

**Before the
FLORIDA PUBLIC SERVICE COMMISSION**

In re:)) Enforcement of Interconnection Agreement) Between BellSouth Telecommunications, Inc. and) NuVox Communications, Inc.) _____)	Docket No.: 040527-TP
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ANSWER OF NUVOX COMMUNICATIONS, INC.

NuVox Communications, Inc. (“NuVox”), by its attorneys, hereby files this Answer to the Complaint of BellSouth Telecommunications, Inc. to Enforce Interconnection Agreement (“Complaint”) filed with the Florida Public Service Commission (“Commission”) on June 4, 2004.

PRELIMINARY STATEMENT

BellSouth’s complaint is frivolous and should be denied. The parties’ Agreement¹, which incorporates certain auditing requirements set forth in the Federal

¹ NuVox and BellSouth have entered into a multi-state Interconnection Agreement that governs their relationship throughout the BellSouth region. The parties submitted the Agreement to each state commission separately, and each state commission has approved the Agreement. NuVox and BellSouth already have litigated before the Georgia Commission the exact same core issues and claims involving the same provisions in their Agreement raised by BellSouth in this action. *See Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Docket No. 12778-U, Order Adopting in Part and Modifying in Part the Hearing Officer’s Recommended Order (rel. June 30, 2004) (appended hereto as **Attachment 1**) (“Georgia Order”); Order on Rehearing, Reconsideration and Clarification (rel. Aug. 24, 2004) (appended hereto as **Attachment 2**) (“Georgia Reconsideration Order”). BellSouth has appealed the Georgia Order and Georgia Reconsideration Order, *see BellSouth Telecommunications, Inc. v. NuVox Communications, Inc. et al.*, Case No. 1:04-CV-2790-WSD (U.S.D.Ct. Ga.). On February 21, 2005, the North Carolina Utilities Commission adopted an order with holdings that contradict or conflict with certain of the Georgia Commission’s holdings and essentially results in the same contract language from the Agreement meaning different things in different states. Without a hearing, the North Carolina Commission also adopted alternative holdings based on contested allegations of fact. *See Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, North Carolina Commission Docket No. P-913, Sub 7, Order Granting Motion for Summary Disposition and Allowing Audit (Feb. 21, 2005). NuVox intends to appeal the North Carolina Commission’s order.

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FPSC-COMMISSION CLEAR

Communications Commission's ("FCC's") *Supplemental Order Clarification*,² does not provide BellSouth with unfettered or sole discretion to conduct an audit of all circuits converted from special access to unbundled network element ("UNE") combinations of loop and transport ("EELs").

As the Georgia Public Service Commission ("Georgia Commission") already has found in reviewing these same issues and the same relevant Agreement provisions,³ BellSouth must demonstrate a concern prior to conducting an audit of particular converted circuits:

[T]he 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.⁴

² *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

³ BellSouth fails to set forth all relevant provisions of the Agreement in its complaint. As discussed herein, section 35.1 of the General Terms and Conditions requires the parties to comply with all applicable law, including "all applicable federal, state, and local statutes, rules, regulations, codes, effective orders, decision, injunctions, judgments, awards and decrees that relate to the obligations under this Agreement...." Agreement, General Terms and Conditions, § 35.1. Pursuant to section 23 of the General Terms and Conditions, the Agreement is "governed by, and construed and enforced in accordance with, the laws of the state of Georgia." Agreement, General Terms and Conditions, § 23. Under Georgia law, laws that exist at the time and place of the making of a contract become part of it and, although parties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, such other legal principles must be expressly set forth in the contract. The Agreement contains no express exemptions from or other language conflicting with and therefore displacing the concern and independent auditor requirements established by the FCC in the *Supplemental Order Clarification*. In accordance with these provisions of the Agreement, these *Supplemental Order Clarification* requirements are incorporated into the Agreement as applicable law, and BellSouth is required to comply with them prior to proceeding with an audit. Sections 23 and 35.1 of the General Terms and Conditions are appended hereto as **Attachment 3**.

⁴ See Georgia Order at 8.

The Georgia Commission also found that BellSouth must hire an independent auditor to conduct the audit in compliance with AICPA standards.⁵ In short, the Georgia Commission's decision vindicated NuVox's rejection of BellSouth's audit request on grounds that BellSouth had failed to demonstrate a concern⁶ (the Georgia Commission found that BellSouth eventually demonstrated a concern with respect to only a small number of circuits; however, BellSouth supplied billing materials that convinced the Georgia Commission of this only days before the Georgia Commission adopted its decision and more than two years after BellSouth filed its Georgia complaint), that the audit should be limited in scope (to a small subset of converted circuits – 44),⁷ and that the auditor BellSouth selected for the audit (the same auditor proposed in this case) was not acceptable.⁸ These Georgia PSC decisions are now part of governing Georgia law which, by agreement of the Parties, governs in Florida and all other BellSouth states, as well. The relevant provisions of the Agreement do not mean different things in different states.⁹

BellSouth has not complied with the requirements of the Agreement in this case, and, therefore, NuVox is not in violation of the Agreement.¹⁰ In this case, BellSouth neither has demonstrated a concern with respect to the converted circuits it seeks to audit nor has hired an

⁵ *Id.* at 12-13

⁶ *See id.* at 5-8.

⁷ *See id.* at 11.

⁸ *See id.* at 12-14.

⁹ *See Enforcement of Interconnection Agreement between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Commission Docket No. 12778-U. In that proceeding, and in contrast to its advocacy here, BellSouth stated: “**Georgia law governs this agreement.** BellSouth’s view is what Commission better to decide what Georgia law requires than the Georgia Public Service Commission.” Georgia Hearing Tr. at 48 (Aug. 13, 2002). Relevant portions of the Georgia Hearing Transcript are appended as **Attachment 4**.

¹⁰ In Georgia, BellSouth took more than two years to produce evidence necessary to convince the Georgia Commission that it had a concern with respect to 44 circuits. In Florida, it took BellSouth more than two years to file this complaint. In September 2003, NuVox requested that BellSouth provide documentation supporting its alleged concern in Florida. More than seventeen months later, BellSouth still has not provided any documentation.

independent auditor. Notably, even if BellSouth had satisfied these prerequisites to conducting an audit, BellSouth's right to audit is limited to a review of the circuits for which it has demonstrated a concern. BellSouth cannot use the audit process as a fishing expedition to review each and every circuit, including those where no concern exists.¹¹

In sum, the Commission should deny BellSouth's complaint. After two years of litigation in Georgia and in accordance with governing law, including the Georgia Commission's decision, BellSouth knows what it must do to proceed with an audit of any of NuVox's converted EEL circuits. If BellSouth demonstrates a concern with respect to a particular circuit, then NuVox will let a truly independent auditor (not the consulting shop BellSouth currently proposes) do an AICPA-compliant audit of any circuits for which BellSouth demonstrates a concern. In the meantime, the Commission should not allow BellSouth to drain the Commission's or NuVox's resources while BellSouth reluctantly takes the steps necessary (if it proves it is so inclined to do so) to comply with the Agreement.

SPECIFIC RESPONSES

1. NuVox submits that no response is required to paragraph 1 of the complaint.
2. Subject to the clarification set forth above in the Preliminary Statement regarding the "nine-state Interconnection Agreement", NuVox admits the allegations set forth in paragraph 2 of the complaint.
3. NuVox submits that no response is required to paragraph 3 of the complaint.

¹¹ BellSouth has stated that it only seeks to audit converted circuits, not new EELs. BellSouth does not have any right to audit new EELs.

4. NuVox admits that Mr. Hamilton E. Russell, III is the name of the respondent to the complaint, but clarifies that Mr. Russell's title is Vice President Legal Affairs and the street address is 2 North Main Street, Greenville, South Carolina 29601.

5. Subject to the clarification set forth above in the Preliminary Statement regarding the "nine-state Interconnection Agreement", NuVox admits the allegations set forth in paragraph 5 of the complaint.

6. NuVox states that Section 15 of the Agreement speaks for itself and that no response is required to the first sentence of paragraph 6 of the complaint. NuVox admits that this complaint is within the Commission's jurisdiction. NuVox denies the remaining allegations set forth in paragraph 6 of the complaint. By way of further answer, NuVox disagrees with BellSouth's characterization of the dispute set forth in paragraph 6 of the complaint. In its complaint, BellSouth seeks to subject its auditing rights only to the provisions contained in Section 10.5.4 of the parties' Agreement. In addition to Section 10.5.4, however, BellSouth's auditing rights and the Commission's resolution of any dispute arising under the Agreement are subject to the concern and independent auditor requirements set forth in the FCC's *Supplemental Order Clarification*, which are incorporated into the Agreement by operation of Georgia law and Section 35.1 of the General Terms and Conditions of the Agreement.¹² The parties do not dispute that the Agreement is governed by Georgia law.¹³ Section 35.1 of the General Terms and Conditions requires each party to comply with all applicable law.¹⁴ Accordingly, as the Georgia

¹² See *Georgia Order* at 5-8 (stating that in the *Supplemental Order Clarification*, the FCC requires parties to demonstrate a concern that those requirements are incorporated into the parties' Agreement).

¹³ Agreement, General Terms and Conditions, § 23 (stating "[t]his Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.").

