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August 26, 2004

By Hand Delivery

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

Re: Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.; Docket No. 040527-TP

Dear Ms. Bayo:

On behalf of NuVox Commmunications, Inc., enclosed please find an original and fifteen copies of a Notice of Filing concerning the above-referenced docket. I would appreciate your filing the original return with the Commission, date stamping the copy, and returning the copy to my attention.

Your assistance in this matter is greatly appreciated. If you have any questions, please do not hesitate to contact our office.

Sincerely,

Christie L. Cratty
Assistant to Jon C. Moyle, Jr.

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OPC _____Enclosure
MMS _____
RCA _____
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Before the
FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	Docket No. 040527-TP
Between BellSouth Telecommunications, Inc. and	)	Filed August 26, 2004
NuVox Communications, Inc.	)	
	)	

NOTICE OF FILING

NuVox Communications, Inc. ("NuVox"), through its undersigned counsel, respectfully gives Notice of Filing of the Order on Rehearing, Reconsideration and Clarification of the Georgia Public Service Commission in *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U ("Reconsideration Order"). The Georgia Public Service Commission released the Order on August 25, 2004; the Reconsideration Order memorializes the actions made by that commission on August 17, 2004.

Respectfully submitted,

NuVox Communications, Inc.

Diana Shumans for

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Docket No. 12778-U

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

ORDER ON REHEARING, RECONSIDERATION AND CLARIFICATION

On June 30, 2004, the Georgia Public Service Commission ("Commission") issued an Order Adopting in Part and Modifying in Part the Hearing Officer's Recommended Order ("Order") in the above-styled matter. The Commission concluded that BellSouth Telecommunications, Inc. ("BellSouth") was entitled, under the parties' interconnection agreement and the applicable law, to conduct an audit of NuVox Communications, Inc.'s ("NuVox") 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. (Order, p. 15). The Order also included findings of fact and conclusions of law on the terms and conditions pursuant to which BellSouth was permitted to conduct its audit.

On July 7, 2004, BellSouth filed with the Commission a Motion for Rehearing, Reconsideration and Clarification ("Motion"). The Motion asked the Commission to reconsider its decision on the scope of the audit as well as which party must bear the costs of the audit, and asked the Commission to clarify that the Order was not intended to preclude the disclosure of customer proprietary network information ("CPNI") to the auditor pursuant to provisions of the Federal Act other than 47 U.S.C. 222(c)(1), which was specifically addressed.

Scope of the Audit

BellSouth moved for reconsideration of the scope of the audit. BellSouth argues that the Order is inconsistent with the Commission's vote at its Administrative Session. At the Administrative Session, Commissioner Burgess made the following motion, which the Commission adopted, to amend the Staff's recommendation on the scope of the audit:

> . . . [That] at this time the audit be limited to forty-four circuits which BellSouth has provided the billing information. And depending upon the outcome of that audit, then the Commission would authorize BellSouth to go forward with a full audit of the remaining 340 some circuits. That would be the amendment that I would offer at this time.

BellSouth argues that the "obvious import" of the amendment that a finding that NuVox falsely certified with respect to any customer served by the forty-four EELs audited BellSouth would be permitted to conduct a "full audit" of the remaining EELs. (Motion, p. 2). BellSouth states that the Order is inconsistent with this vote because it does not allow BellSouth to proceed with a full audit until the Commission determines whether it is appropriate to expand the scope of the audit. *Id.*

In its August 3, 2004 Reply in Support of its Motion ("BellSouth Reply"), BellSouth states that if it is required to demonstrate a concern on a "circuit-by-circuit" basis, then the

results of the audit will not be able to be used to demonstrate that concern. (BellSouth Reply, p. 3). BellSouth also argues that there is no authority for requiring BellSouth to demonstrate a concern on a "circuit-by-circuit" basis. *Id.*

On July 15, 2004, NuVox filed with the Commission its Opposition to BellSouth's Motion ("Opposition"). Nuvox argues that the Order accurately characterizes the Commission's vote at Administrative Session. NuVox states that the Commission determined that it would hold off on determining whether to expand the scope of the audit until it had the opportunity to review the findings of the limited audit. (Opposition, p. 2). NuVox states that if BellSouth finds non-compliance, "then it may attempt to raise additional concerns and it may approach the Commission to request that it be permitted on that basis to broaden the scope of the audit." *Id.* at 3.

