BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

NUVOX COMMUNICATIONS, INC.'S OPPOSITION TO BELLSOUTH'S MOTION FOR SUMMARY DISPOSITION

NuVox Communications, Inc. ("NuVox"), through its undersigned counsel, respectfully submits its Response in Opposition to BellSouth Telecommunications, Inc.'s ("BellSouth's") Motion for Summary Disposition ("Motion") filed on September 13, 2004, in the above-captioned proceeding.[1] Summary judgment is inappropriate as a matter of law because there are material facts in dispute in this case and NuVox has not had a reasonable opportunity to conduct discovery following the period of abatement.[2] Therefore, the Florida Public Service Commission ("Commission") must deny BellSouth's motion in its entirety.

Introduction

In its Motion, BellSouth asks the Commission to grant summary judgment on the basis of a single provision in the parties' nine-state Interconnection Agreement ("Agreement") that BellSouth takes out of context. This provision cannot be read in isolation, but must be read in conjunction with other pertinent provisions of the parties' Agreement. The Commission must

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1 BellSouth Telecommunications, Inc. Motion for Summary Disposition, Case No. 2004-00295 (filed Sept. 13, 2004). The case was abated pursuant to Commission Order PSC-04-0998-FOF-TP and the parties agreed to delay NuVox's response to BellSouth's motion.

2 After the parties agreed to proceed with the case following the abatement period, NuVox contacted BellSouth in an effort to schedule depositions.

reject BellSouth's request to grant summary disposition in its favor based on BellSouth's far-fetched and erroneous arguments.

The Georgia Public Service Commission ("Georgia PSC") already has rejected the arguments that BellSouth raises in its motion on the ground that they are contrary to fact and governing Georgia law.[3] The Georgia PSC has issued an Order and Order on Reconsideration that resolve identical issues to those raised by BellSouth in this case.[4] These orders, which BellSouth sought and now ignores, vindicate NuVox's position in that case (and in this one) by affirming that, under the parties' Agreement: (1) BellSouth is required to demonstrate a concern with respect to each converted Enhanced Extended Link ("EEL") circuit it seeks to audit, and (2) BellSouth is required to retain an independent auditor compliant with AICPA standards to conduct the audit. In reaching these legal conclusions, the Georgia PSC properly applied Georgia law and rejected the array of erroneous arguments that BellSouth raised.

These Georgia PSC decisions, which BellSouth sought two years before initiating a proceeding in any other state in its region, now are part of governing Georgia law. The parties expressly agreed that Georgia law will govern their business relationship. The relevant provisions of the Agreement do not mean different things in different states.[5] BellSouth's repackaging of arguments that the Georgia PSC already has rejected provides no rational or legal

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3 BellSouth's failure to acknowledge the Georgia PSC's decisions is stunning. Only BellSouth's "entire understanding" argument seems to have been freshly invented for this and other post-Georgia cases. BellSouth Motion at 12-13.

4 *See Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Commission Docket No. 12778-U, Order Adopting in Part and Modifying in Part the Hearing Officers Recommended Order (June 30, 2004) ("*Georgia Order*") and *Enforcement of Interconnection Agreement Between BellSouth Telecommunications, Inc. and NuVox Communications, Inc.*, Georgia Commission Docket No. 12778-U, Order on Rehearing, Reconsideration and Clarification (Aug. 24, 2004) ("*Georgia Reconsideration Order*").

5 When the parties intended different terms to govern in different states, state specific phrases were added (*i.e.*, "in Florida"). The relevant provisions of the Agreement contain no provisions of that kind, and the parties intended them to have uniform meaning in all nine BellSouth states.

basis to arrive at such an incongruous result. Indeed, reaching the untenable result BellSouth suggests may well violate the Full Faith and Credit Clause of the U.S. Constitution.[6]

BellSouth's Motion must be rejected not only because it is based on erroneous legal arguments that disregard governing Georgia law, but also because there are genuine issues of material fact that are in dispute and that make grant of summary disposition sought by BellSouth impossible as a matter of law.[7] Material factual issues include, but are not limited to: (1) whether the parties intended for BellSouth to have an unqualified right to audit NuVox's converted EELs circuits without any of the limitations imposed by applicable law (*i.e.*, the concern and independent auditor requirements from the Federal Communications Commission's ("FCC") *Supplemental Order Clarification*[8]) (this issue is relevant only if the Commission finds ambiguity in the terms of the Agreement); (2) whether BellSouth has demonstrated a concern such that it is permitted to conduct an audit of NuVox's converted EEL circuits; (3) whether BellSouth's proposed auditor is independent and authorized to conduct business in the State of Florida; and (4) whether BellSouth seeks to audit circuits that were not converted at the time of its March 15, 2002, notice. Furthermore, the procedural history of this case makes summary judgment inappropriate. To date, BellSouth filed its complaint, NuVox moved to dismiss the complaint, the Commission denied the motion to dismiss and ordered an abeyance period. Moreover, the Commission directed that if the parties were unsuccessful in staff-assisted

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6 U.S. Constitution, Article IV, § 1. *See Global Naps, Inc. v. Verizon New England Inc.*, 332 F.Supp.2d 341 (D. Mass. 2004) (holding that the Massachusetts Department of Telecommunications and Energy violated the Full Faith and Credit Clause by failing to give preclusive effect to a prior interpretation of the Rhode Island Public Utilities Commission of identical language in an interconnection agreement).

7 Under Florida law, summary judgment is inappropriate when there are material facts in dispute. *See First American National Bank v. Hummel*, 825 So.2d 502,503 (Fla. Dist. Ct. App. 2002), 27 Fla. Weekly D2010 (2002).

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

negotiations, then the matter would be set for hearing.[9] The parties recently agreed to discontinue settlement discussions and move the case forward, with NuVox filing its Answer just last week. The Commission has not entered a procedural order, and NuVox recently contacted BellSouth in an effort to schedule certain depositions. Because these are genuine issues of material fact, summary disposition is inappropriate as a matter of law, and because NuVox has not yet had a reasonable opportunity to conduct discovery. NuVox respectfully requests that the Commission deny BellSouth's Motion.

I. SUMMARY OF THE DISPUTE

Pursuant to sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"), BellSouth and NuVox entered into a regional nine-state interconnection agreement that governs their relationship throughout the BellSouth region.[10] The parties submitted the Agreement to each state commission separately, and each state commission has approved the Agreement. The relevant provisions in each agreement are identical and the parties did not intend for the meaning of these identical provisions to vary from state to state.[11]

The Agreement governs BellSouth's right to audit circuits converted from special access to EELs.[12] BellSouth, however, inappropriately relies on one provision—to the exclusion of all others—to support its claim that it is permitted to audit every one of NuVox's converted EELs. Section 10.5.4 of Attachment 2 to the Agreement does not represent a "stand-alone agreement" and it does not provide BellSouth with an "unqualified" audit right, as BellSouth

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9 *Complaint to Enforce Interconnection Agreement with NuVox Communications, Inc. by BellSouth Telecommunications, Inc.*, Docket No. 040527-TP, Order Denying Motion to Dismiss and Placing Docket in Abeyance, Order No. PSC-04-0998-FOF-TP at 2 (Oct. 12, 2004).

10 NuVox Answer at note 1; Affidavit of Hamilton Russell ¶ 4 ("Russell Affidavit") (provided as Attachment A).

11 Russell Affidavit ¶ 4.

12 BellSouth Motion at 7-8.

claims.[13] By its express terms, the Agreement incorporates applicable law not expressly excluded or displaced by conflicting language,[14] including the *Supplemental Order Clarification's* concern and independent auditor requirements. By its own terms, section 10.5.4 does not exclude or displace the concern and independent auditor requirements from the FCC's *Supplemental Order Clarification.*

In the Georgia proceeding, NuVox witness Mr. Hamilton Russell, who personally negotiated the Agreement on NuVox's behalf, confirmed what the text of the relevant provisions of the Agreement makes plain: the parties intended to incorporate the *Supplemental Order Clarification's* concern and independent auditor requirements into the Agreement.[15] Mr. Russell was the only witness to testify based on actual knowledge of the parties' negotiations; BellSouth did not proffer a witness with firsthand knowledge of the negotiations. BellSouth suggests in its Motion that the parties' intent was not to incorporate the concern and independent auditor requirements from the *Supplemental Order Clarification* into their Agreement, a contention that clearly establishes a disputed issue of material fact.[16]

In the *Georgia Order*, the Georgia PSC concluded that "the *Supplemental Order Clarification* requires that an ILEC demonstrate a concern prior to conducting an audit."[17] The Georgia PSC also concluded that, under Georgia law, "parties are presumed to enter into agreements with regard to existing law" and that the plain text of the Agreement indicated no

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13 *See* BellSouth Motion for Summary Disposition, Affidavit of Jerry Hendrix on Behalf of BellSouth Telecommunications, Inc., ¶ 4 (hereinafter "Hendrix Aff.")

14 Agreement, General Terms and Conditions, §§ 23 & 35.1.

15 Georgia Hearing Tr. at 278, ll. 1-4; at 286, ll. 6-13. Relevant portions of the transcript in the Georgia proceeding are attached hereto as Attachment B.

16 *See* BellSouth Motion at 5.

17 *Georgia Order* at 5.

intent to exclude or otherwise displace the concern and independent auditor requirements from the *Supplemental Order Clarification*, which was applicable law in existence at the time the parties negotiated and entered into the Agreement.[18] Accordingly, the Georgia PSC concluded that the *Supplemental Order Clarification's* concern and independent auditor requirements were incorporated into the parties' Agreement, and, therefore, found that BellSouth must demonstrate a concern for each converted circuit prior to being able to conduct an audit and must hire an AICPA-compliant auditor to conduct the audit.[19]

NuVox has refused BellSouth's audit request because BellSouth neither has demonstrated a concern with respect to the converted circuits it seeks to audit nor has hired an independent auditor, as required under the Agreement when applying Georgia law, the law the parties selected to control their relationship. NuVox has repeatedly made clear to BellSouth that it can proceed with an audit after it meets those requirements. Despite two hard years of battle and two adverse Georgia PSC decisions that vindicate NuVox's rejection of BellSouth's audit request, BellSouth refuses to acknowledge that its audit rights are limited and that it does not have an unqualified right to disrupt its smaller competitor's operations with a highly invasive audit that is not based on cause.