¹⁴ See Agreement, General Terms and Conditions, § 35.1 (stating that each Party shall comply 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

Commission already has found, the concern and independent auditor obligations set forth in *Supplemental Order Clarification* are incorporated into the Agreement by operation of Georgia law and Section 35.1 of the General Terms and Conditions of the Agreement.¹⁵ The Agreement contains no exemption from or displacement of these requirements and BellSouth has failed to comply with them. In addition, the Georgia Commission decisions are Georgia law and, therefore, are a part of the Agreement. Under those decisions, BellSouth is required to demonstrate a concern and hire an independent auditor.

7. NuVox admits the allegations set forth in paragraph 7 of the complaint.

8. NuVox admits the allegations set forth in paragraph 8 of the complaint.

9. NuVox denies the allegations set forth in paragraph 9 of the complaint. In **addition** to the audit provision contained in Section 10.5.4 of Attachment 2 to the Agreement, BellSouth's audit request must comply with certain requirements governing such audits set forth in the FCC's *Supplemental Order Clarification*. In the *Supplemental Order Clarification*, the FCC found, *inter alia*, that: (1) audits will not be routine practice and only may be conducted under limited circumstances and only when the incumbent local exchange carrier ("ILEC") has a concern that a requesting carrier is not meeting the qualifying criteria;¹⁶ and (2) such an audit must be performed by an independent third party.¹⁷

this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law....").

¹⁵ See Georgia Order at 5-8, 12-14.

¹⁶ *Supplemental Order Clarification*, 15 FCC Rcd at 9603, ¶ 31 & n.86 (stating "[t]he incumbent LECs...state that audits will not be routine practice, but will only be undertaken when the incumbent LEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange traffic...[w]e agree that this should be the only time that an incumbent LEC should request an audit.").

¹⁷ *Id.* at 9604, ¶ 31

10. NuVox admits that it received a letter from BellSouth dated March 15, 2002. NuVox states that the letter speaks for itself, and denies any suggestion in BellSouth's complaint that the letter satisfies the "Agreement's audit provision."

11. NuVox admits the allegations set forth in paragraph 11 of the complaint.

12. NuVox admits the allegations set forth in paragraph 12 of the complaint.

13. In response to paragraph 13 of the complaint, NuVox admits that it had requested the conversion of numerous circuits in Florida. **NuVox can neither confirm the number provided by BellSouth, as the time period associated with that number has not been set forth with appropriate specificity.**

14. NuVox admits the allegations contained in paragraph 14 of the complaint.

15. NuVox admits the allegations contained in paragraph 15 of the complaint.

By way of further answer, NuVox states that in the *Supplemental Order Clarification*, the FCC established three so-called "safe harbor" circumstances that allow requesting carriers to self-certify to incumbent LECs that they are complying with the FCC's temporary use restrictions by providing a significant amount of local exchange service over the converted circuits.¹⁸ NuVox states that it was its general practice to self-certify to BellSouth that it provided a significant amount of local exchange service over the converted circuits through Option 1.

16. NuVox lacks knowledge or information sufficient to admit or deny the statement set forth in paragraph 16 of the complaint. By way of further answer, NuVox states that it has repeatedly requested traffic studies from BellSouth, but BellSouth has refused to provide NuVox with any traffic studies or other documentation supporting its allegation that "in the months leading up to March 2002, that the local exchange traffic passed from NuVox to

¹⁸ *Id.* at 9598, ¶ 22.

BellSouth was inordinately low in Florida and Tennessee....” NuVox has no reason to believe that the amount of local traffic it exchanges with BellSouth in Florida is low or relevant to this case.

17. In response to paragraph 17 of the complaint, NuVox admits that it received a letter from BellSouth dated March 15, 2002. NuVox denies that BellSouth’s letter, in and of itself, gives BellSouth the right to commence an audit under the Agreement. By way of further answer, NuVox states that BellSouth is required to demonstrate a concern and to hire an independent auditor prior to conducting an audit. BellSouth did not demonstrate a concern in its letter nor did it select an independent auditor, and BellSouth has not done so with respect to Florida circuits at any point since sending NuVox that defective notice letter.

18. NuVox admits the allegations contained in paragraph 18 of the complaint. By way of further answer, NuVox states that it has refused to permit BellSouth to conduct the audit because BellSouth has not complied with the prerequisites for conducting an audit, including demonstrating a concern for the circuits to be audited and hiring an independent auditor. Moreover, BellSouth seeks to audit all converted circuits, not solely those circuits for which BellSouth now claims it has (but still has not demonstrated) a concern.

19. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 19 of the complaint.

20. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 20 of the complaint. NuVox notes that the activity described by BellSouth appears to be unlawful.

21. NuVox denies the allegations contained in paragraph 21 of the complaint. By way of further answer, NuVox states that BellSouth had not provided sufficient evidence in

support of its allegation that NuVox is not providing a significant amount of local service on each of the 44 circuits at issue in Georgia. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in the last sentence of paragraph 21 of the complaint.

22. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 22 of the complaint.

23. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in paragraph 23 of the complaint. By way of further answer, NuVox states that it has repeatedly requested that BellSouth provide records or other documentation in support of its allegations, but, to date, BellSouth has refused to provide any documentary proof in support of its claims.

24. NuVox lacks knowledge or information sufficient to admit or deny the allegations set forth in the paragraph 24 of the complaint. By way of further answer, NuVox states that it has repeatedly requested that BellSouth provide records or other documentation in support of its allegations, but, to date, BellSouth has refused to provide any documentary proof in support of its claims. NuVox also notes that the audit at issue is an annual audit pertaining to the year leading up to March 15, 2002. While NuVox has a continuing obligation to ensure that it is providing a significant amount of local service to customers served via converted EELs, it has no obligation to ensure that it remains the customers sole provider of local service beyond the date of its certification.

25. NuVox denies the allegations contained in paragraph 25 of the complaint. By way of further answer, NuVox states that BellSouth's tariffed special access rates may be applicable to circuits that do not comply with the significant local use requirement. BellSouth is not automatically entitled to rerate these circuits to special access rates on the basis of an

incorrect certification. As stated above, the FCC specified three so-called safe harbor circumstances that allow requesting carriers to self-certify to incumbent LECs that they are complying with the FCC's temporary use restriction. If a converted circuit does not qualify under the option pursuant to which it was certified, that converted circuit still might satisfy one of the remaining two safe harbors.

26. NuVox denies the allegations contained in paragraph 26 of the complaint.

27. NuVox denies the allegations contained in paragraph 27 of the complaint.

By way of further answer, under the Agreement, BellSouth must file a post-audit complaint with the Commission if it seeks a redress as a result of the audit.¹⁹

28. NuVox denies the allegations contained in paragraph 28 of the complaint.

By way of further answer, as the Georgia Commission already has found, NuVox was and remains correct in insisting that BellSouth is required to demonstrate a concern and to retain an independent auditor prior to conducting an audit.²⁰ BellSouth has done neither in this case. Moreover, BellSouth is not permitted to conduct a full-scale audit of all converted circuits; BellSouth only may audit those circuits for which it demonstrates a concern.²¹

29. NuVox denies the allegations contained in paragraph 29 of the complaint.

By way of further answer, as the Georgia Commission already has found, BellSouth is required to demonstrate a concern and to appoint an independent auditor to conduct the audit.²² BellSouth has done neither in this case.

¹⁹ See Agreement, Att. 2, § 10.5.4 (stating “[i]f, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the combinations 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”).

²⁰ See Georgia Order at 5-8, 14.

²¹ *Supplemental Order Clarification*, 15 FCC Rcd at 9603, at note 86; see also Georgia Order at 11.

²² See *id.*; see also Georgia Order at 5-8, 14.

30. NuVox admits the first sentence of paragraph 30 of the complaint. By way of further answer, contrary to BellSouth's allegation, as the Georgia Commission already has found, the Agreement incorporates the concern, (which BellSouth seems to refer to in its complaint as the "reason") and independent auditor requirements of the FCC's *Supplemental Order Clarification* and requires BellSouth to demonstrate a specific, bona fide and legitimately related concern that NuVox has not met the criteria to which it certified compliance.²³ Indeed, BellSouth initially agreed with NuVox that the language of footnote 86 in the *Supplemental Order Clarification* required BellSouth to disclose to NuVox its concern that prompted the audit request.²⁴ BellSouth has not demonstrated a concern with respect to any converted EEL circuit in this case.

Because the *Supplemental Order Clarification* contemplates that audits will be rare and only undertaken for the purpose of pursuing a legitimate and rationally related concern regarding compliance, the audit must not begin prior to BellSouth demonstrating a specific concern for each circuit at issue. BellSouth's lack of a specific, bona fide and legitimately related concern regarding NuVox's compliance on each circuit it seeks to audit demonstrates that BellSouth seeks an audit that is not permitted.

NuVox denies the remainder of the allegations set forth in paragraph 30 of the complaint. By way of further answer, NuVox states that the Agreement specifically imposes a requirement on BellSouth that BellSouth must demonstrate a concern prior to conducting an

²³ *Id.*

²⁴ See Georgia Hearing Tr. at 12, ll. 5-22; 13, ll. 1-7; 18, ll. 21-23; and 19, ll. 1-6; see also Email correspondence between John Heitmann, Kelley, Drye & Warren LLP, and Shelley Walls, BellSouth (Mar. 27, 2002, Mar. 19, 2002) (appended hereto as **Attachment 5**); Email from Parkey Jordan, BellSouth, to John Heitmann, Kelley Drye & Warren LLP (Apr. 1, 2002) (appended hereto as **Attachment 6**).

audit.²⁵ Moreover, the Georgia Commission already has found that, under governing Georgia law, such a requirement exists. KPMG commenced an audit of 44 converted Georgia EEL circuits in November. KMPG is still conducting its audit as of this date.