The Staff recommended that the Commission deny reconsideration on this ground. The Order is consistent with the Commission's vote. The Order states that "[o]nce 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." (Order, p. 11). The Commission voted to expand the scope of the audit depending on the outcome of the audit of the forty-four circuits. Practically, this can only mean that the Commission may determine to expand the scope of the audit.

The Commission did not commit to allowing a full audit upon the finding of a false certification with respect to a single customer, nor did the Commission vote to set a particular standard on what specific audit findings would warrant expanding the scope. The Commission is also not requiring BellSouth to demonstrate a concern on a "circuit-by-circuit" basis with regard to the converted circuits not included in the limited audit that the Commission is approving at this time. A reasonable interpretation of the Commission vote is that it intended to evaluate the audit findings before it tied its hands on the decision of whether to expand the scope of the audit. This approach makes sense and is not legal error. After reviewing the results of the initial audit, the Commission could find, consistent with its Order, that an audit that revealed a sufficient number of violations with respect to the forty-four circuits was adequate to demonstrate a concern for other converted circuits not included in the limited audit.

The Commission adopts the Staff recommendation and denies reconsideration on this issue for the reasons outlined herein.

2. Responsibility to Pay for the Audit

BellSouth also moved for reconsideration of the Commission's finding that BellSouth was responsible for paying for the audit. BellSouth argues that because the Commission found that the parties did not evidence the intent to part from federal law on the independence of the auditor, the Commission is obligated to apply the requirements of the *Supplemental Order Clarification* as to who pays for the audit. (Motion, p. 4). The *Supplemental Order Clarification* requires competitive local exchange carriers to reimburse the incumbent if the audit uncovers non-compliance. *Id.* Finally, BellSouth argues that the language that BellSouth conduct the audit "at its sole expense" applies only if BellSouth itself conducts the audit. *Id.* NuVox argues

that the plain language of the agreement obligates BellSouth to bear the costs of the audit regardless of the outcome, and that nothing in the agreement conditions that obligation on whether BellSouth itself, as opposed to an independent auditor. (Opposition, p. 4).

The Staff recommended that the Commission deny reconsideration on this issue. In its Order, the Commission found that the parties agreed to an independent auditor. Consistent with relevant case law, parties may stipulate for other legal principles to govern their contractual relationship, but the intent to do so will not be implied. *Jenkins v. Morgan,* 100 Ga. App. 561, 562 (1959). The agreement did not indicate that the parties intended to vary from the federal law requirement that the audit be conducted by an independent auditor. Therefore, the Commission, by not impermissibly implying such intent, determined that under the contract BellSouth must use an independent auditor to conduct the audit. In contrast, BellSouth did commit expressly to pay for the audit. The intent for the audit to take place at BellSouth's sole expense is not implied. Consistent with contract law that allows parties to stipulate to terms independent from the law, BellSouth is obligated to pay for the audit.

The Commission adopts Staff's recommendation and denies reconsideration on this issue for the reasons outlined herein. BellSouth's argument that the Commission is bound to apply the terms of the *Supplemental Order Clarification* to the issue of which party pays for the audit because it applied the terms of this FCC Order in determining whether the auditor had to be independent is misguided. This argument presumes that the Commission ignored the interconnection agreement with regard to the independence of the auditor, and therefore, the Commission should ignore it again on the issue of which party must pay for the audit. That is not what the Commission did, and if it were, the proper course would be to reconsider the decision on the independence of the auditor rather than which party pays for the audit. As stated above, the Commission determined the interconnection agreement did not evidence intent to depart from federal law on the issue of the independence of the auditor, but did evidence that intent on the issue of which party was responsible for paying for the audit.

Attachment 2, Section 10.5.4 of the parties' interconnection agreement states, in part, as follows:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox's] records not more than one [sic] in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements.

This provision expressly provides that the audit is to be conducted at BellSouth's sole expense. BellSouth's argument that this only applies if BellSouth is allowed to conduct the audit itself without an independent auditor must fail for the same reasons that support the Commission's interpretation that the parties' agreement requires BellSouth to conduct the audit with an independent auditor.