Now, BellSouth brings the same claims and the same rejected arguments before this Commission. The Commission should adopt a result that is consistent with governing law, which includes the Georgia PSC's decisions.[20]

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18 *Id.* at 6, 8, 12 (citations omitted).

19 *Id.* at 8, 12.

20 The North Carolina Commission adopted an order that conflicts in certain respects with the decision of the Georgia Commission. *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.

II. SUMMARY JUDGMENT IS INAPPROPRIATE IN THIS CASE

BellSouth spends the majority of its motion advocating its position regarding the legal issues in dispute that the Georgia PSC already has rejected. In its motion, BellSouth does not make any discernable attempt to demonstrate that it has satisfied the standard for summary judgment. In doing so, BellSouth has sought to obscure the significant factual issues in dispute, and to focus the Commission's attention on BellSouth's incorrect legal interpretation of the Agreement, which the Georgia PSC already has rejected in evaluating the identical provisions of the Agreement.[21]

Section 120.57(l)(h) of the Florida Statutes provides that a motion for summary final order shall be granted only if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material facts exists. BellSouth must conclusively demonstrate the nonexistence of an issue of material fact and every possible inference must be drawn in favor of NuVox.[22] Summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law.[23] If the record reflects the existence of any issues of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[24] Summary judgment is appropriate only when there is no genuine issue of material

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21 *See id.*

22 *Green v. CSX Transportation, Inc.*, 626 So. 2d 974 (Fla. 1st DCA 1993).

23 *Moore v. Morris*, 475 So. 2d 666 (Fla. 1985).

24 *Abelo v. Southern Bell*, 682 So. 2d 1126 (Fla. 2nd DCA 1996).

fact in dispute.[25] When reviewing a motion for summary judgment, the Commission must view all facts and inferences in a light most favorable to the non-moving party.[26]

BellSouth cannot satisfy the burden necessary to grant summary judgment. When viewing the issues in a light most favorable to NuVox, it is apparent that genuine issues of material fact do exist. As an initial matter, if the Commission finds that the Agreement is ambiguous, then it must determine whether the parties intended to exclude or displace the *Supplemental Order Clarification's* concern and independent auditor requirements from the Agreement. The Georgia PSC already has decided that the meaning of the Agreement is plain and that the concern and independent auditor requirements are indeed incorporated into the Agreement by operation of Georgia law. If BellSouth is to convince this Commission that a different outcome is somehow appropriate,[27] then it must, at least, demonstrate that (a) the Agreement is ambiguous in that there is another "meaning" of the language of the Agreement that the Georgia PSC erroneously dismissed, and (b) the then necessarily ambiguous contract language reflects an intent to exclude or displace the *Supplemental Order Clarification's* concern and independent auditor prerequisites. BellSouth has not made the appropriate factual or legal showings. Nor can it. Moreover, the conflicting affidavits filed by BellSouth and NuVox demonstrate that BellSouth could not possibly prevail on its Motion based on the contested factual assertions made to date in this case.

The Commission also must evaluate whether BellSouth has demonstrated a concern with respect to each circuit it seeks to audit. This is a fact-specific inquiry and no record

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25 *See First American National Bank v. Hummel*, 825 So. 2d at 503; 27 Fla. Weekly at D2010.

26 *Novotny v. Estate of Lilliam S. Dantone*, 848 So.2d 398,400 (2003), 28 Fla. Weekly D1485 (2003).

27 Again, NuVox submits that Georgia law, including the Georgia PSC decisions, effectively bars BellSouth from prevailing on these legal issues.

evidence exists upon which the Commission can reach a decision at this point. BellSouth offered nothing more than naked allegations in its complaint, and its affidavit simply regurgitates those naked, unproven, and contested factual allegations.

NuVox has made repeated requests for documentation to support BellSouth's claim that it has a concern with regard to the accuracy of NuVox's certifications, and BellSouth steadfastly has refused to provide any information to NuVox. NuVox will seek such information through formal discovery in this case, in accordance with the anticipated procedural order. Given the procedural history of this case, with NuVox's answer being filed last week, its informal discovery requests being rebuffed, and its request of BellSouth for deposition dates of key witnesses pending, summary judgment is not appropriate at this time.[28] In the proceeding before the Georgia PSC, BellSouth similarly did not provide any documentation in support of its claim that it had a concern until the eleventh hour (at which point it appeared that the Georgia PSC would deny BellSouth's complaint).[29] The information that BellSouth ultimately provided (confidential BellSouth billing materials) was specific to the circuits at issue in the Georgia case.

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28 *See Fleet Finance & Mortgage, Inc. v. Carey*, 707 So. 2d 949 (Fla. 4th DCA 1998) (court should not enter summary judgment which is akin to a summary final order when opposing party has not completed discovery); *Villages at Mango Key Homeowners Association, Inc. v. Hunter Development, Inc.* 699 So. 2d 337 (Fla. 5th DCA 1998) (summary judgment is inappropriate and premature when discovery is ongoing); *Brandauer v. Publix Super Markets, Inc.*, 657 So. 2d 932 (Fla. 2nd DCA 1995) (as a general rule, a court should not enter summary judgment when the opposing party has not completed discovery); *In re: Complaint of Ocean Properties, Ltd., J.C. Penny Corp., Target Stores, Inc. and Dillard's Department Stores, Inc. against Florida Power and Light Company* concerning thermal demand meter error, Docket No. 0306239EI, Order No. PSC-04-0992-PCO-EI (summary final order should not be entered when good faith discover pending).

29 BellSouth did not provide copies of relevant billing materials to either the Georgia Commission or NuVox until May 11, 2004, nearly two years after it filed its complaint, seven months after the hearing, and only a week before the Georgia Commissioners voted on this matter. Indeed, BellSouth kept changing its stated concern and until that point was unable or unwilling to produce any evidence to support various allegations regarding the level of local traffic carried by NuVox or alleged jurisdictional factor reporting difficulties (which were non-existent).

Therefore, that documentation is not sufficient to demonstrate a concern in this case.[30] This Commission cannot determine whether BellSouth has demonstrated a concern with respect to the Florida converted EEL circuits at issue based on what currently is before it. Therefore, summary judgment is inappropriate as a matter of law.

The Commission also must evaluate, as a factual matter, whether BellSouth has chosen an independent auditor authorized to perform an audit in Florida. As the Georgia PSC found, the Agreement incorporates the requirement in the *Supplemental Order Clarification* that BellSouth retain an independent auditor to conduct the proposed audit in accordance with AICPA standards.[31] BellSouth has selected American Consultants Alliance (ACA), a group of ILEC consultants, to conduct the proposed Florida audit. As the Georgia PSC recognized, NuVox raised legitimate concerns about the independence of ACA.[32] In the Georgia proceeding, BellSouth fully admitted to engaging in private dialog with ACA before and during ongoing audits without the audited entity being present.[33] BellSouth itself supplied testimony in the Georgia proceeding admitting that ACA could not certify AICPA compliance.[34] Thus, as long as BellSouth insists on ACA, there will be an unresolved issue of material fact regarding whether the consultants BellSouth has selected to act as auditors are independent and are capable of complying with AICPA standards.

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30 The process by which BellSouth generated its most recent allegations of concerns in Georgia, and presumably, here in Florida, too, appears to involve blatant violations by BellSouth of section 222 of the federal Communications Act, 47 U.S.C. § 222, and FCC rules promulgated under section 222 of the Act, regarding carrier proprietary information and customer proprietary network information. NuVox reserves all rights with respect to claims it has and may pursue in that regard.

31 *Georgia Order* at 12.

32 *Id.* at 13.

33 Georgia Hearing Tr. at 195, 11.14-25; 196, 11.1-5; 201, 11. 1-16.

34 *See id.* at 208, 11. 15-19.

The Commission also must determine whether BellSouth seeks to audit circuits that were not converted at the time of its March 15, 2002 notice and, whether, as a result, it sought an audit of circuits prior to their conversion. It appears that both parties agree that BellSouth is not entitled to audit circuits prior to conversion.[35] In paragraph 7 of Ms. Padgett's affidavit, Ms. Padgett states that since 2000, NuVox has requested conversion of approximately 981 circuits in Florida and it appears that BellSouth wants to audit each of those converted circuits. Yet, when BellSouth initially sought an audit, NuVox only had requested the conversion of approximately 490 circuits in Florida as of the date of BellSouth's audit request.[36] Thus, either the number presented by Ms. Padgett in paragraph 7 of her Affidavit is not the correct number of circuits at issue in this case or Ms. Padgett's statement in paragraph 8 of her affidavit that BellSouth has not demanded an audit "prior to the conversion of those circuits from special access to EELs" is wrong. In either case, it appears that there is a factual dispute regarding the potential (*i.e.*, maximum) number of converted EEL circuits that could be at issue in the requested audit noticed by BellSouth on March 15, 2002. Of course, given that BellSouth has not demonstrated a concern with respect to any circuits, NuVox contends that the maximum number of converted EEL circuits at issue is zero.

Under Florida law, the presence of these factual issues precludes issuance of summary judgment as a matter of law. As discussed herein, NuVox should prevail on the merits of this case (as it did in Georgia). Accordingly, BellSouth cannot demonstrate, as it must, that there are not any factual issues. Accordingly, the Commission must deny BellSouth's motion.

III. THE PLAIN LANGUAGE OF THE AGREEMENT REQUIRES BELLSOUTH TO DEMONSTRATE A CONCERN WITH RESPECT TO THOSE CIRCUITS IT

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35 *See, e.g.*, BellSouth Motion at 4.