31. NuVox admits the allegations contained in the first sentence of paragraph 31. NuVox denies the allegations contained in the remainder of paragraph 31. By way of further answer, NuVox notes that in stating the allegation, BellSouth shifts from properly characterizing the dispute as being over the auditor's independence to whether both parties must agree on the choice of auditor prior to commencing the audit. BellSouth's slight-of-hand, however, does not cure its failure to select an independent third party auditor. In the *Supplemental Order Clarification*, the FCC explicitly requires the auditor to be independent.²⁶ Moreover, the Georgia Commission agreed that the auditor must be independent and capable of performing an AICPA-compliant audit; thus, BellSouth's requested auditor was not acceptable.²⁷

BellSouth has proposed to use as auditor a consulting enterprise that is incapable of performing an AICPA-compliant audit on its own and that has demonstrated a lack of discretion and good judgment by engaging in private mid-audit conversations with BellSouth without the audited party present.²⁸ An independent auditor simply would not privately seek BellSouth's help in conducting an audit. Yet, the record in the Georgia proceeding demonstrates that it did so. Moreover, the principals of BellSouth's proposed auditor each have had prior careers with ILECs and their present consulting shop has a client base that appears to be

²⁵ See Agreement, Att. 2, § 10.5.4; Agreement, General Terms and Conditions, 35.1 (stating that the parties are subject to all applicable federal and state law, which incorporates the *Supplemental Order Clarification*).

²⁶ *Supplemental Order Clarification*, 15 FCC Rcd at 9604, ¶ 31.

²⁷ See Georgia Order at 12-14 (stating that 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.").

²⁸ See Georgia Hearing Transcript at 198, ll. 14-25; 196, ll. 1-5; 201, ll. 8-25; and 202, ll. 1-16.

composed almost entirely of ILECs and ILEC affiliates. In addition, in its proposal to BellSouth, the proposed auditor touts its success in using audits to recover millions of dollars for its ILEC clients. These circumstances suggest a biased notion of what would constitute a “successful audit” and an overall bias that would be difficult to overcome, notwithstanding the best of intentions.

32. NuVox denies the allegations set forth in paragraph 32 of the complaint. Although there are several additional issues that NuVox would prefer to have resolved prior to initiation of an audit, NuVox and BellSouth previously agreed that they could be addressed in a state commission complaint filed by BellSouth, which is required under Section 10.5.4 of the Agreement prior to BellSouth’s taking action on any finding of non-compliance.²⁹ For example, BellSouth has stated its intention to reconvert to special access any circuit found not to be in compliance and to charge a special access nonrecurring charge for doing so. In such instance, BellSouth, however, only would be entitled to the same billing change charge that applied to the original conversion. In addition, NuVox has previously indicated its consent to BellSouth’s assertion that BellSouth must pay for the cost of the audit and that any audit to be conducted will cost NuVox nothing, regardless of the results.

33. NuVox denies the allegations contained in paragraph 33 of the complaint. The record compiled before the Georgia Commission reveals that, in negotiating their interconnection agreement, the Parties agreed to delete language that could have been interpreted to provide BellSouth with the sole discretion to conduct, and thus have an unconditional right to, an audit.³⁰ Contrary to BellSouth’s assertion that it has an “unconditional right” to audit

²⁹ Section 10.5.4 of the Agreement provides that BellSouth may invoke the dispute resolution provisions of the Agreement and file a complaint with the Commission if an audit determines that certain circuits are not in compliance with the FCC’s temporary use restriction.

³⁰ See Georgia Order at 8 (citing Georgia Hearing Tr. at 278).

NuVox's records, the FCC made clear in the *Supplemental Order Clarification* that BellSouth's right to audit is limited. The Agreement incorporates these components of the *Supplemental Order Clarification*. Specifically, the FCC found that: (1) audits will not be routine practice and may be conducted only under limited circumstances and only when the ILEC has stated a concern that the requesting carrier is not meeting the qualifying criteria; and (2) such an audit must be performed by an independent third party, which is hired and paid for by the ILEC.³¹

CAUSES OF ACTION

34. NuVox incorporates its responses to paragraphs 1-33 as if set forth fully herein.

35. NuVox denies the allegations set forth in paragraph 35 of the complaint, to the extent that BellSouth claims that NuVox has breached the Agreement or continues to breach the Agreement. NuVox admits that the Agreement is governed by Georgia law.

36. NuVox denies the allegations set forth in paragraph 36 of the complaint. By way of further answer, NuVox states that this complaint does not pertain to damages; the purpose of this proceeding is solely to determine whether BellSouth is permitted to conduct an "annual audit" for the period ending March 15, 2002. If BellSouth were to seek any damages, pursuant to the Agreement, it would need to file a post-audit complaint.³²

37. NuVox denies the allegations set forth in the first sentence in paragraph 37 of the complaint. By way of further answer, BellSouth is not permitted to conduct an audit of all converted circuits. Further, as stated above, BellSouth is not required to conduct an audit of any circuit until BellSouth has demonstrated a concern, which it has not done. NuVox lacks

³¹ *Supplemental Order Clarification*, 15 FCC Rcd at 9587, ¶ 1; 9603, ¶ 31 & n.86.

³² *See supra* note 29.

knowledge or information sufficient to admit or deny the allegations contained in the second sentence of paragraph 37 of the complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE: UNCLEAN HANDS

1. BellSouth's repeated refusals to demonstrate a concern with respect to the converted circuits it seeks to audit is in violation of the Agreement which incorporates the *Supplemental Order Clarification's* requirement that BellSouth must demonstrate a concern prior to conducting an audit. *See infra* at 2 (quoting Georgia Order at 8). Despite NuVox's repeated requests, BellSouth has failed to demonstrate any "concern" with respect to the converted EEL circuits that it seeks to audit. Therefore, BellSouth's repeated refusals to demonstrate a concern bar BellSouth's claims in this case.

2. BellSouth steadfastly has refused to conduct its audit with persons that are independent third party auditors, as required by the Agreement, which incorporates the independent auditor requirement set forth in the *Supplemental Order Clarification*. *See infra* Answer at 2 (citing Georgia Order at 12-13). NuVox has raised legitimate doubts about the independence of ACA, the company that BellSouth selected to perform the audit. Indeed, as a result of the Georgia Order, BellSouth is using an AICPA-complaint auditor, KPMG for its Georgia audit. In Florida, however, BellSouth refuses to respond to these concerns and steadfastly refuses to conduct the audit with AICPA-compliant auditors, and instead insists on using ACA. Therefore, BellSouth's repeated refusals to obtain an independent auditor to conduct the audit bar BellSouth's claims in this case.

3. The parties' rights and obligations under the Agreement are governed by Georgia law. Agreement, § 23. Under Georgia law, "unclean hands" bars a complainant from

obtaining relief if the litigant has engaged in misconduct “directly relat[ing] to the subject matter of the transaction concerning which relief is sought.” *Rose v. Cain*, 247 Ga. App. 481, 485, 544 S.E.2d 453, 457 (2000); *see also Fuller v. Fuller*, 211 Ga. 201, 202, 84 S.E.2d 665 (1954); O.C.G.A. § 23-1-10 (2003) (“[h]e who would have equity must do equity and must give effect to all equitable rights of the other party respecting the subject matter of the action”). The law embodies the concept that “one will not be permitted to take advantage of his own wrong.” *Dobbs v. Dobbs*, 270 Ga. 887, 888, 515 S.E.2d 384, 385 (internal citations omitted). Because BellSouth has failed to comply with the Agreement’s concern and independent auditor requirements, which are incorporated into the Agreement via sections 23 and 35.1 of the General Terms and Conditions, BellSouth cannot pursue its complaint against NuVox.

SECOND AFFIRMATIVE DEFENSE: BREACH OF CONTRACT:
FAILURE TO SATISFY CONDITION PRECEDENT

4. NuVox incorporates by reference its allegations in paragraphs 1-3 of its Affirmative Defenses as if set forth fully herein.

5. Under the Agreement, BellSouth is required to demonstrate a concern prior to conducting an audit and to hire an independent auditor to conduct such an audit. BellSouth has failed to demonstrate a concern and has failed to hire an independent auditor.

6. Accordingly, it was BellSouth that materially breached the Agreement and failed to satisfy a condition precedent to its ability to conduct an audit. Thus, BellSouth is precluded from any recovery against NuVox.

THIRD AFFIRMATIVE DEFENSE: WAIVER

7. NuVox incorporates by reference its allegations in paragraphs 1-6 of its Affirmative Defenses as if set forth fully herein.

8. Upon information and belief, BellSouth is prohibited from recovering against NuVox by the doctrine of waiver because BellSouth's own actions prevent it from making claims against NuVox.

FOURTH AFFIRMATIVE DEFENSE: COLLATERAL ESTOPPEL

9. NuVox incorporates by reference its allegations in paragraphs 1-8 of its Affirmative Defenses as if set forth fully herein.