While the Commission's analysis in the June 30, 2004 Order stands on its own, it is instructive that BellSouth's own pleadings on reconsideration undermine its position that by the

inclusion of the language "BellSouth may . . . audit [NuVox's] records" the parties indicated that the audit need not be conducted by an independent auditor. In its Motion, BellSouth states that "[t]he obvious import of Commissioner Burgess' amendment was that if the audit revealed that NuVox had falsely certified that it was the exclusive provider of local exchange service to any customer served by the forty-four EELs audited, then BellSouth would be permitted to conduct a 'full audit' of the remaining EELs circuits that NuVox had converted from special access services in Georgia." (Motion, p. 2) (emphasis added). BellSouth later stated that "[i]n other words, according to NuVox's logic . . . BellSouth was only entitled to audit the forty-four EELs . . ." *Id.* at 3. (emphasis added). BellSouth filed this pleading after the Commission had determined that the audit must be conducted by an independent auditor. Yet, BellSouth characterized an audit to be conducted by an independent auditor, at the request of BellSouth, as an audit that BellSouth was to conduct. This characterization by BellSouth emphasizes why the language in the interconnection agreement does not reflect any intent to vary from the parties' rights and obligations under federal law. The relevant language in its Motion is the same as the language in the interconnection agreement. While BellSouth maintains that the language in the interconnection agreement indicates that it could conduct the audit itself, it uses similar language to describe the audit that will be conducted by the independent auditor.

As stated above, the Commission has previously concluded that the interconnection agreement did not evidence intent to vary from federal law on the issue of whether an independent auditor was required. BellSouth has not moved directly for the Commission to reconsider that prior ruling. However, one of the arguments relied upon by BellSouth in moving to reconsider the issue of which party must pay for the audit is based upon the position that the interconnection agreement allowed BellSouth to conduct the audit itself. The purpose of this discussion has been to affirm the prior analyses on this issue contained in the Commission's June 30, 2004 Order, and to point out that BellSouth's pleadings on reconsideration support the Commission's earlier construction of the interconnection agreement. BellSouth has not provided any meritorious reason to reconsider the issue of which party must pay for the audit.

3. CPNI

BellSouth requests that the Commission clarify that its Order was not intended to preclude the disclosure of CPNI to the auditor pursuant to provisions of the Federal Act other than 47 U.S.C. 222(c)(1), which was specifically addressed. BellSouth argues that the Commission does not have the authority to enforce 47 U.S.C. § 222(d). NuVox responds that the clarification that BellSouth seeks would allow it to sidestep the intent of the Order and federal law. (Opposition, p. 6). NuVox also argues that BellSouth has not supported that 47 U.S.C. 222(d) justifies release of CPNI to the auditor. *Id.*

The Staff recommended that the Commission clarify that its order did not speak to 47 U.S.C. § 222(d)(2), but to specify that this clarification does not mean either that the Commission agrees that BellSouth is permitted to disclose the CPNI to an auditor under this subsection or that the Commission agrees with BellSouth's arguments that the Commission cannot enforce this subsection.

The issue before the Commission was whether to require BellSouth under 47 U.S.C. § 222(c)(1) to provide the information to the auditor. While it is true that BellSouth mentioned subsection (d) in a footnote to its Application for Review of the Hearing Officer's Recommended Order, the footnote merely stated that "arguably" BellSouth could release the CPNI under subsection (d)(2), but urged the Commission to avoid arguments over the scope of this subsection and merely order BellSouth under subsection (c)(1) to provide the information. The Commission declined to order BellSouth under subsection (c)(1) to release the information to its auditor.

The Commission adopts Staff's recommendation both with respect to the clarification of the Commission order and the terms and conditions of the clarification. BellSouth did not ask the Commission for permission to disclose CPNI under subsection (d)(2), and should it disclose the information to the auditor, it will do so at its own risk.

* * * * *

WHEREFORE IT IS ORDERED, that BellSouth's Motion to reconsider the scope of the audit is hereby denied.

ORDERED FURTHER, that BellSouth's Motion to reconsider the determination on which party must pay for the audit is hereby denied.

ORDERED FURTHER, that with regard to CPNI, the Commission clarifies that its June 30, 2004, Order did not address 47 U.S.C. 222(d); however, this clarification does not mean either that the Commission agrees that BellSouth may release the information under subsection 222(d) or that the Commission agrees with BellSouth's argument that the Commission does not have the authority to enforce this code section.

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 17th day of August, 2004.

Reece McAlister
Executive Secretary

H. Doug Everett
Chairman

Date: _____ Date: _____