36 *See* Russell Aff. ¶ 16

SEEKS TO AUDIT AND TO RETAIN AN INDEPENDENT AUDITOR TO CONDUCT ANY AUDIT

Under the plain language of the Agreement, BellSouth is required to demonstrate a concern prior to conducting an audit and to hire an independent auditor to perform the audit. The Commission must reject BellSouth's attempt to evade the concern and independent auditor requirements by relying exclusively on section 10.5.4 of Attachment 2 to the Agreement. Section 10.5.4 is a provision of an attachment to the Agreement – it is not an agreement unto itself. As discussed below, even if the Commission were to read section 10.5.4 in a vacuum (which would be an error), there is no merit to BellSouth's argument that the provision exempts it from complying with the concern and independent auditor requirements set forth in the *Supplemental Order Clarification* that are incorporated into the Agreement by operation of Georgia law and the Agreement's applicable law provision.

The *Supplemental Order Clarification* requires BellSouth to demonstrate a concern and to hire an independent auditor prior to conducting any limited audit of converted circuits. This is not a case where pre-existing audit provisions were preserved by the *Supplemental Order Clarification*; the *Supplemental Order Clarification* predates the Agreement and the parties specifically addressed that order during their negotiations. Accordingly, those requirements are incorporated by operation of Georgia law (and the Applicable Law provision) as though expressly stated therein, unless expressly excluded or displaced by conflicting contract terms.

Section 10.5.4 neither expressly excludes nor contains any other terms that conflict with or displace the concern and independent auditor requirements. The Georgia record makes plain that the parties agree that section 10.5.4 is *silent* with respect to both requirements and that it was their intent to incorporate them. Such silence does not result in any conflict

between the specific and the general, the Agreement and the *Supplemental Order Clarification,* or the Agreement and its attachments -- and no "trumping" results. Thus, although the parties *may* have negotiated to be governed by terms that differ from applicable law, with respect to the concern and independent auditor requirements, the fact of the matter is that they did not.

Section 35.1 of the Agreement erases any possible doubt by requiring compliance with applicable law and by expressly forbidding implication of an intent to exclude or displace applicable law, absent express language to the contrary. Thus, although these basic contract law principles already are incorporated into the Agreement by operation of Georgia law, section 35.1 makes abundantly clear that the Agreement was intended to be like other Georgia contracts which incorporate applicable law as though expressly stated, to the extent the contract contains no express language excluding or displacing the specific requirements of applicable law.

And so, by virtue of section 23 of the Agreement, which selects Georgia law as governing, and section 35, which amplifies its applicability and the parties' intent to incorporate requirements of applicable law to the extent not expressly excluded or displaced by conflicting language, the parties' entire Agreement includes more than section 10.5.4 and it incorporates the concern and independent auditor requirements from the *Supplemental Order Clarification.* There is no express language in the Agreement that says otherwise or that creates conflicting requirements. Accordingly, under the Agreement, NuVox is entitled to avail itself of the protections afforded by the concern and independent auditor requirements set forth in the *Supplemental Order Clarification* and BellSouth is not entitled to an implied exemption from them (to which the parties did not agree).

A. The Supplemental Order Clarification Requires ILECs to Demonstrate a Concern and to Hire an Independent Auditor

As an initial matter, the *Supplemental Order Clarification* requires ILECs such as BellSouth to demonstrate a concern prior to conducting an audit and to hire an independent auditor to perform that audit. The Georgia Commission properly rejected a host of spurious BellSouth arguments intended to create doubt as to that requirement.[37] This Commission also must reject BellSouth's efforts to eliminate the clear requirements of the *Supplemental Order Clarification*.[38] In the *Supplemental Order Clarification*, the FCC grants ILECs certain audit rights, subject to certain prerequisites. Specifically, the FCC found that audits must not be routine[39] and that an ILEC only may conduct an audit when it "has a ***concern*** that a requesting carrier has not met the criteria for providing a significant amount of local exchange service."[40] In addition, an audit only may be conducted by an "independent auditor."[41]

The obligations that the FCC imposes on BellSouth and other ILECs are clear and unequivocal. In rejecting the same spurious arguments that BellSouth now presents before this Commission, the Georgia PSC evaluated the requirements set forth in the *Supplemental Order Clarification*, and concluded that the order requires ILECs such as BellSouth to demonstrate a concern and to hire an independent auditor.[42] In doing so, the Georgia PSC stated that "audits should only take place when the ILECs have a concern" and that this reading of the *Supplemental Order Clarification* is "reinforced by the *Triennial Review Order*", which states:

> Although the bases and criteria for the service tests we impose in this order differ from those of the Supplemental Order

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37 *See Georgia Order* at 5.

38 BellSouth Motion at 18-19 (arguing that the *Supplemental Order Clarification* does not require it to demonstrate a concern prior to conducting an audit).

39 *See Supplemental Order Clarification* ¶ 31, n. 86.

40 *Id.* (emphasis added).

41 *Id.*

42 *Georgia Order* at 5.

> 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.[43]

The Georgia PSC concluded, and there can be no doubt, that the FCC's language quoted above, "eliminates any ambiguity over whether the ... footnote in the *Supplemental Order Clarification* was intended to make the demonstration of concern a mandatory pre-condition of 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*."[44] There is simply no basis for BellSouth to now argue that the *Supplemental Order Clarification* does not require it to demonstrate a concern.[45]

B. The Parties Incorporated the Supplemental Order Clarification's Concern and Independent Auditor Requirements Into Their Agreement

Although the parties voluntarily negotiated the Agreement, and, as such, the parties *could have* negotiated to displace the *Supplemental Order Clarification's* concern and independent auditor requirements,[46] the fact of the matter is that they did not.[47] The plain language of section 10.5.4 indicates no intent to exclude application of or otherwise displace the concern and independent auditor requirements. Georgia law, established by section 23 of the Agreement as the governing body of law, holds that those requirements are part of the Agreement as though explicitly stated and that an intent to the contrary may not be implied. The applicable law provision contained in section 35.1 of the Agreement serves to amplify that the

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43 *Id.* at 5 (quoting *Triennial Review Order* ¶ 622) (emphasis added).

44 *Id.*

45 *Id.*

46 *See* BellSouth Motion at 14-18.

47 *See Georgia Order* at 6-8.

parties intended to incorporate these *Supplemental Order Clarification* requirements and all other requirements of applicable law that were not excluded or expressly displaced with conflicting language. To the extent there is any ambiguity, NuVox demonstrated to the Georgia PSC—and the Georgia PSC agreed—that the parties did not intend to exempt or displace the concern and independent auditor prerequisites set forth in the *Supplemental Order Clarification*. NuVox also demonstrated that BellSouth, though its own conduct, acknowledged that the parties are bound by the auditor and concern requirements of the *Supplemental Order Clarification*. Indeed, BellSouth's own conduct reveals that its attempt to liberate itself from the *Supplemental Order Clarification* concern and independent auditor requirements is merely a fanciful post-hoc creation of BellSouth attorneys seeking to support their client's ongoing efforts to harass NuVox.

1. The FCC's Supplemental Order Clarification Concern and Independent Auditor Requirements Are Incorporated into the Agreement by Operation of Georgia Law

Section 23 of the Agreement states that the "Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia." The *Supplemental Order Clarification's* concern and independent auditor requirements are incorporated into the Agreement by operation of Georgia law, which now includes the Georgia PSC's decisions on the identical legal issues raised in this case. As the Georgia PSC found, under Georgia law, "parties are presumed to enter into agreements with regard to existing law."[48] In *Magnetic Resonance Plus, Inc. v. Imaging Systems International*, the Supreme Court of Georgia stated that the

> [l]aws that exist at the time and place of the making of a contract, enter into and form a part of it...and the parties must be presumed

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48 *Georgia Order* at 6 (citing *Van Dyck v. Van Dyck*, 263 Ga. 161, 163 (1991)).

to have contracted with reference to such laws and their effect on the subject matter.[49]

Georgia law also acknowledges that parties may contract without regard to existing law, but requires that if parties "intend to stipulate that their contract not be governed by existing law, then the other legal principles to govern the contract must be expressly stated therein."[50] In addition, exemptions will not be implied into a contract. Indeed, in *Jenkins v. Morgan*, the court specifically stated that "parties will be presumed to contract under the existing laws, and no intent will be implied to the contrary ...."[51]

The Georgia PSC correctly found that Agreement does not contain any express provision indicating that the concern and independent auditor requirements were displaced by other requirements set forth therein.[52] Indeed, the Georgia PSC correctly found that the Agreement does not say that the notice requirement memorialized in section 10.5.4 is the only prerequisite to an audit.[53] The Georgia PSC, consistent with Georgia law, also declined to imply such an intent[54] (which, in any event, was at odds with the testimony that demonstrated that NuVox did not intend to waive its right to require BellSouth to demonstrate a concern and an independent auditor[55]).

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49 *Magnetic Resonance Plus, Inc. v. Imaging Systems, International*, 273 Ga. 525, 543 S.E.2d 32, 34-5 (2001); *see also Van Dyck v. Van Dyck*, 263 Ga. 161, 163 (1993) (stating that "[p]arties to a contract are presumed to have contracted with reference to relevant laws and their effect on the subject matter of the contract, and a contract may not be construed to contravene a rule of law.").

50 *Georgia Order* at 6 (citing *Jenkins v. Morgan*, 100 Ga. App. 561, 562 (1959)).

51 *Jenkins v. Morgan*, 100 Ga. App. 561, 562, 112 S.E.2d 23, 24 (1959).

52 *Georgia Order* at 6.

53 *Id.* at 7.