10. BellSouth already has litigated the same core legal issues raised in this action before the Georgia Commission, and the Georgia Commission has rendered a final decision on the merits. Both NuVox and BellSouth were parties to that litigation, and BellSouth had a full and fair opportunity to present its claims before that commission.

11. Accordingly, BellSouth is barred from relitigating these same core legal issues in this forum by the doctrine of collateral estoppel.

FIFTH AFFIRMATIVE DEFENSE: RES JUDICATA

12. NuVox incorporates by reference its allegations in paragraphs 1-11 of its Affirmative Defenses as if set forth fully herein.

13. BellSouth already has brought these same causes of action against NuVox in a suit before the Georgia Commission. The Georgia Commission rendered a final judgment of those causes of action on the merits. Accordingly, BellSouth is barred by the doctrine of res judicata from relitigating the same causes of action in this forum.

SIXTH AFFIRMATIVE DEFENSE: FULL FAITH AND CREDIT

14. NuVox incorporates by reference its allegations in paragraphs 1-13 of its Affirmative Defenses as if set forth fully herein.

15. The Georgia Commission already has rendered a final decision on the same cause of action and the same issues that are present in this proceeding. Under the Full Faith and Credit Clause of the United States Constitution, the Commission may be required to render a decision consistent with the Georgia Commission decision. *See Global Naps, Inc. v. Verizon New England Inc.*, 332 F.Supp.2d 341 (D. Mass. 2004).

PRAYER FOR RELIEF

1. For the reasons stated above, NuVox requests that the Commission deny BellSouth's corresponding prayer for relief.

2. Nuvox requests an evidentiary hearing pursuant to section 120.57(1) and section 120.569, Florida Statutes so that disputed issues of material fact may be resolved. Among the issues of material fact in dispute are:

a. Whether the parties intended to incorporate into the Agreement the *Supplemental Order Clarification's* concern and independent auditor requirements;

b. Whether BellSouth demonstrated concern sufficient to justify an audit of particular converted circuits;

c. Whether the auditor selected by BellSouth to perform an audit is independent and authorized to transact business in the State of Florida; and

d. Whether BellSouth seeks to audit circuits that were not converted at the time of its March 15, 2002 notice.

3. NuVox requests that the Commission deny BellSouth's request to use any and all records of its own or its selected auditor's choosing, including records that contain customer proprietary network information (CPNI) and records that are carrier proprietary information (CPI). Under section 222 of the Communications Act of 1934, as amended (the

“Act”), carriers only are permitted to use CPNI and CPI for the purpose of providing the telecommunications services requested. The information that BellSouth already has used – CPNI and NuVox CPI – and the information that BellSouth seeks to use – more CPNI and CPI (including third party CPI) – was provided solely for the purpose of BellSouth’s provision of UNEs and other services. The purpose for which BellSouth intends to use CPNI and CPI is not permitted under the Act, and the Commission should not sanction BellSouth’s misuse of CPNI and CPI. Any audit conducted should be limited to an audit of NuVox’s records.³³

4. NuVox requests that the Commission deny BellSouth’s request for interest. Neither Section 10.5.4 of the parties’ Agreement nor the *Supplemental Order Clarification* provide for interest. Moreover, as stated above, the issue of damages, if any, is not properly part of this proceeding.

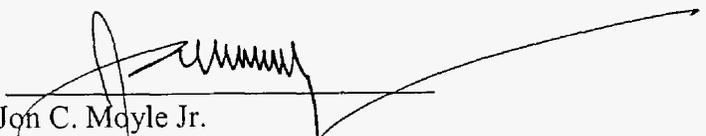
³³ Agreement, Att. 2, § 10.5.4; *Supplemental Order Clarification*, 15 FCC Rcd at 9603-04, ¶¶ 29, 31-32 (limiting the scope of audits).

WHEREFORE, NuVox respectfully requests that the Florida Public Service Commission deny BellSouth's complaint and all of the relief sought forth therein and grant NuVox's Affirmative Defenses.

Respectfully submitted,

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February 23, 2005

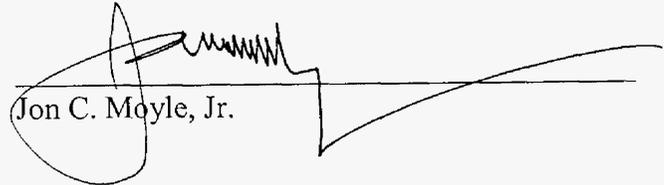
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to the below-listed parties marked with an asterisk, and by U.S. Mail to the below-listed parties not marked with an asterisk, on this 23rd day of February, 2005.

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Jon C. Moyle, Jr.

NuVox Communications, Inc.
Docket No. 040527-TP
February 23, 2005

Attachment 1

Docket No. 12778-U

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

**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.

(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 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.

(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.

E. 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

H. Doug Everett
Chairman

Date: _____

Date: _____

Attachment 2

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.

1. 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: _____

NuVox Communications, Inc.
Docket No. 040527-TP
February 23, 2005

Attachment 3

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., (“BellSouth”), a Georgia corporation, and TriVergent Communications, Inc. (“TCI”), a South Carolina corporation, on behalf of itself and its certificated operating affiliates identified in Part C hereof, and shall be deemed effective as of June 30, 2000. This Agreement may refer to either BellSouth or TCI or both as a “Party” or “Parties “.

WITNESSETH

WHEREAS, BellSouth is an incumbent local exchange telecommunications company (“ILEC”) authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, TCI is an alternative local exchange telecommunications company (“CLEC”) authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, the Parties wish to resell BellSouth’s telecommunications services and/or interconnect their facilities, for TCI to purchase network elements and other services from BellSouth, and to exchange traffic specifically for the purposes of fulfilling their applicable obligations pursuant to sections 251 and 252 of the Telecommunications Act of 1996 (“the Act”).

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and TCI agree as follows:

1. **Purpose**

The resale, access and interconnection obligations contained herein enable TCI to provide competing telephone exchange service to residential and business subscribers within the territory of BellSouth. The Parties agree that TCI will not be considered to have offered telecommunications services to the public in any state within BellSouth’s region until such time as it has ordered services for resale or interconnection facilities for the purposes of providing business and/or residential local exchange service to customers. Furthermore, the Parties agree that execution of this agreement will not preclude either party from advocating its position before the Commission or a court of competent jurisdiction.

BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change.

- 21.3 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.
- 21.4 Execution of this Agreement by either Party does not confirm or infer that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).
- 21.5 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of TCI or BellSouth to perform any material terms of this Agreement, TCI or BellSouth may, on fifteen (15) business days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within forty-five (45) business days after such notice, the Dispute may be referred to the Dispute Resolution procedure set forth in Section 12. In the event that the Parties reach agreement as to the new terms consistent with the above, the Parties agree to make the effective date of such amendment retroactive to the effective date of such Order consistent with this section, unless otherwise stated in the relevant Order.

22. **Waivers**

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.

23. **Governing Law**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia.

not in any way disparage or discriminate against the other Party or its products or services.

35. **Compliance with Applicable Law**

35.1 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.

35.2 Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

36. **Labor Relations**

Each Party shall be responsible for labor relations with its own employees. Each Party agrees to notify the other Party as soon as practicable whenever such Party has knowledge that a labor dispute concerning its employees is delaying or threatens to delay such Party's timely performance of its obligations under this Agreement and shall endeavor to minimize impairment of service to the other Party (by using its management personnel to perform work or by other means) in the event of a labor dispute to the extent permitted by Applicable Law.

37. **Compliance with the Communications Law Enforcement Act of 1994 ("CALEA")**

Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with CALEA. Each Party shall indemnify and hold the other Party harmless from any and all penalties imposed upon the other Party for such other Party's noncompliance, and shall at the non-compliant Party's sole cost and expense, modify or replace any equipment, facilities or services provided to the other Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

38. **Arm's Length Negotiations**

This Agreement was executed after arm's length negotiations between the undersigned Parties and reflects the conclusion of the undersigned that this Agreement is in the best interests of all Parties.

Attachment 4



BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

In the Matter of: :

Enforcement of Interconnection :
Agreement Between BELLSOUTH :
TELECOMMUNICATIONS, INC. and NUVOX : Docket 12778-U
COMMUNICATIONS, INC. :

244 Washington Street
Atlanta, Georgia

Friday, October 17, 2003

The above-entitled matter came on for hearing
pursuant to Notice at 10:00 a.m.

BEFORE:

JEFFREY STAIR, Hearing Officer

CROSS EXAMINATION

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BY MR. HEITMANN:

Q Morning, Ms. Padgett.

A Good morning.

Q Ms. Padgett, on page 1 and 2 of your testimony, it states that you work for BellSouth Marketing, is that correct?

A I'm sorry, did you say page 1?

Q Pages 1 and 2 of your testimony.

A 1 and 2.

Q I believe it states that you work in some capacity for BellSouth's marketing organization, is that correct?

A I work for BellSouth Telecommunications in the Interconnection Services Marketing Organization

Q How is it that you market interconnection services to companies like NuVox?

A BellSouth markets its interconnection services via an interconnection sales force, advertising in trade publications.

Q Is your testimony today part of that marketing effort?

A No, it's not.

Q Now Ms. Padgett, you didn't negotiate the interconnection agreement at issue in this case, did you?

