant to AICPA standards. The Commission does not adopt the Staff's recommendation. NuVox raised serious concerns about the auditor's independence. The FCC has stated clearly not only that auditors must be independent but that the independent auditor must conduct the audit in compliance with AICPA standards. It is true that this latter standard was not clarified until after the parties entered into the Agreement; however, the parties disputed the meaning of the independent requirement prior to the issuance of the *Triennial Review Order*. NuVox always maintained that for an auditor to be independent it must comply with AICPA standards. (Tr. 275). That the FCC later identified AICPA compliance as a prerequisite of an independent audit supports a conclusion that NuVox was correct. BellSouth's argument that the inclusion of the requirement in the latter FCC Order indicates that it was not present in the former is mistaken in this instance. In the *Triennial Review Order*, the FCC gives no indication that it is reversing any portion of the *Supplemental Order Clarification*. The most logical

construction of the *Triennial Review Order* is that it is clarifying the requirement that had been in place from the prior FCC order.

In reaching this conclusion, the Commission concedes that the *Supplemental Order Clarification* did not expressly state that AICPA compliance was a prerequisite for an auditor to be deemed "independent." In fact, the *Supplemental Order Clarification* does not expound on the criteria to be considered in determining whether a third party auditor is independent. This lack of detail should not be construed to render the "independent" requirement meaningless. Rather, it leaves to the discretion of the Commission what is required to comply with the standard of independence. For guidance in reaching this determination, it is reasonable to look at other orders of the FCC. The *Triennial Review Order* gives clear guidance that compliance with AICPA standards is necessary in order for a third party auditor to be independent. The Commission finds that any audit firm selected by BellSouth itself be compliant with AICPA standards and criteria.

The Commission remains cognizant that parties are capable of negotiating and agreeing to terms and conditions that are different than the specific requirements set forth in the law. The Commission has concluded that the parties did not do so with regard to this provision of the Agreement. Therefore, the issue is whether the federal law at the time the parties entered into the Agreement required third party audits to comply with AICPA standards in order to be deemed independent. For the reasons discussed, the Commission concludes that it is a fair construction of the term "independent" to require AICPA compliance.

Regardless of whether BellSouth argues it has a contractual right to conduct an audit that does not comply with AICPA standards, as the finder of fact the Commission may decide the proper weight to afford the findings of any such audit. In light of the FCC's determination that audits should be conducted pursuant to AICPA standards, the Commission concludes that it would not afford any weight to findings from an audit that was not conducted in compliance with AICPA standards. Given that BellSouth would not be able to convert loop and transport combinations to special access services until it prevailed before the Commission, it would not make any difference if the Commission were to permit BellSouth to conduct the audit with an auditor that was not AICPA compliant. As discussed above, the Commission has concluded that BellSouth does not have this right under the Agreement; however, it is important to distinguish between the parties' arguments concerning their respective contractual rights and the Commission's discretion in evaluating the evidence.

The Staff recommended that NuVox should not have to pay the costs related to adherence to AICPA standards. The Commission agrees. The Recommended Order appeared to base the conclusion that NuVox should pay for compliance with AICPA standards on the premise that such compliance was above and beyond what had been agreed to by the parties. Given the conclusion that AICPA compliance is required by the Agreement, the basis for making NuVox pay no longer exists.

F. NuVox's Request for a Stay is denied.

NuVox requested that, should the Commission permit BellSouth to proceed with the audit, that it stay the effect of the order under O.C.G.A. § 50-13-19(d) pending the outcome of any judicial review. NuVox argues that it would be irreparably harmed if BellSouth were to proceed, that it has a likelihood of success on the merits, and that BellSouth would not be harmed if a stay was granted because if NuVox did not prevail on appeal, the time during the stay of the order would not be precluded from the audit. (NuVox Objections, p. 22). BellSouth responds that O.C.G.A. § 50-13-19(d) is inapplicable as it only applies to final orders. (BellSouth Petition, p. 11). BellSouth also argues that NuVox has not shown either that it will be irreparably harmed if the audit is allowed to proceed or that it has a likelihood of success on the merits in an appeal.

The Staff recommended that the Commission deny the requested stay. The Commission adopts Staff's recommendation. The Commission agrees with BellSouth that NuVox has not shown that it will be irreparably harmed if the audit is allowed to proceed because it could recover its out of pocket expenses should it prevail. Moreover, BellSouth will have to come back before the Commission with the findings from its audit prior to converting combinations of loop and transport network elements to special access services. In addition, NuVox has not demonstrated that it has a likelihood of success on appeal. The issue of whether BellSouth has demonstrated a concern is a question of fact, and the Commission's determination is entitled to deference on such an issue. Finally, the limited scope of the approved audit reduces any harm that NuVox can claim as a result of the Commission's decision.

IV. CONCLUSION AND ORDERING PARAGRAPHS

The Commission finds and concludes that the issues presented to the Commission for decision should be resolved in accord with the terms and conditions as discussed in the preceding sections of this Order, pursuant to the terms of the parties' interconnection agreements, the Federal Act and the State Act.

WHEREFORE IT IS ORDERED, that BellSouth was obligated pursuant to the terms of the parties' Agreement to demonstrate a concern prior to conducting an audit of NuVox's records in order to confirm that NuVox is complying with its certification that it is the exclusive provider of local exchange service to its end users.

ORDERED FURTHER, that BellSouth demonstrated a concern that NuVox was not the exclusive provider of local exchange service to the end users served via the forty-four converted EELs at issue.

ORDERED FURTHER, that to the extent the Recommended Order concludes that BellSouth was providing service to EELs for which NuVox has contended it is the exclusive provider, that finding is modified to state that BellSouth has provided evidence indicating that it may be providing such service.

ORDERED FURTHER, that BellSouth provided adequate notice, pursuant to the Agreement, of its intent to audit.

ORDERED FURTHER, that the scope of BellSouth's audit shall be limited to the forty-four circuits for which BellSouth demonstrated a concern. Once the results of this limited audit are examined, the Commission may determine that it is appropriate to expand the scope of the audit to the other converted circuits.

ORDERED FURTHER, that the auditor's access to CPNI in BellSouth's possession should be limited to those instances in which BellSouth obtains the approval of the carriers to whom the information pertains.

ORDERED FURTHER, that any audit firm selected by BellSouth must be compliant with AICPA standards and criteria.

ORDERED FURTHER, that NuVox does not have to pay for any costs related to bringing an auditor into compliance with AICPA standards.

ORDERED FURTHER, that NuVox's request for a stay is hereby denied.

ORDERED FURTHER, that except as otherwise stated the Recommended Order of the Hearing Officer is adopted.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 18th day of May, 2004.

Reece McAlister
Executive Secretary

Date: 6-29-04

H. Doug Everett
Chairman

Date: 06-29-04