54 *Id.*

55 Georgia Hearing Tr. at 278, ll. 1-4, 15-18; 279, ll. 1-4, 13-16; 286, ll. 6-13.

The Georgia PSC also correctly rejected BellSouth's assertion that the PSC should imply an intent to displace the concern and independent auditor requirements on grounds that the parties specified an intent to follow the *Supplemental Order Clarification* by referencing it in certain sections and to displace the requirements set forth in the *Supplemental Order Clarification* where no reference was made.[56] Georgia law bars the reading of such an implied intent into a contract.[57] Moreover, as explained more fully below, section 35.1 of the Agreement makes plain that the parties did not intend to deviate from the requirements of federal law, unless they included express language creating an exemption or displacing the requirements.

Thus, the presumption must be that the plain text of the Agreement evidences an intent to include the requirements of applicable law, unless there is conflicting language that exempts or otherwise displaces such requirements. The absence of a reference to the *Supplemental Order Clarification's* concern and independent auditor requirements does not signal an intent to displace or create an exemption from them. Rather, it indicates an intent to follow them, as there is no express language in section 10.5.4 or elsewhere creating an exemption to or otherwise displacing the concern and independent auditor requirements.

2. The Parties Incorporated the Supplemental Order Clarification's Concern and Independent Auditor Requirements into their Agreement by Operation of the Applicable Law Provision

In addition to governing Georgia law, which unambiguously provides that existing law is part of the contract unless specifically excluded (such that the *Supplemental Order Clarification's* concern and independent auditor requirements are incorporated into the

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56 *Georgia Order* at 7 (stating, "[i]t is one thing to say an agreement that specifies a variance from existing law in one section reflecting 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.").

57 *Jenkins v. Morgan*, 100 Ga. App. 561, 562, 112 S.E.2d 23, 24 (1959).

Agreement), the Agreement by its own terms explicitly incorporates applicable federal and state law. Notably, the Agreement contains an "Applicable Law" provision, which expressly states that the parties will comply with all applicable federal and state law that relates to the obligations addressed in the Agreement.[58] Section 35.1 of the Agreement states:

> 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.

This provision eliminates any possible doubt that the parties, consistent with federal law and Georgia law, agreed that the Agreement would incorporate (and, unless expressly stated otherwise, not supplant) all law related to the obligations under the Agreement – including the *Supplemental Order Clarification's* concern and independent auditor requirements.

Moreover, this provision instructs, consistent with Georgia law, that "[n]othing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law."[59] Thus, not only does section 35.1 of the Agreement expressly require BellSouth to comply with the concern and independent auditor requirements, as they are part of applicable law not expressly excluded or displaced in section

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58 Agreement, General Terms and Conditions, § 35.1.

59 The *Supplemental Order Clarification's* concern and independent auditor requirements are "mandatory". The FCC did not make them optional. Although "requirements" are by their very nature mandatory, an example of an "optional" requirement contemplated by this language would be the *Supplemental Order Clarification's* so-called three safe harbors for EEL conversions. Requesting carriers have the option of certifying compliance with one of the three (making them "optional" requirements). Another example of an "optional" requirement would be the Act's statement that "bill-and-keep" is a permissible, but not required, substitute for cash-based reciprocal compensation in certain instances. *See* 47 U.S.C. § 252(d)(2)(B)(i).

10.5.4 or in any other section of the Agreement, but also it serves to bar the various interpretations of the Agreement that BellSouth has proposed – all of which require construction of an implied exemption from or displacement of the concern and independent auditor requirements. Consistent with Georgia law, including the Georgia PSC decisions on these legal issues, and the express language of section 35.1, there is simply no basis to imply either an exemption or displacement.

C. The Parties Did Not Exclude or Displace the Concern and Independent Auditor Requirements Set Forth in the Supplemental Order Clarification

As stated above, existing law becomes part of the Agreement unless the parties explicitly exclude or displace that law from their agreement.[60] As the Georgia PSC already has found, the parties did not—by the plain terms of their Agreement (or otherwise)—exclude the *Supplemental Order Clarification's* concern and independent auditor requirements. BellSouth cannot lawfully overcome this determination of Georgia law by inviting the Commission to imply an exception or displacement of the concern and independent auditor requirements. There simply is no merit to BellSouth's argument that certain provisions of the Agreement—the audit provision and the entire agreement provision—in any way exclude or displace the concern and independent auditor requirements set forth in the *Supplemental Order Clarification.*

1. Section 10.5.4 Does Not Exclude or Displace the Requirements of the Supplemental Order Clarification

BellSouth's attempt to create a stand-alone agreement out of section 10.5.4 of Attachment 2 is misguided.[61] Contrary to BellSouth's argument, that provision does not operate in a vacuum outside the scope of Georgia law and independent of the main body of the

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60 *Jenkins v. Morgan,* 112 S.E. 2d at 24 (stating [p]arties may stipulate for other legal principles to govern their contractual relationship than those prescribed by law, however, these must be expressly stated in the contract).

61 *See* BellSouth Motion at 4-6, 16-18.

Agreement (the "General Terms and Conditions"). As explained above, both Georgia law, designated in section 23 of the Agreement, and the "applicable law" provision (section 35.1 of the Agreement) establish a presumption that requirements of applicable law are included as though expressly stated and that any voluntary agreement to the contrary must be memorialized expressly. These provisions operate to make clear that the *Supplemental Order Clarification's* concern and independent auditor provisions are incorporated into the Agreement.[62] The plain text of section 10.5.4 neither excludes nor displaces those audit prerequisites.[63]

The text of section 10.5.4 of Attachment 2 to the Agreement does not contain the exemptions to which BellSouth claims it is entitled. That section provides:

> BellSouth may, at its sole expense, and upon thirty (30) days notice to [NuVox], audit [NuVox]'s records not more than on[c]e in any twelve month period, unless an audit finds non-compliance with the local usage options referenced in the June 2, 2000 Order, in order to verify the type of traffic being transmitted over combinations of loop and transport network elements. If, based on its audits, BellSouth concludes that [NuVox] is not providing a significant amount of local exchange traffic over the 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. In the event that BellSouth prevails, BellSouth may convert such combinations of loop and transport network elements to special access services and may seek appropriate retroactive reimbursement from [NuVox].

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62 *See Georgia Order* at 5-8.

63 *See id.* at 7-8 ("The Agreement, however, does not state that notice is the only precondition. . . . Without language evidencing an 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.").

Because the plain text of section 10.5.4 does not contain language expressly exempting BellSouth from, or otherwise displacing, the concern and independent auditor requirements, BellSouth's claim of such exemptions must be rejected.[64]

Even if the Commission were to view section 10.5.4 in isolation from the overarching provisions of the Agreement (the General Terms and Conditions), as BellSouth requests the Commission do, the text is silent on and does not conflict with the *Supplemental Order Clarification's* concern and independent auditor requirements. Indeed, in the hearing before the Georgia PSC, BellSouth admitted that section 10.5.4 is silent with regard to the concern and independent auditor requirements.[65] By BellSouth's own admission, that silence necessarily must result in a default to the requirements of the *Supplemental Order Clarification.*[66]

This silence also reveals that there is no conflict between section 10.5.4 and the terms of either section 23 or section 35.1 of the Agreement. There also is no conflict between section 10.5.4 and the *Supplemental Order Clarification*. This is not a case where specific terms trump general ones or where requirements of the contract conflict with and thereby trump the concern and independent auditor requirements found in applicable law. Indeed, during the Georgia hearing, BellSouth witness Padgett acknowledged that section 10.5.4 (when viewed in isolation from the overarching General Terms and Conditions) is "silent" on the concern

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64 Pursuant to Georgia law, the parties must expressly state any exemptions to or displacement of applicable law within the contract. As such, although parties *may* voluntarily agree to deviate from applicable law in their interconnection agreements, they must do so expressly. The plain text of section 10.5.4 confirms that they did no such thing with respect to the concern and independent auditor requirements.

65 Georgia Hearing Tr. 149, ll. 16-19, 25; 150, ll. 1-4.

66 *Id.*

requirement,[67] and that it does not expressly address the independent auditor requirement (which is tantamount to silence).[68] Accordingly, there is simply no conflict between section 10.5.4 of Attachment 2 and sections 23 and 35.1 of the Agreement, such that one provision governs in lieu of the other. Instead, these provisions work in tandem, requiring BellSouth to state a concern and to hire an independent auditor in order to conduct an EEL audit. Thus, as the Georgia PSC correctly determined, the "plain meaning of the Agreement" is not that which BellSouth implausibly suggests – it is instead, as NuVox suggests, with the concern and independent auditor requirements incorporated therein and not excluded or displaced by implication.[69]

2. The Entire Agreement Provision Does Not Affect the Application of the Supplemental Order Clarification to this Agreement

The Commission must reject BellSouth's misguided attempt to exclude the concern and independent auditor requirements based on the entire agreement provision in the Agreement.[70] BellSouth's claim that section 45 of the Agreement, which states that the "Agreement and its Attachments, incorporated herein by reference, sets forth the entire understanding and supersedes prior Agreements between the Parties relating to the subject matter contained herein...,"[71] somehow overrides other provisions of the Agreement is absurd. The parties did not intend for the "entire agreement" provision to nullify other provisions of the Agreement, including sections 23 and 35.1, which are no less part of the whole and which incorporate legal requirements not repeated separately or verbatim in the Agreement.

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67 Georgia Hearing Tr. at 138, ll. 15-19 (Padgett).

68 *Id.* at 149, ll. 25; 150, ll. 1-6 (Padgett).

69 *Georgia Order* at 6-8.

70 *See* BellSouth Motion at 12-13.

71 Agreement, General Terms and Conditions, § 45.

In this regard, BellSouth suggests that there a conflict between section 10.5.4 of Attachment 2 of the Agreement and the *Supplemental Order Clarification's* concern and independent auditor requirements (which it erroneously describes as "extraneous **material**").[72] As BellSouth has admitted in the Georgia proceeding, section 10.5.4 does not address those prerequisites.[73] It is impossible for the silence or absence of plain text in section 10.5.4 regarding the concern and independent auditor requirements to create the conflict BellSouth claims. Accordingly no such conflict or contradiction exists, and as explained at length above, with respect to the concern and the independent auditor requirements, neither section 10.5.4 nor the *Supplemental Order Clarification* trump each other in that regard.