A No, I didn't. However, I am very familiar with

1 A I'm sorry, would you state that again, please?

2 Q With respect to an exclusion from Georgia law, an
3 exclusion from the applicability of the Supplemental Order
4 Clarification and an exclusion from the requirement within
5 that order that BellSouth needs to have a concern prior to
6 conducting an audit and the requirement in that order that
7 BellSouth needs to state -- to hire an independent auditor,
8 would you agree with me that the agreement is, at best,
9 silent on those issues?

10 A As to the first three parts of that, I agree with
11 you the agreement does not state affirmatively that the
12 parties exclude those particular issues. However, again,
13 the parties did agree as to what they would include and I
14 got lost after the first three.

15 Q Okay. The first three -- I think we can end up
16 with the latter two, which I just want to confirm is the
17 requirement that BellSouth have concern. Is the agreement
18 silent on that point?

19 A The agreement is silent on that point.

20 Q With respect to the requirement that BellSouth
21 hire an independent auditor, you would argue the agreement
22 is silent on that point?

23 A May I look at the terms?

24 Q Sure. Do you have a copy of the general terms
25 with you?

1 those 44 circuits in a little while, but when you state that
2 BellSouth is also providing service to those end users, do
3 you mean local exchange service? What kind of service do
4 you mean?

5 A Local exchange service.

6 Q Ms. Padgett, I'm looking at language on page 8 of
7 your testimony with regard to the concern still, and I want
8 to ask you is there any language in the interconnection
9 agreement that conflicts with or trumps the concern
10 requirements set forth in the Supplemental Order
11 Clarification?

12 A I'm sorry, where did you say you were looking?

13 Q Page 8 of your testimony. Again, with respect to
14 the concern requirement. In particular, you state that
15 NuVox never sought to add language requiring BellSouth to
16 demonstrate the concern. My question to you is is there any
17 language in the interconnection agreement that conflicts
18 with, trumps or excludes that concern requirement.

19 A No, but once again, the parties set forth
20 limitations as to when it would occur, they did not list
21 anything about a concern. And again, BellSouth has shown
22 that we do have a concern, we have more than a concern, we
23 have actual cases where it's clear that NuVox isn't
24 complying with the certification.

25 Q Now is there any language in the interconnection

1 agreement that trumps or conflicts with the requirement that
2 you hire an independent auditor?

3 A There is not anything necessarily that
4 specifically excludes it, but again, the language is pretty
5 clear, it just says BellSouth may conduct the audit, doesn't
6 say anything at all about a third party auditor.

7 Q I'm looking at page 9 of your testimony, lines 17,
8 through 21, continuing on to page 10. This is with respect
9 to who would pay for the audit. Now has BellSouth's
10 position with respect to who pays for this audit been
11 consistent since March 15 of 2002?

12 A BellSouth has made various offers in the context
13 of settling this disagreement with NuVox that differ from
14 that, yes.

15 Q In the notice of the audit, the March 15 letter,
16 which I believe is attached to your testimony, I believe
17 it's SWP-1, is that correct? No, it's not, bear with me one
18 second. It's actually attached to the testimony of Mr.
19 Russell, Exhibit HER-1.

20 Doesn't BellSouth state that the Supplemental
21 Order requires that NuVox pay for 20 percent -- pay for the
22 audit if 20 percent non-compliance is found?

23 A No, it doesn't say that. I do understand how you
24 could read it that way, but that's not what the letter
25 intended to say and again, as I stated in my testimony,

1 each audit to be conducted the same way. This was the first
2 of those audits.

3 Q Okay. On page 6 of that exhibit, Ms. Padgett, is
4 sort of a conclusion statement by BellSouth. Could you read
5 what it says on page 6 for me, please?

6 A Certainly.

7 "BellSouth has fully complied with the FCC's
8 Orders in exercising its right to audit by:

9 "Conducting audits only when it has
10 a concern that the safe harbors are not
11 being met

12 "By hiring an independent auditor."

13 Q It seems to me -- does this seem to state that
14 BellSouth thinks concern is required by the FCC's order?

15 A No, we don't think that, BellSouth does not
16 believe it's a requirement. We chose, however, to do that
17 for business reasons, for reasons of making sure that the
18 audits were not questioned in terms of bias, but primarily
19 because we don't want to go audit when there doesn't appear
20 to be any reason to do it, when we have to pay for the audit
21 if there's no non-compliance there.

22 Q So your testimony today is that this sheet from
23 page 6, BellSouth is not telling the FCC, listen, we're
24 complying with your orders because we tell carriers a
25 concern and we hire an independent auditor? This says

1 BellSouth had nine separate interconnection agreements on
2 its website for NuVox and BellSouth?

3 A No, I am not aware of that.

4 Q Are you aware that now there's only one, that
5 BellSouth subsequently changed it?

6 A No, I don't know how the public website deals with
7 the different records. It may be that they're separated by
8 state, may not, I don't know, haven't looked at it.

9 Q Let's move on to issue number 3, which is the
10 independence of the auditor, the auditor you selected. And
11 you mentioned before that you selected this entity, ACA, to
12 conduct all your EEL audits, is that correct?

13 A That's correct.

14 Q And when they conduct it, do you continue to
15 confer with them about what they found and whether it's a
16 violation or not?

17 A No, we don't. They do keep me posted on the
18 status as they go through an audit. They tell me what kinds
19 of information they're getting, that's the extent of it.

20 Q While the audit is going on?

21 A Yes.

22 Q Hmm. Before you engaged ACA to conduct this
23 audit, had you discussed the Supplemental Order
24 Clarification requirements at all with them?

25 A Yes. As part of the interview process, we asked

1 them to go through it with us and asked them a couple of
2 questions about their understanding, because our experience
3 had been that most auditing firms had no idea even what it
4 was.

5 Q Now are you familiar with -- actually I'm sure you
6 are actually, because you sent them to us -- the documents
7 that you sent to us regarding ACA and the exhibits that Mr.
8 Russell attached to his testimony regarding ACA?

9 A Yes, I am.

10 Q Could I point your attention to Exhibit HER-8
11 attached to Mr. Russell's testimony?

12 A Okay.

13 Q Could you describe what this document is for me?

14 A This document is part of the initial proposal that
15 ACA sent to BellSouth, it's an exhibit listing their typical
16 engagements.

17 Q Are you familiar with some of the companies named
18 on this exhibit?

19 A Some of them, yes.

20 Q Is Centel an ILEC?

21 A Where are they on here?

22 Q The second bullet.

23 A I looked them up in the LURG and they're listed as
24 a reseller and a ULEC. I don't know what that means.

25 Q Is Ameritech an ILEC?

1 of their business case in general.

2 Q Now when they do audits -- I think I saw some
3 evidence that they do some PIU, PLU reporting audits -- are
4 PIU and PLU reporting typically done by an independent
5 auditor? Are those sorts of audits done by an independent
6 auditor?

7 A To my knowledge, they are, yes.

8 Q On page 2 of that letter, Mr. Fowler, who wrote
9 the letter on behalf of American Consultants Alliance, says
10 he's currently conducting an audit of carrier's conversion
11 from special access rates to UNEs on behalf of Sprint. Did
12 you consult with him about how that audit was going?

13 A I have asked him since this time and it's my
14 understanding that that got held up in complaints similar to
15 this one, that it never proceeded.

16 Q So when this auditor comes back and confers with
17 you, he discusses what it is they're finding, checks on the
18 status, do you ever ask them to do additional work?

19 A I don't recall. They have come to me with
20 proposals before primarily asking -- you know, we've having
21 trouble getting the kind of information we need from a
22 carrier, can we send them this kind of a letter, or could
23 you do this to put -- you know, ask them to send it to
24 cooperate, that kind of thing. That's about the extent of
25 it.

1 Q Did you have those conversations with that
2 independent auditor, so-called independent auditor, with the
3 CLEC to be audited present or are those held privately?

4 A We've done some of both.

5 Q How is it possible for that auditor, ACA, to avoid
6 an appearance of partiality when you have conversations with
7 them about ongoing audits and the substance of audits and
8 information you should look at without the other side
9 present? How can they be independent, how can they be
10 impartial?

11 A Again, ACA has absolutely no incentive to be
12 partial, and every incentive not to be partial. The
13 arrangement we have worked out with them is they're paid on
14 an hourly basis, it doesn't matter what they find or what
15 they don't find as far as what the firm ACA gets out of it,
16 they get the same dollar amount one way or the other.

17 Q Now I think in one of the attachments to your
18 rebuttal testimony, you submitted a letter between you and
19 ACA that we had never seen before, despite the fact that you
20 had said that we had seen everything. And I think the
21 letter -- I'm looking for it now, I'll try and identify the
22 exhibit -- states that you want them to go ahead with two
23 audits initially, is that correct?

24 A I recall a letter similar to that, I'm not sure
25 that's what you're referring to.

1 supplies some of its needs and is therefore not independent.

2 And I think that's correct, we take EELs from you and we're
3 dependent on you for EELs, we're dependent on you for loops
4 and many other unbundled network elements. So I think
5 you're right, we can be dependent on you, but NuVox is not
6 an affiliate of BellSouth, we're not legally affiliated.

7 Now ACA is not legally affiliated with BellSouth, are they?

8 A No, they're not.

9 Q Is ACA legally affiliated with any of the ICOEs or
10 ILECs listed on a typical engagement sheet?

11 A Not that I'm aware of, no.

12 Q Have you asked whether they are?

13 A That specific question? No, but they have given
14 us information as to who their partners are and that's
15 included in the proposal that we've given you.

16 Q Now if all of ACA's clients or perhaps a
17 substantial majority of ACA's clients are ILECs, would that
18 not indicate to you that a substantial majority of ACA's
19 revenues come from ILECs?

20 A That certainly does indicate that to me, but
21 that's common with any business. They have a target market.
22 There's nothing wrong with that. I'm sure that's true of
23 any auditing firm, that they have a particular market that
24 they focus on.

25 Q But yet this auditing firm, consulting firm,

1 it with you. In the first sentence you state "It is my
2 understanding that ACA can and is willing to supply the
3 requisite showing and attestation of compliance with the
4 AICPA standards." Have they done so?

5 A No, they have not and BellSouth has not asked them
6 to do so. The audits that we have conducted to this point
7 through ACA have not required that we do that, although
8 we've offered to do that on a number of occasions.

9 Q So you state in the second sentence, "BellSouth
10 has not requested to this point that ACA make such a showing
11 in an attempt to reduce the auditing process."

12 Now is it that you understand that ACA is prepared
13 to make an attestation of compliance with the AICPA auditing
14 standards?

15 A ACA has a relationship with an auditing firm that
16 is a member of -- I don't know if it's AICPA or the
17 organization that supplies those standards. I think it's
18 AICPA -- that is a member and they have worked with them in
19 the past to do that when it was required.

20 Q Now when you refer to AICPA standards, do you mean
21 to include or exclude those standards governing what it
22 means to be an independent auditor?

23 A In this situation, I was responding to Mr.
24 Russell's statements that -- regarding the FCC's
25 requirements in the triennial review, which do require an

1 MR. HEITMANN: The witness is available for cross
2 examination.

3 HEARING OFFICER STAIR: Mr. Ross.

4 MR. ROSS: Thank you, Your Honor.

5 CROSS EXAMINATION

6 BY MR. ROSS:

7 Q Mr. Russell, good afternoon. I wasn't sure I was
8 actually going to live to see this moment, but I'm glad I
9 did.

10 A Oh, yeah.

11 Q I just have a few questions and I will try to be
12 brief.

13 Issue 1, I want to discuss the negotiations
14 surrounding the audit language in the agreement. Is it
15 correct that during negotiations, NuVox never proposed
16 specific language that would have obligated BellSouth to
17 demonstrate a concern prior to conducting an audit?

18 A During our negotiations, which started in I
19 believe the third quarter of 2001, -- I could be wrong about
20 that date -- we came around to the time where we were
21 finishing up negotiations and the Supplemental Order
22 Clarification was released. I believe it was adopted in
23 late May and released in early June. Both parties
24 recognized the importance of the Supplemental Order
25 Clarification and we did not -- we discussed how that would

1 impact our relationship. We did not except out the
2 requirement of a concern, and in fact, deleted from Section
3 10.5.4 BellSouth's proposal that it be able to conduct an
4 audit with -- at its sole discretion.

5 Q Mr. Russell, I appreciate that answer, but you
6 didn't answer my question. I will try very hard to ask yes
7 or no questions and I would appreciate it if you could
8 answer yes or no and then provide whatever explanation you
9 need.

10 A Okay.

11 Q My question was isn't it true that NuVox never
12 proposed specific language that would have specifically
13 required BellSouth to demonstrate a concern prior to
14 conducting an audit? Yes or no.

15 A We did not propose that language because that
16 issue was covered in the Supplemental Order Clarification
17 which was effective prior to the execution date of this
18 agreement and made part of it by reference.

19 Q Was the issue of whether BellSouth had to
20 demonstrate a concern prior to conducting an audit ever
21 discussed during the negotiations?

22 A Yes.

23 Q And when was that?

24 A We discussed that when we looked at BellSouth's
25 template agreement in Section 10.5.4. BellSouth wanted the

1 right to conduct an audit at its sole discretion. We did
2 not believe that to be fair and we felt that there should be
3 -- BellSouth should not have sole discretion to conduct such
4 audits.

5 Q I'm sorry, maybe you misunderstood my question,
6 I'll try to clarify it so maybe I can get a responsive
7 answer. Did you specifically raise the issue with BellSouth
8 during negotiations about whether BellSouth had to
9 demonstrate a concern prior to conducting an audit? Yes or
10 no.

11 A Yes.

12 Q Okay.

13 A BellSouth wanted the right to conduct an audit at
14 its sole discretion. We believed they had to have a concern
15 to do that and so we struck the language of "sole
16 discretion".

17 Q Could you point to me where in your prefiled
18 testimony you testified that NuVox discussed the issue of
19 whether or not BellSouth had to demonstrate a concern?

20 A Not once in our -- I'm sorry --

21 Q What page?

22 A Page 16, lines 17 through 22, "The parties
23 negotiated none of the exemptions claims by BellSouth. Not
24 once in our negotiations did BellSouth propose that it be
25 exempt from the requirement of having to demonstrate a

1 Q -- NuVox proposed various language about the
2 audit, correct?

3 A Correct.

4 Q As part of that proposal, was there any specific
5 language that dealt with the independence of the auditor?

6 A During our negotiations and when the Supplemental
7 Order Clarification was issued in early June prior to
8 execution, both parties looked at that Supplemental Order
9 Clarification. We discussed what requirements it required
10 of the parties. One was independent auditor, the other was
11 a concern for an audit. Those things are specifically
12 addressed in that order, so we discussed those things in the
13 negotiation and did not except out those provisions.

14 Q I'm sorry, maybe you mis -- I'm referring to Mr.
15 Heitmann's proposed language that's referenced in your
16 Exhibit HER-4.

17 A Right.

18 Q As part of that proposed language, did Mr.
19 Heitmann include any language that said specifically
20 BellSouth has to hire an independent auditor? Yes or no.

21 A The e-mail that is attached says we're going to
22 track the Supplemental Order Clarification, which includes
23 those provisions.

24 Q Well, you obviously don't want to answer the
25 question, Mr. Russell, so I'll move on.

1 NUVOX COMMUNICATIONS, INC.

2 DIRECT TESTIMONY OF HAMILTON E. RUSSELL, III

3 BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

4 DOCKET NO. 12778-U

5 SEPTEMBER 12, 2003

6

7 Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH NUVOX
8 COMMUNICATIONS, INC. ("NUVOX") AND YOUR BUSINESS ADDRESS.

9 A. My name is Hamilton E. Russell, III. I am employed by NuVox as Vice President,
10 Regulatory and Legal Affairs. My business address is 301 North Main Street, Suite
11 5000, Greenville, SC 29601.

12

13 Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR EDUCATIONAL
14 BACKGROUND AND PROFESSIONAL EXPERIENCE.

15 A. I received a B.A. degree in European History from Washington and Lee University in
16 1992 and a J.D. degree from the University of South Carolina School of Law in 1995. I
17 have been employed by NuVox and its predecessors since February of 1998. From July
18 of 1995 until January of 1998 I was an associate with Haynsworth Marion McKay &
19 Guerard, LLP. From August of 1993 until July of 1995 I worked for the Office of the
20 Speaker of the South Carolina House of Representatives.

21

22 Q. IN YOUR PRESENT POSITION, ARE YOU RESPONSIBLE FOR LEGAL AND
23 REGULATORY ISSUES RELATED TO OR ARISING FROM NUVOX'S

1 Q. NOW YOU STATED THAT BOTH PARTIES, INCLUDING BELLSOUTH,
2 RECOGNIZED THAT BELLSOUTH NEEDED TO DEMONSTRATE A CONCERN
3 AND ESTABLISH THE INDEPENDENCE OF BELLSOUTH'S CHOSEN AUDITOR.
4 WHAT'S THE BASIS FOR THAT STATEMENT?

5 A. There are actually several bases for that statement. First, BellSouth states repeatedly in
6 its notice (Exhibit HER-1) that its actions are consistent with the requirements of the
7 *Supplemental Order Clarification*. BellSouth only adopted its current argument (which
8 contends that neither the *Supplemental Order Clarification* nor the General Terms and
9 Conditions of the parties' Interconnection Agreement apply and that only Section 10.5.4
10 applies) only after NuVox rejected the fabricated concerns BellSouth eventually
11 invented.

12
13 Second, on March 19, 2002 (at approximately 12:00PM), my outside counsel, Mr.
14 Heitmann, had a telephone conversation about that matter with Mr. Hendrix and during
15 that conversation Mr. Hendrix conceded that BellSouth owed NuVox information
16 regarding its concern. On a second call with Mr. Hendrix, this time with NuVox
17 represented by me, Mr. Heitmann, and Jerry Willis of NuVox on March 25, 2003, Mr.
18 Hendrix again acknowledged that BellSouth needed to provide NuVox with its concern,
19 but that it wanted to keep that information as a confidential secret between the parties.
20 Ms. Padgett (then Ms. Walls) also attended that call. These calls are memorialized in the
21 March 27, 2002 e-mail from Mr. Heitmann to Ms. Padgett (then Ms. Walls) attached
22 hereto as Exhibit HER-2.

23

1 Third, BellSouth, in its pleadings to the FCC on this matter indicated that it was its intent
2 to comply fully with the FCC's *Supplemental Order Clarification* (although it asserted
3 that such a concern need not be legitimate nor demonstrated), while it simultaneously was
4 telling this Commission that certain selected provisions of the *Supplemental Order*
5 *Clarification* weren't really requirements (because they were included in a footnote!) or
6 simply did not apply (for many of the same reasons set forth by Ms. Padgett – other
7 reasons offered by BellSouth were fabricated and apparently have been dropped).