D. Evidence of the Parties' Intent Eliminates Any Ambiguity and Affirms That the Parties Did Not Agree to the Exemptions BellSouth Claims

If the absence of any express exemption were not enough, record evidence from the Georgia PSC proceeding regarding the parties' intent resolves any ambiguity claimed or perceived. In the Georgia proceeding, NuVox witness Hamilton Russell, the only witness with actual knowledge of the parties' negotiations to take the stand and to be subject to cross-examination under oath, testified that the parties were fully cognizant of the FCC's *Supplemental Order Clarification* and its prerequisites pertaining to EEL audits.[74] Having already negotiated the Agreement's General Terms and Conditions, including the applicable law and Georgia law provisions, Mr. Russell explained that there was no need to ensure that each audit pre-requisite contained in the *Supplemental Order Clarification* was expressly included in section 10.5.4 of

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72 *See* BellSouth Motion at 13.

73 Georgia Hearing Tr. at 149, ll. 16-19, 25; 150, ll. 1-4 (Padgett).

74 *Id.* at 278, ll. 15-18, 286, ll. 6-13 (Russell).

Attachment 2, as all requirements were included unless explicitly exempted or displaced.[75] Mr. Russell also testified that there was no intent to create exemptions from or to displace the concern and independent auditor requirements of the *Supplemental Order Clarification.*[76] Indeed, Mr. Russell explained that the parties agreed to strike language originally proposed by BellSouth that would have allowed BellSouth to conduct audits at its "sole discretion."[77] Mr. Russell recalled that the parties discussed and agreed that the proposed language was inconsistent with the requirements set forth in the *Supplemental Order Clarification*, including the "concern" requirement set forth in footnote 86 of that order.[78]

BellSouth's witness had no actual knowledge of the parties' negotiations, as BellSouth decided to protect those with actual knowledge from having to testify under oath.[79] Thus, in the event that any ambiguity is claimed or perceived, evidence regarding the parties' intent in negotiating the Agreement affirms NuVox's position and points to the inevitable conclusion that BellSouth is not exempt from, but rather, must demonstrate that it has complied with the concern and independent auditor requirements.

E. BellSouth's Course of Conduct Affirms That BellSouth Is Required to Comply With the Concern and Independent Auditor Requirements

BellSouth's own course of conduct (prior to and since it served its notice in March 2002) also demonstrates that the parties agreed to be bound by the concern and independent auditor requirements set forth in the *Supplemental Order Clarification* and

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75 *Id.* at 278, ll. 15-18 (Russell).

76 *Id.* at 278, ll. 1-4; 279, ll. 22-25; 280, ll. 1-2 (Russell).

77 *Id.* at 278, ll. 1-4 (Russell).

78 *Id.* at 278, ll. 24-25; 279, ll. 1-16; 280, ll. 15-16 (Russell).

79 *Id.* at 122, ll. 23-25 (Padgett). BellSouth previously had succeeded in shielding those individuals from discovery.

incorporated into the Agreement by sections 23 and 35.1. In the Georgia proceeding, NuVox presented evidence in the form of the March 15, 2002, notice letter from BellSouth in which BellSouth notified NuVox that it was requesting an audit pursuant to and in compliance with the FCC's *Supplemental Order Clarification*.[80] In that two-page letter, BellSouth cites the *Supplemental Order Clarification* no less than a half-dozen times, using such phrases as "[c]onsistent with the FCC Supplemental Order Clarification," "requirements of the FCC Supplemental Order," "per the Supplemental Order," and "as required in the Supplemental Order." BellSouth attempted to distance itself from and downplay the importance of that letter by calling the letter a "form letter." That argument is hollow.[81] Indeed, it is belied by the fact that BellSouth copied the Chief of the FCC's Competition Policy Division of the Wireline Competition Bureau – even though *that* notification requirement is not expressly included in section 10.5.4 of Attachment 2. In fact, the notification requirement appears only in the *Supplemental Order Clarification.* Thus, BellSouth's claim that it is in no way subject to various requirements set forth in the *Supplemental Order Clarification* cannot be squared with the actions of the "client" that is a party to the Agreement.

The Georgia record also contains evidence in the form of calls and e-mail exchanges between the parties that further demonstrate that BellSouth thought the *Supplemental Order Clarification* concern and independent auditor requirements applied until it realized that

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80 *See* Attachment C: Letter to Hamilton E. Russell, III, Regional Vice President – Legal and Regulatory Affairs, NuVox Communications, Inc., from Jerry D. Hendrix, Executive Director, BellSouth Telecommunications (Mar. 15, 2002).

81 Quite frankly, it is as silly as BellSouth's argument that the concern requirement is not really a requirement of the *Supplemental Order Clarification*, because it appears only in a footnote of that order. The reality is that BellSouth cannot walk-away from statements on grounds that they were made in a form letter, and the FCC's footnotes (to the extent that they are adopted by a majority of that fractured agency) constitute applicable law.

NuVox actually would insist that BellSouth must comply with them.[82] Record evidence also reveals that BellSouth, in *ex parte* presentations before the FCC, acknowledged that it is not exempt from the concern and independent auditor requirements. Indeed, the record showed that while BellSouth was telling the Georgia PSC that it was exempt from the concern and independent auditor requirements, BellSouth was telling the FCC that the requirements apply and that it is complying with them, even with respect to NuVox.[83]

During the Georgia proceeding, while the parties were arguing over whether certain requirements set forth in the *Supplemental Order Clarification* applied, BellSouth admitted that certain provisions not expressly set forth (or excluded or displaced) therein applied. On December 1, 2003, BellSouth sent NuVox a letter claiming that NuVox was obligated to retain records supporting its EELs conversion requests Specifically, BellSouth stated:

> [p]aragraph 32 of the Supplemental Order Clarification released June 2, 2000, states that "requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification." Thus, it is Nuvox's responsibility to maintain records to support the local usage option under which it obtained the EEL circuits and to provide compliance in the event of an audit. Shelley's July 31 letter was simply a reminder that given Nuvox's refusal to permit an audit and the pending litigation, BellSouth expects Nuvox to continue to retain the appropriate supporting documentation, whatever it may be, for the period in question.[84]

Thus, with regard to the potential EELs audit that is the subject of this proceeding, BellSouth has insisted that NuVox maintain records in accordance with requirements set forth the *Supplemental Order Clarification*. NuVox agrees that the record maintenance requirements set forth in the

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82 Georgia Hearing Russell Rebuttal at 12, ll. 5-22; 13, ll. 1-7 (referring to NuVox Exhibit HER-2); 18, ll. 21-23.

83 *E.g.*, Georgia Hearing Tr. at 159, ll. 3-15 (Padgett).

84 Letter from Parkey D. Jordan, Senior Counsel, BellSouth, to John J. Heitmann, Partner, Kelley Drye & Warren LLP (Dec. 1, 2003) (provided as Attachment D).

Supplemental Order Clarification are those that are applicable. This is the case because section 10.5.4 contains no express exemption from or displacement of that requirement, and by operation of applicable law (and Georgia law) it applies. Thus, BellSouth's claim that 30-days' notice is the only *Supplemental Order Clarification* audit requirement incorporated into the Agreement is belied by its own claim that the records requirements contained in the *Supplemental Order Clarification* but not expressly repeated in section 10.5.4 of the Agreement also applies (which it does).

F. BellSouth's Reliance on Antitrust Cases From Other Jurisdictions Is Unfounded and those Cases Are Inapposite to this Case

As it repeatedly did in the Georgia proceeding, BellSouth pulls together an incoherent string of antitrust cases from other jurisdictions and suggests that they stand for the proposition that voluntarily negotiated interconnection agreements operate to exclude applicable law.[85] The cases BellSouth cites do not stand for that proposition. Instead those cases acknowledge what is true about interconnection agreements and all other contracts: parties may voluntarily agree to terms that differ from applicable law. As is the case with Georgia law, if parties voluntarily agree to terms that differ from applicable law, then they must do so expressly.[86] With respect to the voluntarily negotiated NuVox/BellSouth Agreement, the plain

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85 *See* BellSouth Motion at 15-17.

86 *See Jenkins v. Morgan*, 100 Ga. App. at 562 (emphasizing that "[t]he parties will be presumed to contract under the existing laws, and no intent will be implied to the contrary unless so provided by the terms of their agreement."). *See also Norfolk Western Ry. Co. v. American Train Dispatchers' Association*, 499 U.S. 117, 129-30 (1991) (stating, "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and from a part of it, as fully as if they had been incorporated in its terms; this principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge"); *see Georgia Order* at 6 (citing *Jenkins v. Morgan*, 100 Ga. App. 561, 562 (1959) for the proposition that "[i]f parties intend to stipulate that their contract not be governed by existing law, then the other legal principles to govern the contract must be expressly stated therein.").

text of the Agreement reveals an intent to incorporate the concern and independent auditor requirements, as they are not expressly excluded or displaced. Thus, despite their ability to do so, the parties did not negotiate and agree to exclusions or other language that would displace these two requirements of applicable law. Moreover, even if BellSouth's contention that voluntarily negotiated interconnection agreements automatically displace section 251 of the Act and related FCC rules and orders is correct (which it is not), that displacement would be trumped by the specific language in the Agreement selecting Georgia law as governing (which says that displacement of applicable law must be express and will not be implied) and the applicable law provision which expressly incorporates that which BellSouth claims is excluded by implication.

Specifically, neither *Trinko* nor *Verizon New Jersey* support BellSouth's claim that the obligations under sections 251(b) and (c) of the Act do not pertain to carriers that have negotiated interconnection agreements.[87] As an initial matter, the plaintiffs in both *Trinko* and *Verizon New Jersey* pursued antitrust claims and did not allege interconnection agreement violations. Thus, those cases are not interconnection agreement enforcement cases, like this one. Indeed, in *Trinko*, the plaintiffs were a CLEC's customers, who brought suit against the ILEC alleging poor performance; they were not parties to an interconnection agreement with the defendant ILEC.[88]

In addition, contrary to BellSouth's claims, neither case supports the proposition that a carrier that has entered into an interconnection agreement cannot allege a violation of the Act or other provisions of applicable law. In *Trinko*, the court did not examine whether the

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87 *See* BellSouth Motion at 15-17; *see also Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corporation*, 294 F.3d 307 (2nd Cir. 2002), *superceded, Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corporation*, 305 F.3d 89 (2nd Cir. 2002); *Verizon New Jersey, Inc. v. Ntegrity Telecontent Services, Inc.*, 219 F.Supp.2d 616 (D.N.J. 2002).

88 *See Trinko*, 305 F.3d at 94.

ILEC's conduct violated the terms of an interconnection agreement, but instead reviewed whether the ILEC's actions could constitute an independent violation of various regulations, including section 251 of the Act. The court specifically limited its application to that case.[89] The court simply noted that the interconnection agreement, *which was not before it*, could "result in a different set of duties than those defined by the statute."[90] In contrast, the dispute in this case arises under the obligations set forth in the parties' interconnection agreement. As stated above, although the parties could have excluded or displaced the concern and independent auditor requirements set forth in applicable law, they did not agree to do so. As such, under the Agreement, BellSouth is required to comply with these requirements, thus mooting, with respect to these two aspects of applicable law, the court's concern in *Trinko* that a voluntarily negotiated interconnection agreement might result in different obligations than those set forth in the Act (or the FCC's rules and orders implementing the Act).

Similarly, *Verizon New Jersey* is wholly inapplicable to the present case. In *Verizon New Jersey*,[91] a CLEC brought a counterclaim against Verizon alleging violations of antitrust law; the CLEC did not allege that the ILEC violated the interconnection agreement. In concluding that Ntegrity's counterclaim could not be sustained under antitrust law, the court stated that Ntegrity had negotiated provisions in its interconnection agreement with Verizon that quashed its claim under the Act, and, thus, under antitrust laws. The court found that Ntegrity's interconnection agreement only provided for the provision of paper bills, yet Ntegrity had

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89 *Id.* at 104.

90 *Id.* As discussed above, parties to a voluntarily negotiated interconnection agreement *may* agree to be governed by contract provisions that deviate from existing law; however, they must include express provisions reflecting their intent to do so. The record contains no evidence whatsoever that the parties to this case did any such thing with respect to the concern and independent auditor requirements.

91 *Verizon New Jersey Inc. v. Ntegrity Telecontent Services Inc.*, 219 F.Supp.2d at 616.

claimed that Verizon New Jersey violated its obligations under the Act and the antitrust laws by providing it with poor performance, in part, due to the provision of paper, not electronic, bills.[92] The present situation is distinct. In this case, NuVox seeks to defend its rights—and enforce BellSouth's obligations—squarely incorporated into the Agreement. NuVox is not seeking an "end run" around the provisions of the Agreement.

Furthermore, the cases upon which BellSouth relies—*Trinko*, a second circuit decision, and *Verizon New Jersey*, a New Jersey District Court case—are not controlling precedent. This case is to be decided in accordance with Georgia law, and as indicated above, there already is Georgia law that squarely resolves the bulk of the legal issues raised in BellSouth's complaint.

IV. BELLSOUTH HAS NOT DEMONSTRATED A CONCERN

In order to conduct an audit, BellSouth must demonstrate a valid concern with respect to the particular converted circuits it seeks to audit. In other words, BellSouth must demonstrate that it has probable or reasonable cause to be believe that NuVox inappropriately certified compliance with the significant local use requirement and the particular safe-harbor elected.[93]

NuVox repeatedly has requested that BellSouth provide documentation to support a concern for auditing the circuits at issue, but BellSouth steadfastly has refused to do so. In this docket, BellSouth also has failed to provide evidence that would support reasonable allegations of concern. As an initial matter, the allegations BellSouth makes regarding the level of local

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92 *Verizon New Jersey*, 219 F.Supp.2d at 630-31.

93 All of NuVox's circuits were certified under safe harbor option number one, which means that NuVox certified that at the time of conversion, it believed that it was the sole provider of local service to the customer being served by the EEL.

exchange traffic exchanged between the parties in Florida is irrelevant. BellSouth claims that it noticed a low volume of local exchange traffic sent from NuVox to BellSouth.[94] NuVox disputes such claims as being contrary to fact.[95] Nevertheless, the quantity of traffic exchanged on trunks between the parties on certain unspecified trunks has virtually nothing to do with the amount of local traffic carried on particular end user dedicated EEL circuits. In some instances, the rules simply do not require that any local traffic be directed over an EEL serving a particular customer. Thus, BellSouth's allegations regarding a "low" amount of local traffic in Florida appear to baseless and are, in any event irrelevant.

BellSouth also alleges that there are 146 circuits in Florida "NuVox is using, or used, to serve end users who also receive(d) local exchange service from BellSouth."[96] While such allegations, if supported, could well prove sufficient to demonstrate a concern, BellSouth has not provided any documentation to support these allegations. BellSouth has failed to demonstrate which circuits are implicated by its allegations. BellSouth also has not demonstrated that it provides local exchange services to the same customers served by those EELs. And BellSouth has not demonstrated that those same customers are NuVox's customers served via the EEL circuits in question. Without any supporting evidence, BellSouth cannot be deemed to have a legitimate concern that would entitle it to an audit of the implicated circuits.

Compounding BellSouth's lack of evidence of a concern is that fact that BellSouth apparently violated the law to obtain information about the circuits at issue. NuVox provided carrier proprietary information to BellSouth's wholesale unit for the purpose of provisioning the requested services. BellSouth then provided this information to its retail unit.

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94 *Id.* ¶ 16.

95 Russell Aff. ¶ 18.

96 BellSouth Complaint ¶ 23.

Section 222(b) of the Act bars BellSouth from providing this information to its retail unit; under section 222(b) of the Act, BellSouth is prohibited from using carrier proprietary information *for any purpose* other than to provide the requested service.[97] BellSouth cannot be permitted to obtain an audit based on this unlawful use of NuVox's carrier proprietary information.

Furthermore, in the Georgia proceeding, the Georgia Commission recognized that whether BellSouth had demonstrated a concern was "fact-specific."[98] As such, the alleged circuit-specific concerns that BellSouth had for the circuits in Georgia cannot be applied to circuits in any other state, including Florida. Instead, BellSouth must demonstrate that it has an actual concern for each of the circuits that it seeks to audit in this particular case. BellSouth has failed to do so, and the Commission must deny its motion.

V. BELLSOUTH HAS FAILED TO DEMONSTRATE THAT THE FIRM IT HAS HIRED FOR THE AUDIT IS INDEPENDENT

Given that NuVox and more than a half-dozen other CLECs continuously have challenged and rejected BellSouth's claims that ACA, the ILEC consulting boutique it has retained for EEL audits, is independent, it is surpassing strange that BellSouth did not produce a witness in the Georgia proceeding capable of demonstrating ACA's qualifications as an independent auditor. Instead, BellSouth insisted, as it does here, that NuVox and all others take BellSouth's word for it.[99] NuVox will not rely on BellSouth's word, as there is more reason than ever before to doubt BellSouth's claim of independence for the auditor it privately screened and hand-picked for EEL audits.

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97 47 U.S.C. § 222(b).

98 *Georgia Order* at 10.

99 BellSouth, it seems, has not even done its own reasonable due diligence to establish this small and relatively unknown consulting shop's independence. For example, BellSouth has never asked whether ACA is affiliated with any of its ILEC clients. Georgia Hearing Tr. at 206, ll. 12-13 (Padgett).

ACA is a small consulting shop that appears to be completely dependent on ILECs, such as and including BellSouth, for virtually all of its revenues. ACA's client/engagement list provides proof of that dependence. In the Georgia proceeding, BellSouth was unable to identify a single ACA client that was, like NuVox, a facilities-based CLEC with no ILEC affiliation. Since ACA is dependent on ILECs such as BellSouth for virtually all of its revenues, it cannot at the same time be deemed independent. Given ACA's virtually all ILEC client list, it is eminently reasonable to doubt whether ACA could provide an independent and unbiased review, regardless of whether it stated an intention to do so.

In the Georgia proceeding, it was also well documented that ACA's marketing materials tout it as "highly successful" in audits that have recovered millions of dollars for its ILEC clients. Certainly, an independent auditor would not include the generation of millions of dollars of revenue for its clients as an indicia of a successful independent audit.

NuVox repeatedly has requested that BellSouth retain a nationally recognized independent auditing firm (*e.g.,* one of the "Big Four" national accounting firms) to conduct an audit and BellSouth repeatedly has refused. In the Georgia proceeding, BellSouth was quite clear that it was not actually ACA that was prepared to make the "requisite" showing and attestation of compliance with AICPA standards, but rather it was some other undisclosed "auditing firm" with a "relationship" with ACA that would be making the showing and attestation.[100]

Most disturbing, however, were revelations that came forth regarding BellSouth's own relationship with ACA. At the hearing in the Georgia proceeding, BellSouth admitted to

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100 *Id.* at 208, ll. 15-19 (Padgett). Additionally, in the Georgia proceeding BellSouth was unable to provide the name of this entity.

having conversations with ACA regarding the requirements set forth in the FCC's *Supplemental Order Clarification*, before and during ongoing audits, with and without the audited party being present.[101] BellSouth also acknowledged discussing privately with ACA the types of information being provided during an ongoing audit and indicated that ACA had requested BellSouth's aid in getting the target to comply with requests for information (that likely were generated by BellSouth in the first place).[102] An independent auditor likely would not have such conversations, and if they did, certainly would not have them without the targeted party being present. Accordingly, it is now clearer than ever before that BellSouth has not established ACA's independence and that there are compelling reasons to doubt it.