8
9 Q. IN HER TESTIMONY, MS. PADGETT DISCUSSES SOME OF THE HISTORY
10 BEHIND THE NEGOTIATION OF SECTION 10.5.4 OF THE AGREEMENT. DO
11 YOU RECALL THOSE NEGOTIATIONS?

12 A. Yes, I do. The negotiations on all of Section 10.5 of Attachment 2 – which addresses the
13 conversion of special access circuits to UNEs – were arduous and went on for months.
14 When the FCC released its *Supplemental Order Clarification* on June 2, 2000, the parties
15 were nearing the conclusion of their negotiations. Frankly, that order, despite its evident
16 imperfections gave both sides a means by which to work around their previous stand-off
17 over the language in various provisions of Section 10.5, as it filled-in (for better or
18 worse) many of the interstices that the parties were trying to create language to fill during
19 the months preceding it. In short, one common way to avoid a negotiations dispute is to
20 track an FCC rule or order. Although we are hearing it from BellSouth in this case, I
21 never before had heard from BellSouth that they simply would not comply with an FCC
22 order.

23

1 Q. MS. PADGETT SUGGESTS THAT BECAUSE NUVOX DID NOT SEEK TO
2 INCORPORATE BY REFERENCE OR INCLUDE DIRECTLY LANGUAGE FROM
3 FOOTNOTE 86 REQUIRING BELLSOUTH TO DEMONSTRATE A CONCERN
4 PRIOR TO CONDUCTING AN AUDIT, BELLSOUTH IS EXEMPTED FROM THE
5 REQUIREMENT. IS THAT WHAT THE PARTIES AGREED TO?

6 A. No, obviously not. Having been frustrated in the attempt to fill the interstices left by the
7 FCC's prior orders on the topic, the parties embraced the *Supplemental Order*
8 *Clarification* as a means of getting past an impasse. NuVox did not negotiate away the
9 requirements of demonstrating a concern (or of auditor independence). The plain text of
10 Section 10.5.4 contains no evidence of the exclusion BellSouth now claims.
11

12 Q. MS. PADGETT, HOWEVER, SUGGESTS THAT NUVOX DID INCORPORATE THE
13 LANGUAGE THAT IT WANTED FROM THE *SUPPLEMENTAL ORDER*
14 *CLARIFICATION* CONCERNING AUDITS. DOES THAT MEAN THAT NUVOX
15 NEGOTIATED AND AGREED TO AN EXEMPTION FOR BELLSOUTH FROM THE
16 OTHERS?

17 A. No. The parties negotiated none of the exemptions claimed by BellSouth. Not once in
18 our negotiations did BellSouth propose that it be exempt from the requirement of having
19 to demonstrate a concern or from the requirement of having to retain an independent
20 auditor. BellSouth never brought it up and we never agreed to it. The text of Section
21 10.5.4 does not suggest otherwise.
22

1 Q. MS. PADGETT SPECULATES WITH RESPECT TO THE LEGAL SIGNIFICANCE
2 OF THE AGREEMENT BEING A "VOLUNTARILY NEGOTIATED" ONE. HOW
3 WOULD YOU REPLY TO THAT.

4 A. Briefly, since that is an issue that is better left to briefing by BellSouth's attorneys and
5 ours. Neither the facts nor the law support Ms. Padgett's speculation in this regard.

6

7 Q. BUT WHAT ABOUT MS. PADGETT'S REMARKS REGARDING THE PROVISION
8 OF SECTION 10.5.4 THAT STATES THAT SUCH AUDITS WILL BE CONDUCTED
9 AT BELL SOUTH'S "SOLE EXPENSE"?

10 A. As originally proposed by BellSouth, that provision was one that stated that audits may
11 be conducted at BellSouth's "sole discretion". NuVox corrected that over-reaching with
12 some of its own – we proposed changing the word "discretion" to "expense". The
13 *Supplemental Order Clarification* does not provide that such audits will be conducted at
14 BellSouth's "sole expense". Instead, it provides that "incumbent LECs requesting an
15 audit should hire and pay for an independent auditor to perform the audit, and that the
16 competitive LEC should reimburse the incumbent if the audit uncovers non-compliance
17 with the local use options." We knew that our proposal would create ambiguity with
18 respect to whether the "sole expense" language indicated an agreement to deviate from
19 the cost shifting mechanism set forth in that sentence of the *Supplemental Order*
20 *Clarification* or whether it was merely intended to track the "hire and pay for" language
21 in the first part of the quoted text. In its audit notice (Exhibit HER-1), BellSouth claimed
22 that cost shifting was required *per the Supplemental Order Clarification*. As is
23 demonstrated by the emails attached hereto as Exhibit HER-5, BellSouth insisted that the

Attachment 5

Heitmann, John

From: Heitmann, John
Sent: Wednesday, March 27, 2002 6:34 PM
To: 'Walls, Shelley'
Cc: 'brussell@nuvox.com'; 'jerry.hendrix@bellsouth.com'; Heitmann, John
Subject: RE: Review of Conversions

Shelley,

This e-mail message is in response to the message you left with my secretary earlier today and serves as a follow-up to our calls earlier this afternoon and on Monday 3/25 (with Jerry Hendrix, Bo Russell and Jerry Willis).

With respect to the **conference call** you have requested, Bo, Jerry W., and I are available at 2, 3 or 4 pm tomorrow afternoon. If one of those times works for you, send us the bridge info and we'll see you then.

Please note, however, that the **scope of the call** will be limited. As we indicated on our call on Monday 3/25, the **independent status of the auditor** is a threshold issue that must be resolved prior to embarking on the audit. I understand that you will be overnighing some information to us that should help in this inquiry. Our own due diligence has turned-up nothing about the auditor. We were unable to locate a website for them and our polling of personnel at NuVox and Kelley Drye was not fruitful, as it did not turn up anybody familiar with ACA. Thus, we are hopeful that the information you are sending overnight and our conference call will help settle this issue. Nevertheless, we will be unable to make an affirmative assessment of the auditor's independent status until we receive a **copy of the contract** that Jerry (on Monday's call) had indicated was signed with ACA. On Monday's call, Jerry had declined to share that document with us. We ask Jerry to consult with BST legal on this, as we feel quite confident that the independent status of an entity cannot be confirmed if one party has a secret contract with it.

Now, there are other "**threshold issues**" that must be resolved before we embark on the audit. As I explained on Monday's call, NuVox is a small CLEC with limited resources. NuVox will devote sufficient resources to resolving these threshold issues first and then will focus on preparing for the actual audit once we have these squared away.

Those threshold issues are as follows:

(1) Reason for the Audit

Jerry and I have both agreed that the FCC's Supplemental Clarification Order gives BST a right to conduct limited audits and that BST must disclose to NuVox a reason for conducting that audit. On two separate calls (3/19 and 3/25), I asked Jerry for the reason. On the first call Jerry acknowledged that he owed us the reason. On the second, he offered to provide it subject to mutual confidentiality treatment. As I indicated on Monday's call, NuVox is not inclined to accept that condition. Jerry asserted that the need for keeping the reason confidential is that it contains NuVox-sensitive data. If that's the case, we appreciate your sensitivity to the need to keep such information confidential. However, at the same time, you must let NuVox be the judge of whether or not it would prefer to share that information with the FCC (where confidential treatment can be sought). If BST does not want the FCC to know its reasons for requesting an audit or how it obtained the information to form its reason, perhaps BST's interests would be best served by revoking its audit request. We will permit you to do that with no questions asked. If BST can explain why mutual confidentiality might serve NuVox's interests, as well, we are more than willing to listen to your views.

(2) Scope of Audit

On Monday's call, you indicated that it would encompass every circuit ever converted and that you'd send a circuit ID list. BST's 3/15 letter also indicated that BST would send a list identifying the circuits to be audited. We are still waiting for that list. In addition, on Monday's call, I asked you to confirm that the list would include only EELs that had been converted from special access (and not "new" EELs). I look forward to receiving that confirmation from you.

(3) Independent Auditor/NDA

On Monday's call, I explained to you and Jerry my concerns regarding your request to have NuVox sign a BST NDA. If ACA is independent, it cannot be affiliated with BST in any way. You had suggested that ACA would be acting as your agent. I challenged that, as well. (They cannot be an agent or an advocate and be independent at the same time.) You asked me to send you an e-mail so that you could check in with BST legal on this. (This is it.) In any event, we need to come to an understanding about what documents BST will see -- and for that matter, the form of the auditor's report. BST will not have access to NuVox's documents. Depending on the form of the auditor's report, it may be necessary to have BST sign a non-disclosure agreement.

(4) Independent Auditor/"Ex Parte" Rules

As I indicated on Monday's call, we need to establish "ex parte" rules or a "code of conduct" to ensure that the independent status of the auditor is not compromised. I proposed that one party may not talk substance with the auditor without the other party being present, but that the parties could contact the auditor with procedural/scheduling issues independently. BST may not provide the auditor with tickets to the BellSouth classic, no Final Four tickets, no entertaining, etc. Same restrictions apply to NuVox. Please review this proposal again with Jerry (and with your legal department). I gladly will consider a modified proposal or alternative suggestion.