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101 *Id.* at 195, ll. 14-25; 196, ll. 1-5; 201, ll. 8-25; 202, ll. 1-16.

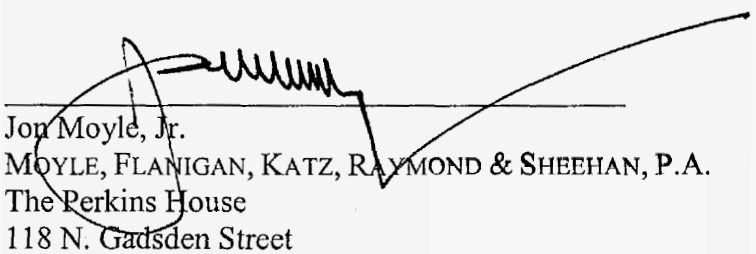
102 *Id.*

VI. CONCLUSION

For the foregoing reasons, the Commission should reject BellSouth's Motion for Summary Disposition.

Respectfully submitted,

NuVox Communications, Inc.



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February 28, 2005

DC01/KASHJ/228320.5

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 28th day of February, 2005.

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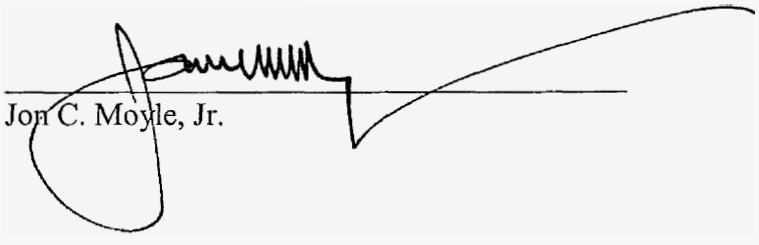

Jon C. Moyle, Jr.

DC01/KASHJ/228320.5

Attachment A

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re:	)	
	)	
Enforcement of Interconnection Agreement	)	Docket No.: 040527-TP
Between BellSouth Telecommunications, Inc.	)	
And NuVox Communications, Inc.	)	

AFFIDAVIT OF HAMILTON E. RUSSELL, III
ON BEHALF OF NUVOX COMMUNICATIONS, INC.

I, Hamilton E. Russell, III, of legal age, being duly sworn, do hereby depose and state:

1. My name is Hamilton E. Russell, III. I have personal knowledge of the facts stated herein, and they are true and correct.

2. My business address is 2 North Main Street, Greenville, South Carolina. I am currently employed by NuVox Communications, Inc. ("NuVox") as a Vice President of Legal Affairs. In this position, I am responsible for legal and regulatory issues related to or arising from NuVox's purchase of interconnection, network elements, collocation, and other services from BellSouth. Prior to holding this position, I was a Regional Vice President of Regulatory and Legal Affairs for NuVox. In that capacity, I was responsible for negotiating numerous interconnection agreements on behalf of NuVox and its predecessor, TriVergent, including the interconnection agreement ("Agreement") that underlies this dispute.

3. NuVox is a competitive local exchange carrier ("CLEC") that provides telecommunications services in various states throughout the United States, including Florida and other states in BellSouth's region.

4. I was personally involved in negotiating the regional nine-state interconnection Agreement that is at issue in this case. The parties entered into and signed a single interconnection agreement that would govern their relationship throughout each of the nine states

in BellSouth's region. The parties filed copies of the interconnection agreement with the applicable state commission. Although there is technically a different interconnection agreement in each state approved by each state commission, the provisions in each agreement relevant to this dispute are identical and their meaning does not vary from state to state.

5. The parties voluntarily negotiated the terms and conditions of the Agreement pursuant to section 252(a)(1) of the Communications Act of 1934, as amended (the "Act"). The parties did not arbitrate any of the provisions before any state public service commission.

6. The parties were fully aware of the Federal Communications Commission's ("FCC") *Supplemental Order Clarification* when they negotiated the Agreement.

7. BellSouth's right to audit NuVox's converted EELs circuits is not based solely on section 10.5.4 of the Agreement. Instead, BellSouth's right to audit NuVox's circuits is governed by the Agreement as a whole, which incorporates the concern and independent auditor requirements of the *Supplemental Order Clarification*.

8. Accordingly, there are several provisions of the Agreement—in addition to section 10.5.4—that are relevant to whether the parties incorporated the *Supplemental Order Clarification* into their Agreement.

9. The parties agreed that the Agreement would be governed by the laws of Georgia. Section 23 of the General Terms and Conditions of the Agreement specifies that the Agreement is governed by Georgia law.

10. The parties also negotiated an applicable law provision, which, consistent with their choice of Georgia law, reflects the parties' agreement to comply with all applicable law in effect at the time of contracting (subsequent changes in law may be included via change in law

amendments). All applicable law is incorporated into the Agreement unless specifically excluded or displaced. Section 35.1 of the General Terms and Conditions states:

> Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

Agreement, General Terms and Conditions, § 35.1.

11. The parties, therefore, clearly incorporated the concern and independent auditor requirements of the *Supplemental Order Clarification* into the Agreement.

12. Since we chose Georgia law as governing and further memorialized a basic tenet of Georgia law in the applicable law provision, there was no need to ensure that each audit prerequisite contained in the *Supplemental Order Clarification* was repeated verbatim in section 10.5.4 of Attachment 2.

13. In addition, the parties did not exclude or displace the concern and the independent auditor requirements of the *Supplemental Order Clarification* from the Agreement. Indeed, the parties specifically negotiated the EELs audit provisions, and intended to include these requirements from the *Supplemental Order Clarification*. BellSouth initially proposed language in the Agreement that would have allowed BellSouth to conduct audits at its "sole discretion." I recall that the parties discussed and agreed that the proposed language was inconsistent with the prerequisites set forth in the *Supplemental Order Clarification*, including the concern requirements set forth in footnote 86 of that order. Accordingly, the parties agreed to strike the language from the Agreement.

14. Section 10.5.4 of the Agreement does not operate independently from the General Terms and Conditions of the Agreement.

15. BellSouth's own actions indicate that it believes that the *Supplemental Order Clarification* is part of the parties' Agreement. For example, by letter dated March 15, 2002, BellSouth notified NuVox of its intent to conduct an audit. As Mr. Hendrix states in his affidavit, BellSouth also submitted that letter to the FCC, in accordance with the requirement in the *Supplemental Order Clarification* that the ILECs notify the FCC prior to conducting an audit. That particular requirement, however, is not stated in the parties' Agreement, but is incorporated into the Agreement by operation of the fact that the *Supplemental Order Clarification* is incorporated into the Agreement. There are other examples and I expressly reserve the right to testify about them, if necessary, in accordance with a procedural schedule adopted by the Commission.

16. BellSouth has not demonstrated a concern with regard to auditing the circuits at issue. BellSouth sent a letter to NuVox dated March 15, 2002, in which it indicated that it intended to conduct an audit of NuVox's converted EELs circuits. At that time that BellSouth made its audit request, NuVox had converted approximately 490 special access circuits to EELs in Florida.

17. After receipt of the letter, NuVox requested that BellSouth demonstrate a concern, as required by the *Supplemental Order Clarification*. BellSouth acknowledged its obligation to do so, but has since reversed position. NuVox also raised numerous other issues regarding BellSouth's request. To this end, NuVox and BellSouth held several phone calls and exchanged extensive correspondence. The parties were unable to resolve many of these issues.

18. In a letter dated April 1, 2002, BellSouth offered the following reasons for the audit request: (1) BellSouth's records show a high percentage of intrastate access traffic in Tennessee and Florida, and (2) NuVox now claims a significant change in certain percent interstate jurisdictional factors. The information that BellSouth provided in its letter dated April 1, 2002, is to my knowledge false and does not appear to be related in any way to the converted EEL circuits for which NuVox has certified that it was the sole provider of local services at the time of the conversion request. Moreover, NuVox and BellSouth have agreed that the percentage of local traffic factors for those states is in the mid-ninety percent range. BellSouth has refused informal and formal requests to provide documentation to support its accusations. Thus, the unsupported and false allegations made by BellSouth in this regard are insufficient to demonstrate a concern.

19. More than a year after requesting an audit, BellSouth made unsupported allegations of a concern regarding various converted EEL circuits in Florida. BellSouth has refused informal and formal requests to provide documentation to support its accusations. Given that BellSouth has made erroneous, and in my view, highly suspect, allegations of concerns to justify its audit request, I will not consider accepting BellSouth's latest manufactured allegations of concern (see BellSouth Complaint, ¶¶ 19-22) without reviewing supporting documentation first.

20. The consulting firm BellSouth proposes to use to conduct the audit in Florida, American Consultants Alliance ("ACA"), is the same consulting firm that BellSouth proposed to use to conduct the audit in Georgia.

21. It is my understanding, based on the testimony of Ms. Padgett, that ACA is not itself capable of complying with AICPA standards.

22. The consulting firm that BellSouth wants to use to conduct the audit is not independent. It is my understanding that the parties agree that, in order to be independent, ACA cannot be subject to the influence or control of BellSouth.

23. Information provided by BellSouth to NuVox indicates that ACA is a consulting firm that is dependent on incumbent LECs and their affiliates for the bulk of their work. The roster of ACA engagements provided to NuVox does not indicate that ACA has done work for any competitive LECs that are not themselves affiliated with incumbents. In its marketing materials, ACA touts as "highly successful" its audits that have received millions of dollars for its incumbent LEC clients.

24. In addition, it is my understanding that ACA has had various conversations with BellSouth regarding the *Supplemental Order Clarification* and has even had private mid-audit conversations with BellSouth seeking BellSouth's help in getting information from the CLEC being audited. A professional and independent auditor would not have such conversations that caste such serious doubt on its impartiality and independence.

25. NuVox repeatedly has indicated that it would accept a nationally or locally well recognized independent auditor to conduct the audit and BellSouth has steadfastly refused to suggest any firm other than ACA.