(5) Money Issues/20% Threshold

In Jerry's 3/15 letter, he proposed that NuVox pay for the audit, if the auditor found non-compliance on 20% or more of the circuits. On Monday's call, I asked for back-up for Jerry's assertion that the 20% rule was an established industry practice. Jerry indicated that he could provide back-up, but asked for an e-mail on this as well. (This is it.) I gladly will review the information Jerry provides. However, in the meantime, I invite you to consider this proposal: if the auditor finds non-compliance, NuVox will pay for a proportionate share of the audit. For example, if the auditor finds non-compliance on 20% of the circuits, NuVox would pay 20% of the reasonable costs of the audit.

(6) Money Issues/NRC

In Jerry's 3/15 letter, he indicated that any non-compliant circuits would be converted to special access and would be subject to the applicable non-recurring charges for those services. On Monday's call, I explained that NuVox will agree only to pay the same cost-based conversion charge that applies when circuits are converted from special access to UNEs. I reminded Jerry that such a conversion need only involve a billing change and that the FCC did not authorize a charge for anything more. To date, NuVox has tolerated BST's insistence on making the conversion process more complicated. Provided that NuVox customers do not experience service disruptions as a result of such conversions, NuVox's tolerance will continue. However, NuVox will not pay for anything more than the cost-based billing change charge authorized by the FCC. Before we embark on the audit, we will require written mutual consent as to the exact charge that will apply to any conversions that may be deemed necessary, as a result of the audit. NuVox already has to devote far too much attention to billing disputes with BST. It is in both parties' interests to avoid future ones.

NuVox hopes that these threshold issues can be resolved expeditiously and amicably. If we are unable to resolve them in such a manner, NuVox suggests that BST request FCC mediation, as we believe that it is in neither party's best interest to drag this process out.

I look forward to your response.

Best regards,

John

John J. Heitmann
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1200 19th Street, NW
Washington, DC 20036

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Fax (202) 955-9792
Wireless (703) 887-9920

jheitmann@kelleydrye.com

-----Original Message-----

From: Heitmann, John
Sent: Tuesday, March 19, 2002 11:40 AM
To: Heitmann, John
Cc: 'brussell@nuvox.com'; 'beth.shiroishi@bellsouth.com'; 'Walls, Shelley'; 'jerry.hendrix@bellsouth.com'
Subject: RE: Review of Conversions

Jerry,

I'd appreciate a call from you today. I already have gotten e-mail notices indicating that Shelley and Beth are both on vacation.

Thanks, John

John J. Heitmann
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jheitmann@kelleydrye.com

-----Original Message-----

From: Heitmann, John
Sent: Tuesday, March 19, 2002 11:25 AM
To: 'Walls, Shelley'
Cc: 'brussell@nuvox.com'; 'jerry.hendrix@bellsouth.com';
'beth.shiroishi@bellsouth.com'; Heitmann, John
Subject: RE: Review of Conversions

Shelley,

Earlier this morning, I left you a voice mail requesting that you call me to discuss the attached materials. My thinking is that we may want to talk generally about the lay of the land before NuVox responds formally and before the full audience you have designated with your CC's. On that front, I would appreciate an introduction to the non-NuVox people you have cc'd on your e-mail. You may want to include Jerry and Beth on our call.

Thanks, John

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jheitmann@kelleydrye.com

-----Original Message-----

From: Walls, Shelley [mailto:Shelley.Walls@BellSouth.com]
Sent: Friday, March 15, 2002 2:15 PM
To: 'brussell@nuvox.com'
Cc: Jordan, Whit ; Larry Fowler (E-mail); Schenk, James;
'jheitmann@kelleydrye.com'; 'anelson@nuvox.com'
Subject: Review of Conversions

Please see the attached letter. The originals are being overnighted to you.
<<Nuvox Letter 3-15-02.doc>> <<NDA 3-15-02.doc>>
Shelley P. Walls

Manager - Regulatory Policy Support
BellSouth Interconnection Services
675 W. Peachtree St., NE
Atlanta, GA 30075
(404) 927-7511
Fax: (404) 529-7839

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NuVox Communications, Inc.
Docket No. 040527-TP
February 23, 2005

Attachment 6

Heitmann, John

From: Jordan, Parkey [Parkey.Jordan@BellSouth.COM]
Sent: Monday, April 01, 2002 5:10 PM
To: 'jheitmann@kelleydrye.com'
Subject: Nuvox EEL Audit



9FZ001!.DOC (34 KB)

<<9FZ001!.DOC>> John, sorry to be so late in the day getting this to you. I have been in meetings all afternoon. This is the response to your "threshold issues" regarding the Nuvox EEL audit.

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John, this is in response to the issues you raised in your email of March 27, 2002, regarding BellSouth's audit request to Nuvox for EEL circuits. I believe we covered most of these issues, at least briefly, on our conference call yesterday. As for providing Nuvox with the auditor's agreement, we can provide you with the auditor's proposal to BellSouth, which we have accepted. Shelley will send you a copy via overnight mail. As for your specific enumerated issues:

1. Reason for the Audit

I do not agree that that the FCC has obligated BellSouth to disclose to Nuvox the reason for conducting the audit. That being said, I do agree that that audits of EEL circuits are not "routine" and should only be undertaken in the event BellSouth has a concern that a particular carrier has not met the local service requirements set forth in the Supplemental Clarification Order. I would have assumed that Nuvox would want to maintain the confidentiality of the reasons for the audit, but if that is not the case, I have no problem simply providing the information. In the case of Nuvox, the facts that cause BellSouth concern and that prompted this audit are as follows:

BellSouth's records show that a high percentage of NuVox's traffic in Tennessee and Florida is intrastate access, yet NuVox has certified that it provides a significant amount of local traffic over circuits in these two states. In addition, Nuvox is now claiming a significant change in its PIU jurisdictional factors.

2. Scope of Audit

BellSouth indicated when requesting the audit that the audit would encompass all the special access circuits that Nuvox has requested be converted. Nuvox should have that information, but on March 28, 2002, Shelley Walls forwarded to you via email the spreadsheet listing those circuits. The audit will encompass converted circuits only. New EELS are not included in this audit.

3. Independent Auditor/NDA

As we discussed on the conference call on March 28, the auditor BellSouth has selected is an independent auditor, not an agent of BellSouth. You spent some time on the call questioning Larry Fowler about his background, the background of his company and his affiliation (or lack thereof) with BellSouth. I believe we have established that the auditor is an independent third party. The auditor will be requesting information relevant to prove that the circuits listed in the spreadsheet are or are not in compliance with the appropriate local usage option under which the circuits were converted. BellSouth will not be reviewing the information Nuvox provides to the auditor. However, BellSouth will see the audit results. I believe it is appropriate for BellSouth to agree not to disclose any information contained in the audit results, or the results themselves, and we forwarded you a nondisclosure agreement for that purpose.

4. Independent Auditor / "Ex Parte" Rules

The independent auditor will have to certify, in connection with the audit, that he did in fact act independently. BellSouth has no intention of "bribing" the auditor, and I feel certain that Nuvox similarly has no such intention. I do not want to burden the auditor or the parties with unnecessary and burdensome rules. However, BellSouth will agree with Nuvox that during the audit the parties will not conduct any substantive conversations with the auditor concerning information provided by Nuvox or the auditor's use of that information without both parties being represented.

5. Money Issues / 20% Threshold

The Supplemental Clarification Order provides that "incumbent LECs requesting an audit should hire and pay for an independent auditor to perform the audit, and that the competitive LEC should reimburse the incumbent if the audit uncovers non-compliance with the local usage options." The Order does not speak in terms of partial reimbursement. In fact, per the language of the Order, there is no threshold level of non-compliance that must be met for the CLEC to become responsible for the cost of the audit. Any non-compliance triggers the reimbursement obligation. However, to allow for unintentional errors, BellSouth has established a reasonable threshold under which no reimbursement will be necessary. In other contexts, BellSouth has used a threshold of 20% to shift the burden of payment for an audit. PIU audits described in BellSouth's tariffs specify the 20% threshold (see tariff section attached). Further, the parties' interconnection agreement states that the party requesting a PIU or PLU audit will be responsible for the cost of the audit unless the audited party is found to have misstated the PIU or PLU in excess of 20% (see Attachment 3, Section 6.5, of the parties' interconnection agreement). We believe such a proposal is reasonable and consistent with industry practice. Further, we believe that no such threshold actually exists per the Supplemental Clarification Order, and that any non-compliance would shift the burden for payment to Nuvox. Whether Nuvox agrees with this position should not affect whether Nuvox proceeds with the audit. BellSouth is the party responsible for paying the auditor, and reimbursement from Nuvox, if applicable, has no effect on whether the audit occurs in the first place. Unless non-compliance is found, this will be a moot issue.

6. Money Issues / NRC

To the extent Nuvox's circuits, or any number of them, fail to meet the requirements for those circuits to be provisioned and maintained as UNEs, BellSouth will convert those circuits to the corresponding special access circuits. The charge for such conversion should be the appropriate non-recurring charges set forth in BellSouth's tariffs. Bear in mind that if Nuvox has in fact lived up to its certification, no such charges will apply. However, by law, BellSouth provisions special access circuits only pursuant to filed and approved tariffs, not pursuant to interconnection agreements. Again, the rate for reestablishing special access circuits is not a threshold issue that must be litigated before the audit occurs. If Nuvox has certified correctly, no charges would apply, and the issue will never arise.