Attachment B

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

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

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

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

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

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

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

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

A The agreement is silent on that point.

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

A May I look at the terms?

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

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

A Local exchange service.

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

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

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

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

Q Now is there any language in the interconnection

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

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

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

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

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

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

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

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

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

A Certainly.

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

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

"By hiring an independent auditor."

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

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

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

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

A No, I am not aware of that.

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

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

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

A That's correct.

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

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

Q While the audit is going on?

A Yes.

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

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

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

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

A Yes, I am.

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

A Okay.

Q Could you describe what this document is for me?

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

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

A Some of them, yes.

Q Is Centel an ILEC?

A Where are they on here?

Q The second bullet.

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

Q Is Ameritech an ILEC?

of their business case in general.

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

A To my knowledge, they are, yes.

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

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

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

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

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

A We've done some of both.

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

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

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

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

supplies some of its needs and is therefore not independent. And I think that's correct, we take EELs from you and we're dependent on you for EELs, we're dependent on you for loops and many other unbundled network elements. So I think you're right, we can be dependent on you, but NuVox is not an affiliate of BellSouth, we're not legally affiliated. Now ACA is not legally affiliated with BellSouth, are they?

A No, they're not.

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

A Not that I'm aware of, no.

Q Have you asked whether they are?

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

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

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

Q But yet this auditing firm, consulting firm,

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

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

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

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

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

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

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

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

HEARING OFFICER STAIR: Mr. Ross.

MR. ROSS: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. ROSS:

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

A Oh, yeah.

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

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

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

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

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

A Okay.

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

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

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

A Yes.

Q And when was that?

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

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

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

A Yes.

Q Okay.

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

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

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

Q What page?

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

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

A Correct.

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

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

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

A Right.

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

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

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

NUVOX COMMUNICATIONS, INC.

DIRECT TESTIMONY OF HAMILTON E. RUSSELL, III

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

DOCKET NO. 12778-U

SEPTEMBER 12, 2003

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. As originally proposed by BellSouth, that provision was one that stated that audits may be conducted at BellSouth's "sole discretion". NuVox corrected that over-reaching with some of its own – we proposed changing the word "discretion" to "expense". The *Supplemental Order Clarification* does not provide that such audits will be conducted at BellSouth's "sole expense". Instead, it 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 use options." We knew that our proposal would create ambiguity with respect to whether the "sole expense" language indicated an agreement to deviate from the cost shifting mechanism set forth in that sentence of the *Supplemental Order Clarification* or whether it was merely intended to track the "hire and pay for" language in the first part of the quoted text. In its audit notice (Exhibit HER-1), BellSouth claimed that cost shifting was required *per the Supplemental Order Clarification.* As is demonstrated by the emails attached hereto as Exhibit HER-5, BellSouth insisted that the

Attachment C

BellSouth Telecommunications
Interconnection Services
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30075

Jerry D. Hendrix
Executive Director

(404) 927-7503
Fax (404) 529-7839
e-mail: jerry.hendrix@bellsouth.com

March 15, 2002

VIA ELECTRONIC AND OVERNIGHT MAIL

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc.
Suite 500
301 North Main Street
Greenville, SC 29601

Dear Mr. Russell:

NuVox has requested BellSouth to convert numerous special access circuits to Unbundled Network Elements (UNEs). Pursuant to those request, BellSouth has converted many of those circuits in accordance with BellSouth procedures. Some of the circuits were not converted due to various reasons, (e.g., previously disconnected, duplicates, etc.).

Consistent with the FCC Supplemental Order Clarification, Docket No. 96-98, BellSouth has selected an independent third party, American Consultants Alliance (ACA), to conduct an audit. The purpose of this audit is to verify NuVox's local usage certification and compliance with the significant local usage requirements of the FCC Supplemental Order.

In the Supplemental Order Clarification, Docket No. 96-98 adopted May 19, 2000 and released June 2, 2000 ("Supplemental Order"), the FCC stated:

> "We clarify that incumbent local exchange carriers (LECs) must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled network elements, and we allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements."

Accompanying this letter, please find a Confidentiality and Non-Disclosure Agreement on proprietary information and Attachment A, which provides a list of the information ACA needs from NuVox.

NuVox is required to maintain appropriate records to support local usage and self-certification. ACA will audit NuVox's supporting records to determine compliance of

each circuit converted with the significant local usage requirements of the Supplemental Order.

In order to minimize disruption of NuVox's daily operations and conduct an efficient audit, ACA has assigned senior auditors who have expertise in auditing, special access circuit records and the associated facilities, minutes of use traffic studies, CDR records recorded at the switch for use in billing, and Unbundled Network Elements.

BellSouth will pay for American Consultants Alliance to perform the audit. In accordance with the Supplemental Order, NuVox is required to reimburse BellSouth for the audit if the audit uncovers non-compliance with the local usage options on 20% or more of the circuits audited. This is consistent with established industry practice for jurisdictional report audits. Circuits found to be non-compliant with the certification provided by NuVox will be converted back to special access services and will be subject to the applicable non-recurring charges for those services. BellSouth will seek reimbursement for the difference between the UNE charges paid for those circuits since they were converted and the special access charges that should have applied.

Per the Supplemental Order, BellSouth is providing at least 30 days written notice that we desire the audit to commence on April 15 at NuVox's office in Greenville, SC, or another NuVox location as agreed to by both parties. Our experience in other audits has indicated that it typically takes two weeks to complete the review. Thus, we request that NuVox plan for ACA to be on-site for two weeks. Our audit team will consist of three auditors and an ACA partner in charge.

NuVox will need to supply conference room arrangements at your facility. Our auditors will also need the capability to read your supporting data, however you choose to provide it (file on PC, listing on a printout, etc.). It is desirable to have a pre-audit conference next week with your lead representative. Please have your representative call Shelley Walls at (404) 927-7511 to schedule a suitable time for the pre-audit planning call.

BellSouth has forwarded a copy of this notice to the FCC, as required in the Supplemental Order. This allows the FCC to monitor implementation of the interim requirements for the provision of unbundled loop-transport combinations.

If you have any questions regarding the audit, please contact Shelley Walls at (404) 927-7511. Thank you for your cooperation.

Sincerely,

Jerry D. Hendrix
Executive Director

Enclosures

cc: Michelle Carey, FCC (via hand delivery)
Jodie Donovan-May, FCC (via hand delivery)

Larry Fowler, ACA (via electronic mail)
John Heitmann, Kelley Drye & Warren LLP (via electronic mail)
Tony Nelson, NuVox (via electronic mail)
Jim Schenk, BellSouth (via electronic mail)

ATTACHMENT A
NuVox
March 15, 2002

Audit to Determine the Compliance Of Circuits Converted by NuVox From BellSouth's Special Access Tariff to Unbundled Network Elements With The FCC Supplemental Order Clarification, Docket No. 96-98

Information to be Available On-site April 15

Prior to the audit, ACA or BellSouth will provide NuVox the circuit records as recorded by BellSouth for the circuits requested by NuVox that have been converted from BellSouth's special access services to unbundled network elements. These records will include the option under which NuVox self-certified that each circuit was providing a significant amount of local exchange service to a particular customer, in accordance with the FCC's Supplemental Order Clarification.

Please provide:

NuVox's supporting records to determine compliance of each circuit converted with the significant local usage requirements of the Supplemental Order Clarification.

First Option: NuVox is the end user's only local service provider.

- Please provide a Letter of Agency or other similar document signed by the end user, or
- Please provide other written documentation for support that NuVox is the end user's only local service provider.

Second Option: NuVox provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the total traffic and the local traffic separately identified and measured as a percent of total end user customer local dial tone lines.
- For DS1 circuits and above please provide total traffic and the local voice traffic separately identified individually on each of the activated channels on the loop portion of the loop-transport combination.
- Please provide the total traffic and the local voice traffic separately identified on the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Third Option: NuVox provides local exchange and exchange access service to the end user customer's premises but is not the exclusive provider of an end user's local exchange service.

- Please provide the number of activated channels on a circuit that provide originating and terminating local dial tone service.
- Please provide the total traffic and the local voice traffic separately identified on each of these local dial tone channels.

- Please provide the total traffic and the local voice traffic separately identified for the entire loop facility.
- When a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), please provide the above total traffic and the local voice traffic separately identified for each individual DS1 circuit.

Depending on which one of the three circumstances NuVox chose for self certification, other supporting information may be required.

Attachment D

BellSouth Corporation
Legal Department
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375-0001

parkey.jordan@bellsouth.com

Parkey D. Jordan
Senior Counsel

404 335 0794
Fax 404 658 9022

December 1, 2003

VIA ELECTRONIC MAIL
and Via First Class Mail

John J. Heitmann
Kelley Drye & Warren LLP
1200 19th St. NW
Suite 500
Washington, DC 20036

Dear John:

Shelley Padgett has provided me with a copy of your November 24, 2003 letter. As a preliminary matter, last spring Mary Jo Peed sent you a letter specifically instructing you not to correspond directly with our clients. Shelley's letter to which you were responding was addressed to Bo Russell, and while we have no objection to your responding on your client's behalf, we expect you to respond to me or Bennett Ross, as you are well aware of our involvement in the EEL audit matter.

As for the substance of your letter, BellSouth cannot identify the internal Nuvox records that Nuvox should retain in order to support its certification that the EEL circuits in question meet the Interconnection Agreement's requirements. Paragraph 32 of the Supplemental Order Clarification released June 2, 2000, states that "requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification." Thus, it is Nuvox's responsibility to maintain records to support the local usage option under which it obtained the EEL circuits and to prove compliance in the event of an audit. Shelley's July 31 letter was simply a reminder that given Nuvox's refusal to permit an audit and the pending litigation, BellSouth expects Nuvox to continue to retain the appropriate supporting documentation, whatever it may be, for the period in question.

Sincerely,

Parkey Jordan

cc: Shelley Padgett, Interconnection Marketing
Bennett Ross, Senior Counsel